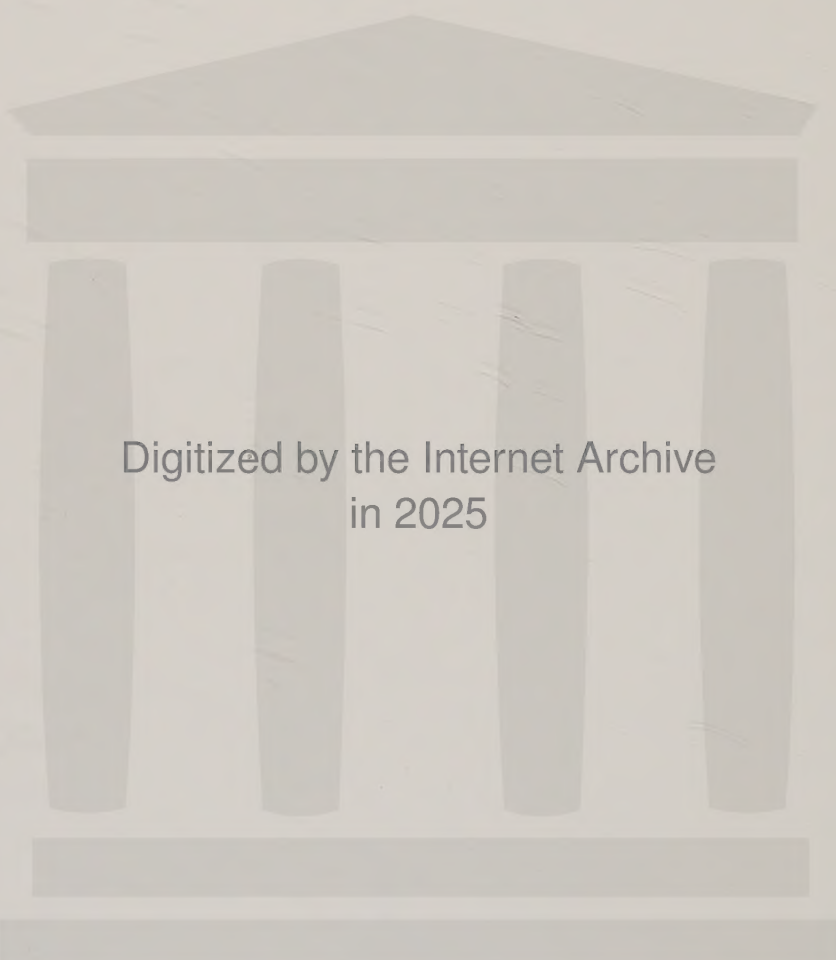


CALIFORNIA REPORTER REFERENCES

104 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page
1.....	230 667	177.....	230 875	402.....	231 896	599.....	232 293
21.....	230 379	181.....	231 62	417.....	231 910	614.....	232 301
23.....	230 432	185.....	231 86	425.....	233 577	621.....	232 262
26.....	230 440	190.....	231 507	435.....	233 583	629.....	232 34
27.....	230 637	199.....	230 869	438.....	233 585	632.....	232 288
32.....	230 654	204.....	231 115	441.....	231 498	634.....	232 290
35.....	230 642	212.....	231 167	446.....	231 869	640.....	232 54
41.....	230 867	218.....	231 91	453.....	231 512	642.....	234 65
44.....	230 832	219.....	230 877	455.....	231 873	688.....	232 268
53.....	231 105	224.....	231 81	461.....	231 505	697.....	232 318
59.....	230 640	227.....	231 124	463.....	232 55	704.....	232 308
61.....	230 864	233.....	231 164	477.....	232 64	710.....	232 31
66.....	230 830	238.....	231 83	480.....	231 546	713.....	232 41
70.....	230 856	242.....	231 119	482.....	231 552	716.....	232 572
76.....	230 838	250.....	231 101	486.....	231 560	735.....	232 546
81.....	230 684	257.....	231 573	488.....	231 526	740.....	232 590
83.....	230 861	271.....	231 534	490.....	231 894	746.....	232 500
86.....	230 641	281.....	231 540	491.....	231 895	759.....	232 583
88.....	230 651	291.....	231 595	494.....	231 595	771.....	232 510
94.....	231 137	295.....	230 872	495.....	231 880	777.....	232 594
98.....	230 649	298.....	231 156	497.....	231 905	782.....	232 549
100.....	231 65	311.....	231 530	506.....	231 876	786.....	232 551
109.....	231 74	317.....	231 524	512.....	231 864	793.....	232 541
111.....	231 69	321.....	231 92	517.....	232 36	796.....	232 306
118.....	231 133	323.....	231 554	526.....	232 48	799.....	233 70
120.....	231 89	331.....	231 134	536.....	232 1	806.....	232 494
124.....	230 880	336.....	231 513	541.....	231 933	810.....	232 543
126.....	231 75	340.....	231 548	545.....	232 26	814.....	232 563
137.....	231 93	347.....	231 561	551.....	232 30	816.....	232 560
148.....	231 171	353.....	231 502	554.....	232 22	821.....	233 82
159.....	230 885	359.....	231 516	560.....	232 15	827.....	232 523
162.....	230 863	371.....	231 527	567.....	232 11	832.....	232 286
165.....	230 873	375.....	231 152	571.....	232 531	835.....	233 91
167.....	231 128	380.....	231 881	588.....	232 323	850.....	232 597
175.....	230 860	392.....	231 916	594.....	232 255	861.....	231 592
175.....	231 868	400.....	231 497	597.....	232 33		





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CASES REPORTED

	Vol.	Page
Ace Realty Co. v. Friedman, App.	236	P.2d 174
Adams; Kuchel v., App.	236	P.2d 418
Adams' Estate, In re, App.	236	P.2d 418
Aetna Bldg. Maintenance Co. v. West, App.	236	P.2d 390
Airways Water Co. v. Los Angeles County, App.	236	P.2d 199
Alexander v. Angel, Sup.	236	P.2d 561
Allen v. Franchise Tax Bd., App.	236	P.2d 378
Almeida v. Price, App.	236	P.2d 823
Alta Const. Co.; Myers v., Sup.	235	P.2d 1
Altman v. McCollum, Super.	236	P.2d 914
American Auto. Ins. Co. v. American Fidelity & Cas. Co. of Richmond, Va., App.	235	P.2d 645
American Enterprise v. Van Winkle, App.	236	P.2d 901
American Fidelity & Cas. Co. of Richmond, Va.; American Auto. Ins. Co. v., App.	235	P.2d 645
American Trust Co.; State v., App.	235	P.2d 837
Anderson, Ex parte, App.	236	P.2d 659
Angel; Alexander v., Sup.	236	P.2d 561
Armstrong; People v., App.	235	P.2d 242
Ashburn; Lipman v., App.	235	P.2d 627
Back v. Hook, App.	236	P.2d 910
Baldwin; Shaff v., App.	236	P.2d 634
Bank of America Nat. Trust. & Sav. Ass'n; Cecil v., App.	236	P.2d 408
Bank of America Nat. Trust & Sav. Ass'n; Heard v., App.	236	P.2d 810
Banks v. Puma, Sup.	236	P.2d 369
Barker, Inc. v. Briggs, App.	236	P.2d 600
Bauder; Paulus v., App.	235	P.2d 422
Bennetts; Champion v., Sup.	236	P.2d 155
Bergin v. Van Der Steen, App.	236	P.2d 613
Bethlehem Pac. Coast Steel Corp. v. Industrial Acc. Commission, App.	235	P.2d 125
Biles v. Biles, App.	236	P.2d 621
Binford; Eggeman v., App.	235	P.2d 409
Biscailuz; People v., App.	236	P.2d 591
Board of Sup'rs, Los Angeles County; Edmonds v., App.	236	P.2d 646
Bobak v. Mackey, App.	236	P.2d 626
Borsook v. Continental Cas. Co., App.	236	P.2d 383
Bradley; Clark v., App.	235	P.2d 439
Brahs v. Katcher, App.	235	P.2d 619
Brietigam v. Industrial Acc. Commission, Sup.	236	P.2d 582
Briggs; Lawrence Barker, Inc., v., App.	236	P.2d 600
Brill; Levy v., App.	236	P.2d 603
Brinkerhoff by Nelson v. Ferguson, App.	236	P.2d 588
Brock v. Superior Court In and For City and County of San Francisco, App.	236	P.2d 11
Brock; West Los Angeles Mill. Co. v., App.	236	P.2d 11
Brooks; Guerra v., Sup.	236	P.2d 807
Brown; Kaufman v., App.	235	P.2d 632
California Home Extension Ass'n v. Hilborn, Sup.	235	P.2d 369
California Western States Life Ins. Co.; Di Pasqua v., App.	235	P.2d 64
Carollo; Department of Social Welfare v., App.	236	P.2d 821
Carter; Seaboard Finance Co. v., App.	236	P.2d 27

CASES REPORTED

	Vol.	Page
Cavalier Restaurant; Noble v., App.	235	P.2d 396
Cecil v. Bank of America Nat. Trust & Sav. Ass'n, App.	236	P.2d 408
Chaffee v. Sorensen, App.	236	P.2d 851
Champion v. Bennetts, Sup.	236	P.2d 155
Channell; People v., App.	233	P.2d 654
Charach v. Lansing, App.	236	P.2d 1
Cheeley; People v., App.	236	P.2d 22
Cheesman v. Odermott, App.	236	P.2d 211
City and County of San Francisco; Madison v., Sup.	236	P.2d 141
City and County of San Francisco; Wilson v., App.	235	P.2d 81
City of Los Angeles; M. F. Kemper Const. Co. v., Sup.	235	P.2d 7
City of Los Angeles; Parcher v., App.	235	P.2d 220
City of Los Angeles; Smokler v., App.	235	P.2d 42
City of Los Angeles; Southwestern Inv. Corp. v., App.	235	P.2d 388
City of Los Angeles; Villanazul v., Sup.	235	P.2d 16
City of Sacramento; Sutter Hospital of Sacramento v., App.	236	P.2d 186
Clark v. Bradley, App.	235	P.2d 439
Clark v. Leshor, App.	235	P.2d 71
Clark; People v., App.	235	P.2d 56
Clements, Hayes by, v. Ferguson, App.	236	P.2d 588
Clifford v. Ruocco, App.	235	P.2d 653
Clopton v. Scharrenberg, App.	235	P.2d 84
Coaster Co.; Neptune Pier Co. v., App.	236	P.2d 386
Coeffield; People v., Sup.	236	P.2d 570
Cohen; People v., App.	236	P.2d 837
Cole's Estate, In re, App.	236	P.2d 206
Collins; Parsons v., App.	236	P.2d 189
Comastri; Paterson v., App.	236	P.2d 230
Constans v. Ross, App.	235	P.2d 113
Continental Cas. Co.; Borsook v., App.	236	P.2d 383
Contra Costa County; Miller v., App.	235	P.2d 76
Cowan, Zamloch, For and on Behalf of, v. Municipal Court of City and County of San Francisco, App.	235	P.2d 25
Cox; McGrath v., App.	236	P.2d 593
Coxe v. Martin, App.	236	P.2d 2
Coyle; Hall v., App.	235	P.2d 67
Cross v. Tustin, Sup.	236	P.2d 142
Cugat v. Cugat, App.	236	P.2d 831
Cunial; Grasso v., App.	235	P.2d 32
Curtis; People v., App.	235	P.2d 51
Dabney; Evans v., Sup.	235	P.2d 604
Dabney v. Mann, Sup.	235	P.2d 606
Dabney's Estate, In re, Sup.	235	P.2d 606
Dale v. Palmer, App.	235	P.2d 650
Darden; Reese v., App.	236	P.2d 4
Davis, Ex parte, Sup.	236	P.2d 579
Dempster; Rawnsley v., App.	235	P.2d 223
Department of Social Welfare v. Carollo, App.	236	P.2d 821
Dicco, Inc. v. Farrar, App.	235	P.2d 62
Dick v. Woolson, App.	235	P.2d 119
Di Pasqua v. California Western States Life Ins. Co., App.	235	P.2d 64
Director, Dept. of Public Welfare, San Diego County; Fiske v., App.	236	P.2d 427
Division of Labor Law Enforcement, Dept. of Indus. Relations v. Ryan Aeronautical Co., Super.	236	P.2d 236
Dockweiler v. Superior Court In and For Los Angeles County, App.	236	P.2d 20
Dorsk v. Spivack, App.	236	P.2d 840
Driver v. Norman, App.	236	P.2d 6
D. S., In re Adoption of, App.	236	P.2d 821

CASES REPORTED

	Vol.	Page
Edlund v. Los Altos Builders, two cases, App.	235	P.2d 28
Edmonds v. Board of Sup'rs, Los Angeles County, App.	236	P.2d 646
Edmonds v. Los Angeles County, App.	236	P.2d 650
Eggeman v. Binford, App.	235	P.2d 409
Etchart v. Pyles, App.	235	P.2d 427
Evans v. Dabney, Sup.	235	P.2d 604
Faeh v. Union Oil Co. of Cal., App.	236	P.2d 667
Fairfax Markets; Moise v., App.	236	P.2d 216
Farrar; Dicco, Inc. v., App.	235	P.2d 62
Farrell; People v., App.	236	P.2d 424
Fedler v. Hygelund, App.	235	P.2d 247
Ferguson; Brinkerhoff by Nelson v., App.	236	P.2d 588
Ferguson; Hayes by Clements v., App.	236	P.2d 588
Ferguson; Morton v., App.	236	P.2d 588
Filomeo; Reynolds v., Sup.	236	P.2d 801
Fischer; Rast v., App.	236	P.2d 393
Fiske v. Director, Dept. of Public Welfare, San Diego County, App.	236	P.2d 427
Flanagan v. San Marcos Silk Co., App.	235	P.2d 107
Franchise Tax Bd.; Allen v., App.	236	P.2d 378
Franklin; People v., App.	235	P.2d 402
Fredrickson v. Superior Court of State, In and For City and County of San Francisco, App.	236	P.2d 405
Freeman; People v., App.	236	P.2d 396
Freitas; Longo v., App.	236	P.2d 403
French; Whitmore v., Sup.	235	P.2d 3
Friedman; Ace Realty Co. v., App.	236	P.2d 174
Fuschi v. Vir Den, App.	236	P.2d 829
Gallow; People v., App.	235	P.2d 660
Gantner v. Gantner, App.	236	P.2d 220
Gantner v. Superior Court In and For City and County of San Francisco, App.	236	P.2d 220
Garcia v. Venegas, App.	235	P.2d 89
Giddings v. Superior Oil Co., App.	235	P.2d 843
Gilbert; Pritchard v., App.	236	P.2d 412
Glick; People v., App.	236	P.2d 586
Godley v. State, Sup.	236	P.2d 372
Golden; Penland v., App.	236	P.2d 823
Gordon; Green v., App.	236	P.2d 611
Gould; Hart v., App.	236	P.2d 884
Gould v. Hart, App.	236	P.2d 891
Gould; People v., Sup.	235	P.2d 604
Grasso v. Cunial, App.	235	P.2d 32
Green v. Gordon, App.	236	P.2d 611
Griffin; People v., App.	235	P.2d 424
Griffith v. Hannam, App.	236	P.2d 208
Griswold v. Hollywood Turf Club, App.	235	P.2d 656
Guerra v. Brooks, Sup.	236	P.2d 807
Hall v. Coyle, App.	235	P.2d 67
Hamlet v. Hook, App.	236	P.2d 196
Hanna v. O'Connor, App.	236	P.2d 181
Hannam; Griffith v., App.	236	P.2d 208
Hannam's Estate, In re, App.	236	P.2d 208
Hart v. Gould, App.	236	P.2d 884
Hart; Gould v., App.	236	P.2d 891
Hart's Estate, In re, App.	236	P.2d 884
Hart's Estate, In re, App.	236	P.2d 891
Hayes by Clements v. Ferguson, App.	236	P.2d 588
Heard v. Bank of America Nat. Trust & Sav. Ass'n, App.	236	P.2d 810

CASES REPORTED

	Vol.	Page
Heard's Estate, In re, App.	236	P.2d 810
Hernon; People v., App.	235	P.2d 614
Herrin v. White, App.	236	P.2d 180
Hilborn; California Home Extension Ass'n v., Sup.	235	P.2d 369
Hollywood Turf Club; Griswold v., App.	235	P.2d 656
Holt v. Parmer, App.	235	P.2d 43
Hook; Back v., App.	236	P.2d 910
Hook; Hamlet v., App.	236	P.2d 196
Hygelund; Fedler v., App.	235	P.2d 247
Industrial Acc. Commission; Bethlehem Pac. Coast Steel Corp. v., App.	235	P.2d 125
Industrial Acc. Commission; Brietigam v., Sup.	236	P.2d 582
Industrial Acc. Commission; Subsequent Injuries Fund of State v., App.	236	P.2d 609
Industrial Acc. Commission; Sweeney v., App.	236	P.2d 651
International Longshoremen's and Warehousemen's Union; Juneau Spruce Corp. v., Sup.	235	P.2d 607
Irwin v. Zuver, App.	236	P.2d 834
Jackson v. Lovas, App.	235	P.2d 232
John Hancock Mut. Life Ins. Co.; Juhl v., App.	236	P.2d 628
Johnson; Orella v., App.	236	P.2d 867
Johnson; Pease v., App.	235	P.2d 229
Johnson; People v., App.	236	P.2d 190
Johnston v. Johnston, App.	236	P.2d 212
Juhl v. John Hancock Mut. Life Ins. Co., App.	236	P.2d 628
Juneau Spruce Corp. v. International Longshoremen's and Warehousemen's Union, Sup.	235	P.2d 607
Karas v. Karas, App.	236	P.2d 415
Katcher; Brahs v., App.	235	P.2d 619
Kaufman v. Brown, App.	235	P.2d 632
Kelley v. Upshaw, App.	235	P.2d 861
Kemper Const. Co. v. City of Los Angeles, Sup.	235	P.2d 7
Kennedy's Estate, In re, App.	235	P.2d 837
Kent v. Superior Court of State, In and For City and County of San Francisco, App.	235	P.2d 420
King v. King, App.	236	P.2d 912
Knapp's Estate, In re, Sup.	236	P.2d 372
Koeslag; Reid v., App.	236	P.2d 192
Kolis v. Kolis, App.	236	P.2d 838
Krug v. Meehan, App.	235	P.2d 410
Kuchel v. Adams, App.	236	P.2d 418
Kuchel; Lowell v., Sup.	236	P.2d 566
Kuenzi v. Nociaro, App.	236	P.2d 661
Lansing; Charach v., App.	236	P.2d 1
Larson; Tyler v., App.	235	P.2d 39
Lawrence Barker, Inc. v. Briggs, App.	236	P.2d 600
L. B. Laboratories v. Mitchell, App.	235	P.2d 253
L. B. Williams Organization v. Winter, App.	235	P.2d 407
Le Beau; People v., App.	235	P.2d 850
Lencioni; Van Cise v., App.	235	P.2d 236
Lerner v. Superior Court In and For San Mateo County, App.	236	P.2d 227
Leshner; Clark v., App.	235	P.2d 71
Levene; People v., App.	236	P.2d 604
Levy v. Brill, App.	236	P.2d 603
Lichtenstein; Solon v., App.	235	P.2d 22
Lipman v. Ashburn, App.	235	P.2d 627
Loewenstein's Estate, In re, Sup.	236	P.2d 566
Longo v. Freitas, App.	236	P.2d 403
Lord v. Lund, App.	235	P.2d 609

CASES REPORTED

	Vol.	Page
Los Altos Builders; Edlund v., App.	235	P.2d 28
Los Angeles County; Airways Water Co. v., App.	236	P.2d 199
Los Angeles County; Edmonds v., App.	236	P.2d 650
Los Angeles County v. Pacific Lighting Gas Supply Co., App.	236	P.2d 892
Los Angeles County v. Wright, App.	236	P.2d 892
Los Angeles County Civil Service Commission; Wilson v., App.	235	P.2d 620
Loucks v. Luckel, App.	236	P.2d 905
Lovas; Jackson v., App.	235	P.2d 232
Lowell v. Kuchel, Sup.	236	P.2d 566
Lucas' Estate, In re, App.	235	P.2d 225
Luckel; Loucks v., App.	236	P.2d 905
Luigi Consentino & Sons; Wold v., App.	235	P.2d 217
Lund; Lord v., App.	235	P.2d 609
McCollum; Altman v., Super.	236	P.2d 914
McCoy; Nichols v., App.	235	P.2d 412
McGoldrick; People v., App.	236	P.2d 597
McGrath v. Cox, App.	236	P.2d 593
McInturff, Ex parte, Sup.	236	P.2d 574
McInturff v. People, Sup.	236	P.2d 574
McKay; People v., Sup.	236	P.2d 145
McKenna; Sipe v., App.	235	P.2d 416
Mackey; Bobak v., App.	236	P.2d 626
MacSweeney Enterprises v. Tarantino, App.	235	P.2d 266
McSweeney's Estate, In re, App.	236	P.2d 846
Madison v. City and County of San Francisco, Sup.	236	P.2d 141
Mallory; Messner v., App.	236	P.2d 898
Mann; Dabney v., Sup.	235	P.2d 606
Marshall v. Packard-Bell Co., App.	236	P.2d 201
Marshall; Williams v., Sup.	235	P.2d 372
Martin; Coxe v., App.	236	P.2d 2
Martin's Estate, In re, App.	236	P.2d 2
Meehan; Krug v., App.	235	P.2d 410
Melody Farms Dairy Products Co.; Southern Cal. Collection Co. of Los Angeles v., App.	235	P.2d 434
Meneley; Parker v., App.	235	P.2d 101
Messner v. Mallory, App.	236	P.2d 898
M. F. Kemper Const. Co. v. City of Los Angeles, Sup.	235	P.2d 7
Middleton v. Post Transp. Co., App.	235	P.2d 855
Midway Fishing Tool Co.; Miller v., App.	235	P.2d 630
Miller v. Contra Costa County, App.	235	P.2d 76
Miller v. Midway Fishing Tool Co., App.	235	P.2d 630
Miller; People v., Sup.	236	P.2d 137
Milstein v. Turner, App.	236	P.2d 606
Mitchell; L. B. Laboratories v., App.	235	P.2d 253
Moise v. Fairfax Markets, App.	236	P.2d 216
Monticelli's Estate, In re, App.	236	P.2d 661
Morrison v. Murphy, App.	236	P.2d 206
Morton v. Ferguson, App.	236	P.2d 588
Municipal Court of City and County of San Francisco; Zamloch, For and on Behalf of Cowan v., App.	235	P.2d 25
Murphy; Morrison v., App.	236	P.2d 206
Myers v. Alta Const. Co., Sup.	235	P.2d 1
Napkie; Southern Cal. Collection Co. of Los Angeles v., App.	235	P.2d 434
National Auto. & Cas. Ins. Co. of Los Angeles; Reachi v., Sup.	236	P.2d 151
Nelson, Brinkerhoff by, v. Ferguson, App.	236	P.2d 588
Neptune Pier Co. v. Coaster Co., App.	236	P.2d 386
Nichols v. McCoy, App.	235	P.2d 412
Noble v. Cavalier Restaurant, App.	235	P.2d 396

CASES REPORTED

	Vol.	Page
Nociaro; Kuenzi v., App.	236	P.2d 661
Norman; Driver v., App.	236	P.2d 6
O'Connor; Hanna v., App.	236	P.2d 181
Odermott; Cheesman v., App.	236	P.2d 211
Ogle Aluminum Furniture; Phillips v., App.	235	P.2d 857
Olstad v. Olstad, App.	236	P.2d 625
Orella v. Johnson, App.	236	P.2d 867
Ott v. Packard-Bell Co., App.	236	P.2d 205
Oviedo; People v., App.	235	P.2d 612
Pacific Coast Title Ins. Co.; Wilson v., App.	235	P.2d 431
Pacific Lighting Gas Supply Co.; Los Angeles County v., App.	236	P.2d 892
Packard-Bell Co.; Marshall v., App.	236	P.2d 201
Packard-Bell Co.; Ott v., App.	236	P.2d 205
Packard-Bell Co.; Quinlan v., App.	236	P.2d 206
Packard-Bell Co.; Scrafield v., App.	236	P.2d 205
Packard-Bell Co.; White v., App.	236	P.2d 205
Palmer; Dale v., App.	235	P.2d 650
Parcher v. City of Los Angeles, App.	235	P.2d 220
Parker v. Meneley, App.	235	P.2d 101
Parker v. Parker, App.	236	P.2d 828
Parks v. Superior Court In and For Alameda County, App.	236	P.2d 874
Farmer; Holt v., App.	235	P.2d 43
Parsons v. Collins, App.	236	P.2d 189
Paterson v. Comastri, App.	236	P.2d 230
Patten v. San Diego County, App.	235	P.2d 217
Paulus v. Bauder, App.	235	P.2d 422
Pease v. Johnson, App.	235	P.2d 229
Peninsula Properties Co. v. Santa Cruz County, App.	235	P.2d 635
Penland v. Golden, App.	236	P.2d 823
People v. Armstrong, App.	235	P.2d 242
People v. Biscailuz, App.	236	P.2d 591
People v. Channell, App.	236	P.2d 654
People v. Cheeley, App.	236	P.2d 22
People v. Clark, App.	235	P.2d 56
People v. Coefield, Sup.	236	P.2d 570
People v. Cohen, App.	236	P.2d 837
People v. Curtis, App.	235	P.2d 51
People v. Farrell, App.	236	P.2d 424
People v. Franklin, App.	235	P.2d 402
People v. Freeman, App.	236	P.2d 396
People v. Gallow, App.	235	P.2d 660
People v. Glick, App.	236	P.2d 586
People v. Gould, Sup.	235	P.2d 604
People v. Griffin, App.	235	P.2d 424
People v. Hernon, App.	235	P.2d 614
People v. Johnson, App.	236	P.2d 190
People v. Le Beau, App.	235	P.2d 850
People v. Levene, App.	236	P.2d 604
People v. McGoldrick, App.	236	P.2d 597
People; McInturff v., Sup.	236	P.2d 574
People v. McKay, Sup.	236	P.2d 145
People v. Miller, Sup.	236	P.2d 137
People v. Oviedo, App.	235	P.2d 612
People v. Prescott, App.	235	P.2d 406
People v. Ramos, App.	235	P.2d 864
People v. Riley, Sup.	235	P.2d 381
People v. Simon, App.	236	P.2d 855
People v. Skov, App.	235	P.2d 846

CASES REPORTED

	Vol.	Page
People v. Syde, Sup.	235	P.2d 601
People v. Thornton, App.	235	P.2d 227
People v. Toppin, App.	236	P.2d 30
People v. Wilson, App.	236	P.2d 9
Phillips v. Ogle Aluminum Furniture, App.	235	P.2d 857
Phillips v. Phillips, App.	236	P.2d 816
Post Transp. Co.; Middleton v., App.	235	P.2d 855
Prescott; People v., App.	235	P.2d 406
Price; Almeida v., App.	236	P.2d 823
Pritchard v. Gilbert, App.	236	P.2d 412
Puma; Banks v., Sup.	236	P.2d 369
Pyles; Etchart v., App.	235	P.2d 427
Quinlan v. Packard-Bell Co., App.	236	P.2d 206
Rainey v. Ross, App.	235	P.2d 45
Ramos; People v., App.	235	P.2d 864
Rast v. Fischer, App.	236	P.2d 393
Rawnsley v. Dempster, App.	235	P.2d 223
Rawnsley's Estate, In re, App.	235	P.2d 223
Reachi v. National Auto. & Cas. Ins. Co. of Los Angeles, Sup.	236	P.2d 151
Reese v. Darden, App.	236	P.2d 4
Reid v. Koeslag, App.	236	P.2d 192
Reynolds v. Filomeo, Sup.	236	P.2d 801
Riley; People v., Sup.	235	P.2d 381
Ross; Constans v., App.	235	P.2d 113
Ross; Rainey v., App.	235	P.2d 45
Rowland; Turkovich v., App.	235	P.2d 123
Ruocco; Clifford v., App.	235	P.2d 653
Ryan Aeronautical Co.; Division of Labor Law Enforcement Dept. of Indus. Relations v., Super.	236	P.2d 236
Sanders v. Warden, App.	236	P.2d 19
San Diego County; Patten v., App.	235	P.2d 217
San Marcos Silk Co.; Flanagan v., App.	235	P.2d 107
Santa Cruz County; Peninsular Properties Co. v., App.	235	P.2d 635
Scharrenberg; Clopton v., App.	235	P.2d 84
Schneider v. Whittley, App.	235	P.2d 403
Scrafield v. Packard-Bell Co., App.	236	P.2d 205
Seaboard Finance Co. v. Carter, App.	236	P.2d 27
Seven Up Bottling Co. of Los Angeles v. Superior Court of Los Angeles County, App.	236	P.2d 623
Shaff v. Baldwin, App.	236	P.2d 634
Silizhoff; State Rubbish Collectors Ass'n v., App.	235	P.2d 95
Simon; People v., App.	236	P.2d 855
Sipe v. McKenna, App.	235	P.2d 416
Skov; People v., App.	235	P.2d 846
Smokler v. City of Los Angeles, App.	235	P.2d 42
Solon v. Lichtenstein, App.	235	P.2d 22
Sorensen; Chaffee v., App.	236	P.2d 851
Southern Cal. Collection Co. of Los Angeles v. Melody Farms Dairy Prod- ucts Co., App.	235	P.2d 434
Southern Cal. Collection Co. of Los Angeles v. Napkie, App.	235	P.2d 434
Southwestern Inv. Corp. v. City of Los Angeles, App.	235	P.2d 388
Sperry v. Tammany, App.	235	P.2d 847
Spivack; Dorsk v., App.	236	P.2d 840
Stagnaro's Estate, In re, App.	236	P.2d 593
State v. American Trust Co., App.	235	P.2d 837
State; Godley v., Sup.	236	P.2d 372
State Rubbish Collectors Ass'n v. Silizhoff, App.	235	P.2d 95
Subsequent Injuries Fund of State v. Industrial Acc. Commission, App.	236	P.2d 609

CASES REPORTED

	Vol.	Page
Superior Court In and For Alameda County; Parks v., App.	236	P.2d 874
Superior Court In and For City and County of San Francisco; Brock v., App.	236	P.2d 11
Superior Court In and For City and County of San Francisco; Gant- ner v., App.	236	P.2d 220
Superior Court In and For Los Angeles County; Dockweiler v., App.	236	P.2d 20
Superior Court In and For Los Angeles County; Superior Ins. Co. v., Sup.	235	P.2d 833
Superior Court In and For San Mateo County; Lerner v., App.	236	P.2d 227
Superior Court of Los Angeles County; Seven Up Bottling Co. of Los Angeles v., App.	236	P.2d 623
Superior Court of State, In and For City and County of San Francisco; Fredrickson v., App.	236	P.2d 405
Superior Court of State, In and For City and County of San Francisco; Kent v., App.	235	P.2d 420
Superior Court of State, In and For City and County of San Francisco; Swift v., App.	235	P.2d 624
Superior Ins. Co. v. Superior Court In and For Los Angeles County, Sup.	235	P.2d 833
Superior Oil Co.; Giddings v., App.	235	P.2d 843
Sutter Hospital of Sacramento v. City of Sacramento, App.	236	P.2d 186
Sweeney v. Industrial Acc. Commission, App.	236	P.2d 651
Sweeney v. Welte, App.	236	P.2d 846
Swift v. Superior Court of State, In and For City and Count of San Fran- cisco, App.	235	P.2d 624
Syde; People v., Sup.	235	P.2d 601
Tammany; Sperry v., App.	235	P.2d 847
Tarantino; MacSweeney Enterprises v., App.	235	P.2d 266
Thomsen v. Yankee Mariner Corp., App.	235	P.2d 234
Thornton; People v., App.	235	P.2d 227
Toppin; People v., App.	236	P.2d 30
Towers; White v., Sup.	235	P.2d 209
Tringali v. Vest, App.	236	P.2d 171
Turkovich v. Rowland, App.	235	P.2d 123
Turner; Milstein v., App.	236	P.2d 606
Tustin; Cross v., Sup.	236	P.2d 142
Tuttle v. Tuttle, App.	236	P.2d 639
Tyler v. Larson, App.	235	P.2d 39
Union Oil Co. of Cal.; Faeh v., App.	236	P.2d 667
United Theatres; Whiteside v., App.	235	P.2d 261
Upshaw; Kelley v., App.	235	P.2d 861
Van Cise v. Lencioni, App.	235	P.2d 236
Van Der Most v. Workman, App.	236	P.2d 842
Van Der Steen; Bergin v., App.	236	P.2d 613
Van Winkle; American Enterprise v., App.	236	P.2d 901
Venegas; Garcia v., App.	235	P.2d 89
Vest; Tringali v., App.	236	P.2d 171
Viera v. Viera, App.	236	P.2d 630
Viera v. Viera, App.	236	P.2d 632
Villanazul v. City of Los Angeles, three cases, Sup.	235	P.2d 16
Vir Den; Fuschi v., App.	236	P.2d 829
Warden; Sanders v., App.	236	P.2d 19
Weil v. Weil, Sup.	236	P.2d 159
Wellauer's Estate, In re, App.	236	P.2d 906
Welte; Sweeney v., App.	236	P.2d 846
West; Aetna Bldg. Maintenance Co. v., App.	236	P.2d 390
West Los Angeles Mill. Co. v. Brock, App.	236	P.2d 11
White; Herrin v., App.	236	P.2d 180

CASES REPORTED

	Vol.	Page
White v. Packard-Bell Co., App.	236	P.2d 205
White v. Towers, Sup.	235	P.2d 209
Whiteside v. United Theatres, App.	235	P.2d 261
Whitmore v. French, Sup.	235	P.2d 3
Whittley; Schneider v., App.	235	P.2d 403
Williams v. Marshall, Sup.	235	P.2d 372
Williams Organization v. Winter, App.	235	P.2d 407
Wilson v. City and County of San Francisco, App.	235	P.2d 81
Wilson v. Los Angeles County Civil Service Commission, App.	235	P.2d 620
Wilson v. Pacific Coast Title Ins. Co., App.	235	P.2d 431
Wilson; People v., App.	236	P.2d 9
Winter; L. B. Williams Organization v., App.	235	P.2d 407
Wold v. Luigi Consentino & Sons, App.	235	P.2d 217
Woolson; Dick v., App.	235	P.2d 119
Workman; Van Der Most v., App.	236	P.2d 842
Wright; Los Angeles County v., App.	236	P.2d 892
Yankee Mariner Corp.; Thomsen v., App.	235	P.2d 234
Zamloch, For and on Behalf of Cowan v. Municipal Court of City and County of San Francisco, App.	235	P.2d 25
Zuver; Irwin v., App.	236	P.2d 834

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CALIFORNIA REPORTER

235 PACIFIC REPORTER

SECOND SERIES

37 Cal.2d 739

MYERS v. ALTA CONST. CO. et al.

L. A. 21909.

Supreme Court of California, in Bank.

Sept. 4, 1951.

Action by Robert F. Myers against the Alta Construction Company and Standard Accident Insurance Company to recover the value of surveying and engineering services rendered in connection with the construction of a warehouse. The Superior Court, Kern County, William L. Bradshaw, J., gave judgment in favor of the plaintiff and the defendant Standard Accident Insurance Company appealed. The Supreme Court, Gibson, C. J., held that the provision in a surety bond by which the principal and surety agreed to pay all just claims of laborers arising under contract and to waive the filing of lien claims or giving written notice required by mechanic's lien law as condition to bringing suit to enforce the same, was not limited to workers who personally performed manual labor.

Judgment affirmed.

Prior opinion, 226 P.2d 36.

1. Mechanics' liens ⇨315

The word "laborer", used in surety bond, is commonly used to designate one whose work demands strength and physical toil rather than skill, but it is also applied to one who performs work which requires combination of skill and physical exertion as distinguished from one who depends primarily upon exercise of mental faculties to accomplish a task, and in more comprehensive sense it includes those who toil with their brains as well as those performing manual work.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Laborer".

235 P.2d—1

Cal.Rep. 235-236 P.2d—1

2. Mechanics' liens ⇨313

Where surety bond expressly stated it was given for purpose of complying with mechanic's lien law, terms of statute were read into the bond and controlled its interpretation and effect. Code Civ.Proc., § 1183 et seq.

3. Mechanics' liens ⇨39

Under statute providing that laborers of every class shall have lien upon property upon which they worked or furnished materials, the term manual laborers could not be read into the statute in place of the word laborers. Code Civ.Proc., § 1183 et seq.

4. Mechanics' liens ⇨315

Where word laborers was used in broad and comprehensive sense in mechanic's lien law so as to include surveyor, court would not adopt more restrictive meaning in construing surety bond given pursuant to statute. Code Civ.Proc., § 1183 et seq.

5. Principal and surety ⇨59

Where proper interpretation of surety bond is in doubt, court will be governed by statutory direction that it shall be construed most strongly against surety and in favor of all persons for whose benefit it is given. Code Civ.Proc., § 1183.

6. Principal and surety ⇨59

To determine sense in which word "laborers" was used in surety bond court took into consideration rule that any uncertainty in a contract is to be construed against the person who caused the uncertainty to exist. Civ.Code, § 1654.

7. Mechanics' liens ⇨315

Waiver provision in surety bond to effect that principal and surety agreed to pay all claims of laborers and to waive filing of lien claims or giving written notice

required by statute as a condition to bringing suit to enforce the same, was not limited to workers who personally performed manual labor, but included professional surveyor whose services consisted of furnishing field crews in connection with construction of warehouse. Code Civ.Proc., § 1183.

Thomas E. Davis, San Francisco, for appellant.

West, Vizzard, Howden & Baker and Gordon L. Howden, Bakersfield, for respondent.

GIBSON, Chief Justice.

Plaintiff, a licensed surveyor and civil engineer, brought this action against a contractor and its surety to recover the value of surveying and engineering services rendered in connection with the construction of a warehouse. Defendant surety has appealed from a judgment in favor of plaintiff.

The bond given by the surety was executed and recorded pursuant to the mechanic's lien law, Code Civ.Proc., § 1183, which requires the filing of a lien claim or the giving of a written notice to the surety as a condition precedent to an action on the undertaking. It is conceded that plaintiff failed to take either of these steps and that he is not entitled to recover against the surety unless he was excused from complying with these statutory requirements by the following provision in the bond: "The Principal and Surety further agree to pay all just claims of laborers arising under said contract, within two (2) weeks after demand, and to waive the filing of lien claims or giving written notice required by Statute as a condition to bringing suit to enforce the same." It appears that plaintiff's services were professional in nature and for the most part consisted of furnishing field crews. Defendant contends that the waiver provision of the bond applies only to manual laborers who personally perform the work for which a claim is made and that plaintiff is not within its terms.

[1,2] The meaning of the word "laborer" is not fixed in its application (see Webster's Dict. of Synonyms), and it has

been said that "it would be difficult, if not impracticable, to give any general definition of the word 'laborer' which would at once include all of the cases falling within the concept of the word and exclude those falling without." See 31 Am.Jur., p. 834. It is commonly used to designate one whose work demands strength and physical toil rather than skill. See Webster's Dict. of Synonyms. It is also applied to one who performs work which requires a combination of skill and physical exertion as distinguished from one who depends primarily upon the exercise of mental faculties to accomplish a task. See *Kerr v. Nelson*, 7 Cal.2d 85, 88, 59 P.2d 821. In the more comprehensive sense it includes those who toil with their brains as well as those performing manual work. See 31 Am.Jur., p. 835. Since the meaning of the word is not fixed, it is necessary in each particular situation to look to the context in which the term is used to ascertain what is meant. As stated by Justice Harrison in *Estate of Nelson*, 132 Cal. 182, 191, 64 P. 294, 298, "Philology is at best an unsafe criterion for ascertaining the meaning of words which are in common use, and the definition thus obtained is always subordinate to the meaning derived from the context, or from the circumstances under which the word is used." The bond in the present case expressly states that it was given for the purpose of complying with the mechanic's lien law, Code Civ.Proc., § 1183 et seq., and the terms of the statute are to be read into the bond and control its interpretation and effect. *Carpenter v. National Surety Co.*, 25 Cal.App.2d 90, 93, 76 P.2d 523. Accordingly, we look to the statute in ascertaining the meaning of "laborers" as used in the waiver provision of the bond.

[3] Section 1183 provides that "Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services, or furnishing materials * * * appliances, teams and power * * * shall have a lien upon the property upon which they have bestowed labor or furnished materials * * *."

There can be no question that the "laborers" referred to in the section include "laborers of every class", skilled as well as unskilled, those who toil with their brains as well as those who work with their hands—in short, persons performing work of any kind. Nowhere in the section does the term "manual laborers" appear, and there can be no justification for reading it into the statute in place of the word "laborers."

[4] It is also apparent from a reading of the entire section that the Legislature makes no distinction as to whether a claimant performs work personally or merely furnishes persons to do the work. In the portion of the section relating to the liability of sureties it is provided that under no circumstances shall a surety be released from liability to the "*laborers* or materialmen or persons furnishing appliances, teams or power, for whose benefit said bond has been written, by reason of any breach of contract between owner and contractor or on the part of any obligee named in said bond, but the sole condition of recovery on the part of such person *furnishing labor* or material or appliances, teams or power * * * shall be that said labor or material has been used or consumed in or said appliances, teams or power have contributed to the work of improvement * * *." (Italics added.) It is further provided that no attempt to limit the right of recovery on the bond given for the benefit of "laborers or materialmen" shall release the surety. The provisions relating to bonds and the liability of sureties obviously were intended to apply to every one who has a right to claim a lien. Hence a person such as plaintiff, who is entitled to claim a lien but is neither a materialman nor a person furnishing appliances, teams or power, must have been intended to come within the term "laborers." Throughout the section the expressions "laborers," "persons performing labor" and "persons furnishing labor" are used interchangeably. In view of the broad and comprehensive sense in which the word "laborers" is used in the statute, we should not adopt a more restricted meaning in construing a bond given pursuant to the statute.

[5,6] If any doubt remains as to the proper interpretation of the bond, we should be governed by the express statutory direction that it shall "be construed most strongly against the surety and in favor of all persons for whose benefit" it is given. Code Civ.Proc., § 1183. Moreover, in determining the sense in which "laborers" is used in the bond, we must take into consideration the rule that any uncertainty in a contract is to be construed against the person who caused the uncertainty to exist. Civ.Code, § 1654. If the surety in the present case desired to limit the application of the waiver clause to one personally performing manual labor, it could easily have avoided any ambiguity or uncertainty by using an express statement to that effect.

[7] When the terms of the bond are read in the light of the statute and in accordance with settled rules of construction, it is clear that the waiver provision of the bond is not limited to workers who personally perform manual labor.

The judgment is affirmed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER and SPENCE,
JJ., concur.



37 Cal.2d 744

WHITMORE et ux. v. FRENCH et ux.

L. A. 21928.

Supreme Court of California, in Bank.

Sept. 4, 1951.

Arthur M. Whitmore, and wife, brought action against Howard W. French, and wife, for personal injuries sustained while plaintiffs were riding in automobile owned by defendants and driven by Howard W. French. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment on verdict for plaintiffs and defendants appealed. The Supreme Court, Gibson, C. J., held that plaintiffs were passengers, not guests, and defendants were liable for ordinary negligence.

Affirmed.

Schauer and Edmonds, JJ., dissented.
Prior opinion, Cal.App., 226 P.2d 671.

1. Automobiles ⇨229½

In action by occupants against motorist for injuries sustained in accident in Yosemite National Park, the California guest law was operative in view of federal law which provides that action for injuries sustained in national park shall be governed by laws of state wherein park is located. Vehicle Code, § 403; 16 U.S.C.A. § 457.

2. Automobiles ⇨181(2)

A person who accepts a ride does not cease to be guest and become passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls. Vehicle Code, § 403.

3. Automobiles ⇨181(2)

Sharing of expenses of travel does not destroy host-guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality. Vehicle Code, § 403.

4. Automobiles ⇨181(1, 2)

Where driver receives tangible benefit from occupant, monetary or otherwise, which is a motivating influence for furnishing transportation, occupant is a passenger and driver is liable for ordinary negligence, whether trip is for joint pleasure or is nonsocial in nature. Vehicle Code, § 403.

5. Automobiles ⇨181(1, 2)

Where occupant and wife paid half of all expenses of vacation trip, including food, lodging, and sightseeing, although driver's family was twice as large as occupant's, occupant and wife were "passengers", not "guests", and driver was liable for ordinary negligence. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Passenger" and "Guest".

1. Section 403 provides as follows: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legal-

6. Automobiles ⇨246(54)

In action by two occupants against driver for injuries sustained in accident, refusal of instruction based on guest law was proper in view of fact that occupants shared all expenses of trip, including food, lodging, and sightseeing, equally with driver whose family was twice as large. Vehicle Code, § 403

Thomas P. Menzies, Harold L. Watt and James O. White, all of Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee and White McGee, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiffs, husband and wife, brought this action to recover damages for personal injuries sustained by them in an accident in Yosemite National Park while they were riding in an automobile owned by defendants, Mr. and Mrs. French, and driven by Mr. French. The jury returned a verdict for plaintiffs, and defendants have appealed from the judgment.

[1] The sole question to be decided is whether the trial court erred in refusing to give instructions requested by defendants as to their liability under section 403 of the Vehicle Code,¹ commonly known as the "guest law." It is clear that the statute is operative within Yosemite National Park, which is located entirely within the State of California. Congress has provided that in an action to recover for personal injuries sustained in a national park "the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be." 16 U.S.C.A. § 457. There was no evidence that the accident resulted from the intoxication or wilful misconduct of the driver, and accordingly, we must determine whether the

ly liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

evidence established as a matter of law that plaintiffs gave compensation for the transportation furnished them by defendants.

The parties, who had been friends for many years, were taking an extended vacation trip from Missouri to the Pacific Coast. They visited the Royal Gorge in Colorado and other places of interest, and on the sixth day they had reached Yosemite National Park where the accident occurred. They had planned to go to Lake Tahoe and Oregon before returning home. In making arrangements for the trip, the parties agreed that they would be accompanied by defendants' two sons, 12 and 14 years old, that defendants would furnish the car, and that each couple would contribute an equal amount to a common fund, out of which all expenses, such as gasoline, oil, meals, lodging, and sightseeing, would be paid. Each couple put \$100 into the common fund as an initial contribution. Mr. French did all of the driving, and Mr. Whitmore procured maps and made suggestions as to the route to be followed.

[2-4] The designations "passenger" and "guest" have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 of the Vehicle Code from one carried gratuitously. *Kruzie v. Sanders*, 23 Cal.2d 237, 241, 143 P.2d 704. A person who accepts a ride does not cease to be guest and become a passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls (see *Rest., Torts*, § 490, Comment a), and it has been held that the sharing of expenses does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality. *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909. Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. See *Kruzie v. Sanders*, 23 Cal.2d 237, 143 P.2d 704; *Druzanich v. Criley*, 19 Cal.2d 439, 122 P.2d 53; *Whitechat v. Guyette*,

19 Cal.2d 428, 122 P.2d 47; *Walker v. Adamson*, 9 Cal.2d 287, 70 P.2d 914; *Kerstetter v. Elfman*, 327 Pa. 17, 192 A. 663, 664-666. This is, of course, true whether the trip is for the joint pleasure of the participants or is of a nonsocial nature.

[5,6] In the present case the evidence is without substantial conflict, and in our opinion the trial judge, who the record shows gave careful consideration to the problem, correctly determined that the only reasonable inference that could be drawn from the evidence was that plaintiffs gave compensation for their transportation. It is obvious that something more was involved in the arrangements for the trip than a mere exchange of social amenities, and it cannot be disputed that plaintiffs made a substantial contribution toward the cost of the journey. The financial arrangements were definite and businesslike and resulted in a tangible benefit to defendants, a cash payment was made into the common fund by plaintiffs before the commencement of the journey, and in addition to sharing the cost of the operation of the car and the expenses of the two couples, plaintiffs obligated themselves to pay one-half the cost of the food, lodging, and sightseeing for defendants' two sons on an extended trip which might last two or three weeks. The evidence establishes as a matter of law that plaintiffs compensated defendants for the ride, and the requested instructions were, therefore, properly refused.

The judgment is affirmed.

SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. In my view the evidence does not establish as a matter of law that plaintiffs compensated defendants for the trip in question. The majority opinion does not expressly state that it is departing from the general precepts, announced in *McCann v. Hoffman* (1937), 9 Cal.2d 279, 286, 70 P.2d 909, that "where a special tangible benefit to the defendant was the motivating influence for furnishing the

transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants. The payment of a portion of the expense, as for gasoline and oil consumed on the trip, is merely incidental and does not constitute the moving influence for the transportation. The provocation for the offer of transportation remains the joint social one of reciprocal hospitality or pleasure."

What are the salient differences between the facts of the McCann case, where it was held that plaintiffs as a matter of law did not give compensation, and the facts of this case, where it is held that plaintiffs as a matter of law did give compensation? There, as here, two couples, friends, went on a pleasure trip in defendants' automobile and shared the expenses of gasoline and oil, lodging and meals. There the trip was to be for a few days; here the trip "might last two or three weeks" (majority opinion, 235 P.2d 5). There the two defendants and the two plaintiffs tacitly understood that they would share expenses equally. Here the two plaintiffs and the two defendants expressly agreed that each would pay one half the expenses, although four Frenches and only two Whitmores were making the trip. It was at Mr. Whitmore's insistence that the expenses were not divided per capita; this was because he had poor eyesight and therefore desired, and it was agreed, that Mr. French take the Frenches' car and do all the driving.

There is nothing in the length of the trip or the express agreement as to division of expenses and driving of the Frenches' car by Mr. French which establishes as a matter of law that the plaintiffs' payment of more than their per capita share of the expenses was an influence which motivated the defendants in taking the plaintiffs on the vacation trip. The Restatement of Torts (§ 490, Comment a; see Scope Note to Chap. 19, p.

1292) states that "if there is a prior arrangement that there shall be a substantial sharing of the expenses, the host and guest relation does not exist." This has not been the law of California. (Rogers v. Vreeland (1936), 16 Cal.App.2d 364, 367, 60 P.2d 585 [express agreement to share expenses on a pleasure trip as a matter of law was not compensation]; Stephen v. Spaulding (1939), 32 Cal.App.2d 326, 328, 89 P.2d 683 [as in McCann v. Hoffman (1937), supra, 9 Cal.2d 279, 70 P.2d 909, there was a tacit, mutual understanding that plaintiff and defendant would share expenses of a pleasure trip; held, as a matter of law defendant was a guest, not a passenger]; Fiske v. Wilkie (1945), 67 Cal.App.2d 440, 446, 154 P.2d 725 [Garden Club trip; no express arrangement as to the particular trip but "it is understood with the Garden Club when we take these trips" that the riders pay for all the gasoline; as a matter of law the riders are guests]; Whitechat v. Guyette (1942), 19 Cal.2d 428, 435, 122 P.2d 47 [defendant testified that he agreed to make a trip from Fresno to Stockton before any mention of compensation was made and solely for friendship; but he also testified that \$5 he received from his riders was "for driving up there"; held, question of fact as to whether the \$5 was compensation or mere sharing of expenses].)

It is my opinion that the evidence here, as in the Whitechat case, supra, presented a question for the trier of fact as to whether the defendants took the plaintiffs on the vacation trip primarily because the parties were friends who wished to enjoy the trip together or primarily because of plaintiffs agreed to pay more than their per capita share of the traveling expenses. Therefore, the failure to instruct as to defendants' liability under the guest law (Veh.Code, § 403) was prejudicial error.

EDMONDS, J., concurs.

37 Cal.2d 696

Cite as 235 P.2d 7

**M. F. KEMPER CONST. CO. v. CITY OF
LOS ANGELES et al.****L. A. 21472.****Supreme Court of California, in Bank.****Aug. 28, 1951.****Rehearing Denied Sept. 24, 1951.**

Action by M. F. Kemper Construction Company, a co-partnership, against the City of Los Angeles, a municipal corporation, and members of Board of Public Works of city to cancel a bid on public construction work and obtain discharge of bid bond, wherein defendant city filed a cross-complaint against M. F. Kemper and others for forfeiture of bid bond and damages. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered judgment for plaintiff and defendants appealed. The Supreme Court, Gibson, C. J., held that omission of one item in compiling estimates of cost of various parts of work resulting in bid being substantially less than amount intended was a material mistake not caused by neglect of legal duty by plaintiff and entitled plaintiff to rescind bid where city had knowledge of mistake before it attempted to accept bid.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 224 P.2d 861.

1. Municipal corporations ⇨332

Bid for contract with city to construct piping system for sewer project, when opened and declared, was in the nature of an irrevocable option, being a contract right of which city could not be deprived without its consent, unless the requirements for rescission were satisfied.

2. Contracts ⇨93(5)

Knowledge by one party to contract that the other is acting under a mistake is equivalent to mutual mistake for purposes of rescission. Civ.Code, § 1689.

3. Contracts ⇨93(1)

Relief from obligation of bid for contract made under a mistake is allowed where one party knew or had reason to know of the other's error and the requirements for rescission are fulfilled. Civ.Code, § 1689.

4. Contracts ⇨93(1), 266(1), 270(2)

Rescission may be had for mistake of fact if the mistake is material to the con-

tract and was not the result of neglect of a legal duty, enforcement of contract as made would be unconscionable and the party seeking relief gives prompt notice of his election to rescind and restores or offers to restore to other party everything of value which he has received under contract and the other party can be placed in status quo. Civ.Code, §§ 1577, 1689, 1691, 3406, 3407.

5. Municipal corporations ⇨354

Error in compiling estimates of cost of various parts of work for the purpose of computing amount of bid to be made for contract with city to construct piping system for sewer project resulting in omission of an item amounting to almost one-third of total amount intended to be bid was a "material mistake" which justified rescission of bid, where bidder gave prompt notice of election to rescind, and city had actual notice of error before it attempted to accept bid. Civ.Code, §§ 1577, 1689, 1691, 3406, 3407.

See publication Words and Phrases, for other judicial constructions and definitions of "Material Mistake".

6. Contracts ⇨93(1)

A contract may be rescinded on ground of mistake, though such mistake was due to some carelessness, if it was not caused by neglect of a legal duty. Civ.Code, §§ 1577, 1689.

7. Municipal corporations ⇨354

Where mistake in bidding substantially less than amount intended for contract with city to construct piping system for sewer project resulted from omission of one item in compiling estimates of cost of various parts of work for purpose of computing amount of bid, under all the circumstances, it could not be said as a matter of law that such mistake, even if due to some carelessness, was caused by a "neglect of legal duty," such as would bar right to equitable relief. Civ.Code, §§ 1577, 1689.

See publication Words and Phrases, for other judicial constructions and definitions of "Neglect of Legal Duty".

8. Municipal corporations Ⓒ354

In action by construction company to cancel bid for contract with city to construct piping system for sewer project, evidence sustained conclusions that it would be unconscionable to hold company to its bid which due to clerical mistake, of which city had knowledge before bid was accepted, was for substantially less than the amount intended to be bid. Civ.Code, §§ 1577, 1689, 3406, 3407.

9. Municipal corporations Ⓒ354

Where city had ample time to award contract for construction of piping system for sewer project without readvertising after learning of clerical error which resulted in lowest bid being for substantially less than the amount intended and contract was actually awarded to the next lowest bidder, rescission of lowest bid on ground of mistake could not be denied on ground that city could not be restored to status quo merely because it would not have the benefit of an inequitable bargain. Civ.Code, §§ 1577, 1689, 1691, 3406, 3407.

10. Municipal corporations Ⓒ354

Where construction company gave notice promptly upon discovering the facts entitling it to rescind on ground of mistake its bid for contract with city to construct piping system for sewer project and company had received nothing of value under contract which it could restore, no offer of restoration was necessary as a prerequisite to right to rescind bid. Civ. Code, §§ 1577, 1689, 1691, 3406, 3407.

11. Municipal corporations Ⓒ354

Relief from mistakes in bids on public work is generally refused for errors in judgment and allowed only for clerical or mathematical mistakes. Government Code, § 14352.

12. Municipal corporations Ⓒ354

Statement in invitation for bids to construct piping system for city sewer project and in official bid form that bidders would not be released on account of errors referred to errors of judgment, such as underestimating cost of labor or materials, as distinguished from clerical mistakes, and did not preclude rescission of bid for

substantially less than the amount intended caused² by clerical error in compiling estimates of cost of various parts of the work. Civ.Code, §§ 1577, 1689.

13. Municipal corporations Ⓒ354

Public interest did not preclude rescission of bid for city contract on ground of mistake notwithstanding provision in city charter prohibiting withdrawal of a bid, after bids have been opened and declared except with consent of city council or proper officer or board. Civ.Code, §§ 1577, 1689, 1691, 3406, 3407.

14. Contracts Ⓒ249

A bid for government contract is subject to rescission upon proper equitable grounds the same as a private contract, no distinction being recognized between public and private contracts with regard to the right of equitable relief. Civ.Code, §§ 1577, 1689, 1691, 3406, 3407; Government Code, § 14352.

15. Contracts Ⓒ1

Special rules of law will not be applied merely because a governmental body is a party to a contract. Civ.Code, § 1635.

16. Municipal corporations Ⓒ333

Where construction company was entitled to rescind on ground of mistake its bid for contract with city to construct piping system for sewer project, city was not entitled to forfeiture of bid bond, since the contingency which would give rise to a forfeiture had not occurred. Civ.Code, § 1689.

17. Municipal corporations Ⓒ333

Provisions of city charter will be so construed as to prevent forfeiture whenever possible.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and James A. Doherty, Deputy City Atty., Los Angeles, for appellants.

Stephen Monteleone, John M. Martin and Frank L. Martin, Jr., Los Angeles, for respondents.

Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, as amici curiae on behalf of respondents.

GIBSON, Chief Justice.

M. F. Kemper Construction Company brought this action against the City of Los Angeles to cancel a bid it had submitted on public construction work and to obtain discharge of its bid bond. The city cross-complained for forfeiture of the bond and for damages. The trial court canceled the bid, discharged the bond, and allowed appellant city nothing on its cross-complaint. The sole issue is whether the company is entitled to relief on the ground of unilateral mistake.

On July 28, 1948, the city Board of Public Works published a notice inviting bids for the construction of the general piping system for the Hyperion sewer project. Pursuant to the city charter, the notice provided that each bid must be accompanied by a certified check or surety bond for an amount not less than 10% of the sum of the bid "as a guarantee that the bidder will enter into the proposed contract if it is awarded to him," and that the bond or check and the proceeds thereof "will become the property of the city of Los Angeles, if the bidder fails or refuses to execute the required contract * * *." ¹ The charter provides: "After bids have been opened and declared, except with the consent of the officer, board or City Council having jurisdiction over the bidding, no bid shall be withdrawn, but the same shall be subject to acceptance by the city for a period of three months * * *." Sec. 386(d). The notice inviting bids reserved to the board the right to reject any and all bids, and both it and the official bid form stated that bidders "will not be released on account of errors."

Respondent company learned of the invitation for bids on August 17 and immediately began to prepare its proposal.

1. Section 386 (d) of the Charter of the City of Los Angeles provides in part that every bid shall be accompanied by a certified check or surety bond for an amount not less than ten per cent of the aggregate sum of the bid "guaranteeing that the bidder will enter into the proposed contract if the same be awarded to him." Section 386 (i) provides, "If the successful bidder fails to enter

Over a thousand different items were involved in the estimates. The actual computations were performed by three men, each of whom calculated the costs of different parts of the work, and in order to complete their estimates, they all worked until 2:00 o'clock on the morning of the day the bids were to be opened. Their final effort required the addition and transposition of the figures arrived at by each man for his portion of the work from his "work sheet" to a "final accumulation sheet" from which the total amount of the bid was taken. One item estimated on a work sheet in the amount of \$301,769 was inadvertently omitted from the final accumulation sheet and was overlooked in computing the total amount of the bid. The error was caused by the fact that the men were exhausted after working long hours under pressure. When the bids were opened on August 25, it was found that respondent company's bid was \$780,305 and the bids of the other three contractors were \$1,049,592, \$1,183,000 and \$1,278,895.

The company discovered its error several hours after the bids were opened and immediately notified a member of the board of its mistake in omitting one item while preparing the final accumulation of figures for its bid. On August 27 the company explained its mistake to the board and withdrew its bid. A few days later, at the board's invitation, it submitted evidence which showed the unintentional omission of the \$301,769 item. The board, however, passed a resolution accepting the erroneous bid of \$780,305, and the company refused to enter into a written contract at that figure. On October 15, 1948, without readvertising, the board awarded the contract to the next lowest bidder. The city then demanded forfeiture of the Kemper Com-

into the contract awarded him * * * within ten days after the award, then the sum posted in cash or by certified check or guaranteed by the bid bond is forfeited to the city. Such forfeiture shall not preclude recovery of any sum over and above the amount posted or guaranteed to which the city sustains damage by reason of such default or failure to contract * * *."

pany's bond, and the company commenced the present action to cancel its bid and obtain discharge of the bond.

The trial court found that the bid had been submitted as the result of an excusable and honest mistake of a material and fundamental character, that the company had not been negligent in preparing the proposal, that it had acted promptly to notify the board of the mistake and to rescind the bid, and that the board had accepted the bid with knowledge of the error. The court further found and concluded that it would be unconscionable to require the company to perform for the amount of the bid, that no intervening rights had accrued, and that the city had suffered no damage or prejudice.

[1-3] Once opened and declared, the company's bid was in the nature of an irrevocable option, a contract right of which the city could not be deprived without its consent unless the requirements for rescission were satisfied. See *Conduit & Foundation Corporation v. Atlantic City*, 2 N.J.Super. 433, 64 A.2d 382, 384-385; *School District of Scottsbluff v. Olson Const. Co.*, 153 Neb. 451, 45 N.W.2d 164, 166-168; 5 *Williston on Contracts* [1937] §§ 1441, 1578. The company seeks to enforce rescission of its bid on the ground of mistake. See *Civ.Code*, § 1689. The city contends that a party is entitled to relief on that ground only where the mistake is mutual, and it points to the fact that the mistake in the bid submitted was wholly unilateral. See *Rest., Contracts* § 503; *Rest., Restitution*, § 12; 5 *Williston on Contracts* [1937] § 1579. However, the city had actual notice of the error in the estimates before it attempted to accept the bid, and knowledge by one party that the other is acting under mistake is treated as equivalent to mutual mistake for purposes of rescission. 5 *Williston on Contracts* [1937] § 1557, p. 4362; see also *School District of Scottsbluff v. Olson Const. Co.*, 153 Neb. 451, 45 N.W.2d 164, 166; *Rest., Contracts*, § 503, Comment a, Illus. 5; *Rest., Restitution*, § 12, Comment c; 3 *Pomeroy's Equity Jurisprudence* [1941] § 870a, p. 389-390. Relief from mis-

taken bids is consistently allowed where one party knows or has reason to know of the other's error and the requirements for rescission are fulfilled. *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 178 U.S. 373, 385, 387, 20 S.Ct. 957, 961-962, 44 L.Ed. 1108; *Conduit & Foundation Corporation v. Atlantic City*, 2 N.J.Super. 433, 64 A.2d 382, 386; *Geremia v. Boyarsky*, 107 Conn. 387, 140 A. 749; *R. O. Bromagin & Co. v. City of Bloomington*, 234 Ill. 114, 84 N.E. 700; *W. F. Martens & Co. v. City of Syracuse*, 183 App.Div. 622, 171 N.Y.S. 87; note 59 A.L.R. 809, 815-817; 80 A.L.R. 586; see *School District of Scottsbluff v. Olson Const. Co.*, supra, 153 Neb. 451, 45 N.W.2d 164, 166; 5 *Williston on Contracts* [1937] § 1578, p. 4410-4412; *Lubell, Unilateral Palpable and Impalpable Mistake in Construction Contracts* [1931] 16 Minn. L.Rev. 137, 143-147.

[4] Rescission may be had for mistake of fact if the mistake is material to the contract and was not the result of neglect of a legal duty, if enforcement of the contract as made would be unconscionable, and if the other party can be placed in statu quo. See *Civ.Code*, §§ 1577, 3406, 3407, 1689, 1691; 3 *Pomeroy's Equity Jurisprudence* [1941] § 870a. In addition, the party seeking relief must give prompt notice of his election to rescind and must restore or offer to restore to the other party everything of value which he has received under the contract. *Civ.Code*, § 1691; see *McCall v. Superior Court*, 1 Cal.2d 527, 535-536, 36 P.2d 642, 95 A.L.R. 1019; *Seeger v. Odell*, 18 Cal.2d 409, 417-418, 115 P.2d 977, 136 A.L.R. 1291.

[5-7] Omission of the \$301,769 item from the company's bid was, of course, a material mistake. The city claims that the company is barred from relief because it was negligent in preparing the estimates, but even if we assume that the error was due to some carelessness, it does not follow that the company is without remedy. Civil Code section 1577, which defines mistake of fact for which relief may be allowed, describes it as one not caused by "the neglect of a legal duty" on the part of the person making the mistake. It has been

recognized numerous times that not all carelessness constitutes a "neglect of a legal duty" within the meaning of the section. *Los Angeles & R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21, 28, 87 P. 1029; *Mills v. Schulba*, 95 Cal.App.2d 559, 565, 213 P.2d 408; see *Burt v. Los Angeles Olive Growers Ass'n*, 175 Cal. 668, 675-676, 166 P. 993; 3 *Pomeroy's Equity Jurisprudence* § 856b. On facts very similar to those in the present case, courts of other jurisdictions have stated that there was no culpable negligence and have granted relief from erroneous bids. See *Conduit & Foundation Corporation v. Atlantic City*, 2 N.J.Super. 433, 64 A.2d 382; *School District of Scottsbluff v. Olson Const. Co.*, 153 Neb. 451, 45 N.W.2d 164; *Board of Regents v. Cole*, 209 Ky. 761, 273 S.W. 508; *Geremia v. Boyarsky*, 107 Conn. 387, 140 A. 749; *Barlow v. Jones*, N.J., 87 A. 649; *W. F. Martens & Co. v. City of Syracuse*, 183 App.Div. 622, 171 N.Y.S. 87; *R. O. Bromagin & Co. v. City of Bloomington*, 234 Ill. 114, 84 N.E. 700; *Board of School Com'rs v. Bender*, 36 Ind. App. 164, 72 N.E. 154; *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 178 U.S. 373, 20 S.Ct. 957, 44 L.Ed. 1108; see 59 A.L.R. at 818-824; cf. *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N.E. 564, 10 L.R.A., N.S., 114. The type of error here involved is one which will sometimes occur in the conduct of reasonable and cautious businessmen, and, under all the circumstances, we cannot say as a matter of law that it constituted a neglect of legal duty such as would bar the right to equitable relief.

[8-10] The evidence clearly supports the conclusion that it would be unconscionable to hold the company to its bid at the mistaken figure. The city had knowledge before the bid was accepted that the company had made a clerical error which resulted in the omission of an item amounting to nearly one-third of the amount intended to be bid, and, under all the circumstances, it appears that it would be unjust and unfair to permit the city to take advantage of the company's mistake. There is no reason for denying relief on the ground that the city cannot be re-

stored to status quo. It had ample time in which to award the contract without re-advertising, the contract was actually awarded to the next lowest bidder, and the city will not be heard to complain that it cannot be placed in statu quo because it will not have the benefit of an inequitable bargain. *Union & People's Nat. Bank v. Anderson-Campbell Co.*, 256 Mich. 674, 240 N.W. 19, 80 A.L.R. 584; *School District of Scottsbluff v. Olson Const. Co.*, 153 Neb. 451, 45 N.W.2d 164, 166-167; see 59 A.L.R. at page 825. Finally, the company gave notice promptly upon discovering the facts entitling it to rescind, and no offer of restoration was necessary because it had received nothing of value which it could restore. See *Rosemead Co. v. Shipley Co.*, 207 Cal. 414, 420-422, 278 P. 1038. We are satisfied that all the requirements for rescission have been met.

[11, 12] The city nevertheless contends that the company is precluded from relief because of the statement in the invitation and in the official bid form that bidders "will not be released on account of errors," and that this language required all contractors to warrant the accuracy of their bids and to waive all rights to seek relief for clerical mistake. There is a difference between mere mechanical or clerical errors made in tabulating or transcribing figures and errors of judgment, as, for example, underestimating the cost of labor or materials. The distinction between the two types of error is recognized in the cases allowing rescission and in the procedures provided by the state and federal governments for relieving contractors from mistakes in bids on public work. See *School District of Scottsbluff v. Olson Const. Co.*, 153 Neb. 451, 45 N.W.2d 164, 166; *Cal.Govt.Code*, § 14352; *Federal Armed Services Procurement Regulation*, 32 C.F.R. 401; *Decisions B-91381*, 29 Comp. Gen. 393. Generally, relief is refused for error in judgment and allowed only for clerical or mathematical mistakes. See cases cited in 59 A.L.R. 827-830 and 80 A.L.R. 586. Where a person is denied relief because of an error in judgment, the agreement which is enforced is the one he intended to make, whereas if he is denied

relief from a clerical error, he is forced to perform an agreement he had no intention of making. The statement in the bid form in the present case can be given effect by interpreting it as relating to errors of judgment as distinguished from clerical mistakes. If we were to give the language the sweeping construction contended for by the city, it would mean holding that the contractor intended to assume the risk of a clerical error no matter in what circumstances it might occur or how serious it might be. Such interpretation is contrary to common sense and ordinary business understanding and would result in the loss of heretofore well-established equitable rights to relief from certain types of mistake.

[13-15] The city also argues that public interest precludes any right to rescind for mistake, and in this connection it asserts that a literal interpretation should be given to the provision in section 386(d) of the charter that "After bids have been opened and declared, except with the consent of the officer, board or City Council having jurisdiction over the bidding, no bid shall be withdrawn * * *." As we have seen, such a bid is in the nature of an irrevocable offer or option, but the offer is subject to rescission upon proper equitable grounds, and the cases recognize no distinction between public and private contracts with regard to the right of equitable relief. In *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 178 U.S. 373, 386, 20 S.Ct. 957, 961, 44 L.Ed. 1108, the city of Rochester urged that a construction of a charter provision similar to one involved here prevented a bidder from rescinding, and the court in rejecting the argument said, "* * * If the [city is] correct in [its] contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth \$1,000,000 for \$10.00, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The

[city's] position admits of no compromise, no exception, no middle ground." Most of the authorities from other jurisdictions heretofore cited as allowing rescission for mistake and relief from forfeiture involved public construction contracts, and in many of them there were express contract or charter provisions making the bids irrevocable. See also cases collected in 59 A.L.R. 809, 824; 80 A.L.R. 586; *Daddario v. Town of Milford*, 296 Mass. 92, 5 N.E.2d 23, 107 A.L.R. 1451. The California cases uniformly refuse to apply special rules of law simply because a governmental body is a party to a contract. See *Petrovich v. City of Arcadia*, 36 Cal.2d 78, 222 P.2d 231; *Brown v. Town of Sebastopol*, 153 Cal. 704, 709, 96 P. 363, 19 L.R.A., N.S., 178; *County of Sacramento v. Southern Pac. Co.*, 127 Cal. 217, 222-223, 59 P. 568, 825; *Corporation of America v. Durham Mut. Water Co.*, 50 Cal.App.2d 337, 340, 123 P.2d 81; *Milovich v. City of Los Angeles*, 42 Cal.App.2d 364, 108 P.2d 960; *L. A. Athletic Club v. Bd. Harbor Com'rs*, 130 Cal.App. 376, 393, 20 P.2d 130; see also *Civ.Code*, § 1635.

[16,17] There is no merit in the city's contention that, even assuming the company is entitled to cancellation of the bid and is not liable for breach of contract, the bid bond should nevertheless be enforced because the company failed to enter into a written contract. It is argued that forfeiture of the bond is provided for by charter and that equity cannot relieve from a statutory forfeiture. We do not agree however that the city charter should be construed as requiring forfeiture of bid bonds in situations where the bidder has a legal excuse for refusing to enter into a formal written contract. Under such circumstances the contingency which would give rise to a forfeiture has not occurred. See *Rainey v. Quigley, Or.*, 178 P.2d 148, 152. In line with the general policy of construing against forfeiture wherever possible, decisions from other jurisdictions permitting rescission of bids uniformly excuse the contractors from similar provisions relating to forfeiture of bid bonds or deposits. See, for example, *Moffett, Hodgkins & Clarke Co. v. City of Roches-*

ter, 178 U.S. 373, 20 S.Ct. 957, 44 L.Ed. 1108; Conduit & Foundation Corp. v. Atlantic City, 2 N.J.Super. 433, 64 A.2d 382, 383, 386; Union & People's Nat. Bank v. Anderson-Campbell Co., 256 Mich. 674, 240 N.W. 19, 80 A.L.R. 584; School District of Scottsbluff v. Olson Const. Co., 153 Neb. 451, 45 N.W.2d 164; Board of Regents v. Cole, 209 Ky. 761, 273 S.W. 508; W. F. Martens & Co. v. City of Syracuse, 183 App.Div. 622, 171 N.Y.S. 87; R. O. Bromagin & Co. v. City of Bloomington, 234 Ill. 114, 84 N.E. 700; Barlow v. Jones, N.J., 87 A. 649; Bd. of School Com'rs v. Bender, 36 Ind.App. 164, 72 N.E. 154; see Kemp v. U.S., D.C., 38 F.Supp. 568, 573. The city places reliance on language in Palo and Dodini v. City of Oakland, 79 Cal.App. 2d 739, 750, 180 P.2d 764, where the opinion justified the enactment and enforcement of statutory provisions for forfeiture of bid bonds. However, the court's remarks must be read in light of the fact that the bidder there had not alleged matters entitling him to relief on the ground of mistake and had failed to comply with statutory provisions regarding relief from forfeiture. See 79 Cal.App.2d at pages 746-747, 749, 180 P.2d 764.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion is based upon two grounds: (1) That a bidder on a public construction job may rescind his bid for unilateral mistake after it is opened and thus escape the forfeiture provided by statute; (2) That the clause in the invitation for bids and the bid, that bidders "will not be released on account of errors" does not apply to clerical errors, and, therefore, is not applicable in the instant case. I do not agree with either premise.

The first violates one of the obvious and fundamental principles of the law of rescission for unilateral mistake, that is, that the one against whom rescission is sought *must have had knowledge of the mistake before a binding contract is made.*

This question is glossed over in the majority opinion by a tacit assumption that the contract being rescinded is the contract for the performance of the work rather than the irrevocable and binding offer—the bid. Yet the action is one to cancel the bid—to permit its withdrawal—and throughout the opinion, the binding effect of the bid is the thing considered. For illustration it is said: "The company seeks to enforce *rescission* of its *bid* on the ground of mistake." Indeed, there is no contract to perform the work, for the bidder refused to enter into it. The contract to be rescinded is a contract to make a contract to perform the work, that is, the irrevocable bid, the performance of which is guaranteed by the bid bond. At the time the bids were opened the city had no knowledge and had no means of knowing that the bidder had made a mistake. There is nothing left therefore but a naked unilateral mistake which is not ground for rescission. As it is said: "A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable * * *" Rest.Contracts, § 503. If that rule is not applied to bidding contracts there is nothing left of the supposedly binding bid and forfeiture provision, for the bidder may always avoid it by claiming mistake. The proof of whether or not he has made such a mistake is so completely within his control and power that the public body is helpless to refute it. Charter provisions, invitation for bids, and the forfeiture provisions, such as those here involved, are made wholly meaningless, for in practically every case the reason the bidder wants to withdraw is because he has made a mistake. The important considerations of public policy behind those provisions will be completely destroyed. Those considerations were well expressed in Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, 750, 180 P.2d 764, 771: "It would be very difficult to fix the money value of the city's loss. Among the factors involved are the following: First, of course, would be the cost of readvertising (and even this amount plaintiffs have not offered to pay); secondly, there would be the delay in getting

a new contract; thirdly, the lower returns the city would probably receive under a new contract, now that the highest bidder had been eliminated; fourthly, the fact that possibly in view of their experience at the first bidding, the other bidders would not bid at all.

"Provisions requiring a deposit accompanying a bid for city contracts, or for forfeiture thereof, *are necessary as a matter of public policy to protect the public interests.* If, as here, a bidder were allowed without loss to himself to withdraw his bid after the bids have been publicly opened, *fraudulent practices would develop.* The body awarding contracts could agree to release a favored contractor if it turned out that his proposal was low as compared to other bids. Moreover, any bidder who found that in comparison with the other bidders, his bid was quite low, could withdraw his bid, and the city would thereby lose the value of competitive bidding and be forced to pay the prices of higher bidders with no compensation to itself for the loss sustained." (Emphasis added.) This court recently approved the holding of that case when it said: "*Palo and Dodini v. City of Oakland*, 79 Cal.App.2d 739, 180 P.2d 764, involved a provision of the Oakland City Charter requiring the deposit of a certified check with a bid and the forfeiture of the check in the event the successful bidder failed to execute the contract. It was held that, restricting the charter language to its most technical limits, as required by the established rule, *the explicit and mandatory terms called for a forfeiture and prohibited any relief therefrom.*" (Emphasis added.) *Petrovich v. City of Arcadia*, 36 Cal.2d 78, 82, 222 P.2d 231, 235. Likewise, in the instant case the policy is expressly declared by the charter that there shall be no relief from forfeiture.

The cases support the foregoing rule. *Sanitary Dist. v. Ricker*, 7 Cir., 91 F. 833; *Mayor & City Council of Baltimore v. J. L. Robinson Const. Co.*, 123 Md. 660, 91 A. 682; *Bowes Co. v. Town of Milton*, 255 Mass. 228, 151 N.E. 116; *Brown v. Levy*, 29 Tex.Civ.App. 389, 69 S.W. 255; *United States v. Conti*, 1 Cir., 119 F.2d 652; *Southbridge Roofing Co. v. Providence Cornice*

Co., 39 R.I. 35, 97 A. 210; *State v. Scholz Bros.*, Tex.Civ.App., 4 S.W.2d 661. The rule announced in the above cited cases has been thus stated: "When it is necessary for a person to make calculations or estimates, in order to determine the sum which he will bid for an offered contract, or to determine the cost to him of a proposed contract, or whether or not it will be advantageous to him to enter into it, he must assume the risk of any error or oversight in his computations, and cannot have relief in equity on the ground of mistake, if he reaches a wrong conclusion through inadvertence, misunderstanding of that which is plain on its face, or mathematical error. Thus, the negligent omission by a bidder for public work to take into consideration certain features of the work in making the estimates on which his bid was based, does not constitute a mistake which will authorize a court of equity to release him from the contract created by the acceptance of such bid. So, where plaintiff makes an offer to erect a building for a certain amount, and defendant accepts it, there is a consummated and binding agreement, although the plaintiff, in adding up the items of his estimates, makes a mistake of a very large sum, provided defendant is not in any way responsible for it. And a contract by which a company agrees to construct waterworks and furnish a municipal corporation and its inhabitants with an adequate supply of water, all to be taken from springs on certain land, will not be canceled merely because the springs prove inadequate, the mistake as to their capacity having been no more the fault of the one party than of the other. So a contractor who agrees to build a house for a specified sum is not justified in refusing to carry out his undertaking because of the error of a subcontractor in making his bid, which error induced the subcontractor to refuse to accept the work." *Black on Rescission & Cancellation*, § 142.

In addition to the foregoing, the bidder here was advised by words printed in capital letters in the invitation for bids and also in the bid itself that *he would not be released for errors.* Nothing could be more explicit. There is no room left for

claiming mistake. Yet the majority say that the "errors" to which reference is made in the above mentioned documents, are of judgment, not in computation. The term "error" has a broad meaning and is not confined to those of judgment. It means the same as mistake. To narrow its meaning is to alter the contract of the parties. The phrase was used to avoid the precise claim now made by the bidder. It was contemplated by the parties that the risk of any mistakes was to be borne by the bidder. Pertinent rules are stated: "Where the parties treat upon the basis that the fact is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties."

"The rule is elaborated in 2 Pomeroy on Eq.Juris. § 855, quoted in Colton v. Stanford, 82 Cal. 351, 388, 389, 23 P. 16, 16 Am.St.Rep. 137. The cases put by Mr. Pomeroy presuppose 'an arrangement based upon uncertain or contingent events purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result—and there is in either case an absence of bad faith, violation of confidence, misrepresentation or concealment or other inequitable conduct.' 'In such classes of agreements and transactions,' says the learned author, 'the parties are supposed to calculate the chances, and they certainly assume the risks, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud.'

"Defendant still further relies upon the rule as stated in Ashcom v. Smith, 2 Pen. & W.(Pa.) 211, 21 Am.Dec. 437, where acreage was estimated. The court said:

"'Equity will indeed relieve against a plain mistake, as well as against misrepresentation and fraud. But can mistake be alleged in a matter which was considered as doubtful, and treated accordingly? Where each of the parties is content to take the risk of its turning out in a particular way,

chancery will certainly not relieve against the event.'" (Emphasis added.) Taber v. Piedmont Heights Bldg. Co., 25 Cal.App. 222, 227, 143 P. 319, 320; see also, Colton v. Stanford, 82 Cal. 351, 388, 23 P. 16.

The majority opinion cites School Dist. of Scottsbluff v. Olson Const. Co., 153 Neb. 451, 45 N.W.2d 164, but there was no clause there like we have here. Reference is made to section 14352 of the Government Code, dealing with state contracts as excusing claimed mistakes. That provision, however, illustrates that no such excuse existed here. The Legislature felt that it was necessary to deal expressly and specifically with the subject. It provided that a bidder cannot be relieved for mistake but may bring an action for the amount forfeited, Gov.Code, § 14350, and in such action must establish that the mistake was in filling out the bid and not in judgment. Id. § 14352.

To limit the errors of the bidder for which he is responsible to those of judgment, is to strike at the very purpose of the clause in question and the bid bond. The clause and bond are there to assure certainty of contract and to preserve the integrity of the bidding system in letting public contracts. In the majority of cases that purpose will be defeated by the limitation. From the standpoint of the bidder, his mistake is far more inexcusable when it is in computation rather than judgment. There is no reason why he cannot have his arithmetic correct. School boys have been disciplined for stupidity in that field. It is entirely within his control unaffected by any extraneous uncertain factors such as are involved in judgment as to the amount of materials and labor required, complicated by the fluctuation in their value, the physical conditions encountered, etc.

Thus we have: The charter provisions requiring competitive bidding; that the bidder's bid be irrevocable and binding; and that security must be posted to assure that the bidder will execute the contract, which security will be forfeited if he does not do so. The bidding papers expressly state that the bidder will not be excused

for any mistakes he makes. Nevertheless, the majority opinion holds by dubious reasoning that all of those circumstances mean nothing. The disastrous effect of the majority holding in the Petrovich case on public corporations seeking bids for public improvements, fades into insignificance by the holding of the majority in the case at bar.

I would, therefore, reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



37 Cal.2d 718

VILLANAZUL et al. v. CITY OF LOS ANGELES et al. (three cases).

L. A. 21398, 21348 and 21425.

Supreme Court of California, in Bank.

Aug. 31, 1951.

Actions by Mercy Villanazul by Nicholas Villanazul, her guardian ad litem, and Nicholas Villanazul, individually, against the City of Los Angeles, a municipal corporation, and others, the County of Los Angeles, a political division of the State of California, and others and the State of California and others for damages sustained by reason of negligent operation of an automobile by deputy marshal of the Municipal Court of the City of Los Angeles. The Superior Court, County of Los Angeles, Byron J. Walters, J., pro tem., and William B. McKesson and Arnold Praeger, JJ., entered judgments in favor of named defendants upon orders sustaining their general demurrers and plaintiffs appealed. The Supreme Court, Edmonds, J., held that the County of Los Angeles, and not the city or state, would be liable for the negligent operation of an automobile by deputy marshal of the municipal court of the City of Los Angeles while acting within scope of his office and in the course of his employment as such deputy marshal.

Judgments in favor of the State of California and the City of Los Angeles affirmed and judgment in favor of the County of Los Angeles reversed with directions.

For prior opinion see 223 P.2d 279.

1. Master and servant ⇐1

The right to control and direct the activities of the person rendering service or

the manner and method in which the work is performed is the essential characteristic of "employment relationship".

See publication Words and Phrases, for other judicial constructions and definitions of "Employment Relationship".

2. Master and servant ⇐1

Existence of right to control and direct activities of person rendering service or manner and method in which work is performed essential to existence of employment relationship may be tested by determining whether, if instructions are given, they must be obeyed.

3. Master and servant ⇐1

The right to terminate service at any time is a strong circumstance tending to show the right to control activities and manner and method of performing work which is essential to existence of employment relationship.

4. Courts ⇐58

Under constitutional and statutory provisions for establishment of municipal courts, the municipal court itself and not the city, county or state as such has power to supervise the conduct of deputy marshal of municipal court and direct the manner in which his duties are to be performed. Gen.Laws, Act 5238, §§ 1 et seq., 7b, 25a; Const. art. 6, § 11.

5. Courts ⇐58

A municipal court is a part of the judicial system of the state, and the constitution or control of such courts, except only the question as to whether one shall be established in a given locality, is a state rather than a municipal affair, but it does not follow that a municipal court is an agency of state government, as distinguished from county or city government, in the sense that a deputy marshal of municipal court is a state employee. Gen. Laws, Act 5238, §§ 1 et seq., 7b, 25a; Const. art. 6, § 11.

6. Courts ⇐187

Justices of the peace ⇐1

Justices' courts and police or city courts are part of the judicial system of the state, but their local character is recognized and their attachés are either county

or city officers and employees. Const. art. 6, § 1.

7. Courts ⇐58

Fact that the legislature created the office of deputy marshal of municipal court and prescribed the duties and salary of the position does not fix the status of such deputy marshal as a state rather than a county or city employee. Gen.Laws, Act 5238, §§ 1 et seq., 7b, 25a; Const. art. 6, § 11.

8. Clerks of courts ⇐1

The office of clerk of a city justice's court was created by the legislature with specified duties and salary but such clerk is an officer of the county government. Const. art. 11, § 5.

9. Courts ⇐187

The constitutional and statutory provisions authorizing and governing municipal courts, considered in connection with the purpose and effect of the establishment of such courts, impress such courts with a local character, which is to some extent dual, a municipal court having the nature of a county court in some respects and of a city court in other respects. Gen.Laws, Act 5238, §§ 1 et seq., 1-3, 7b, 7½, 22, 25a, 25.5; Code Civ.Proc., §§ 84, 88; Pen.Code, § 1463; Pol.Code, § 4300l, Government Code, §§ 26524, 26665, 31555; Const. art. 6, §§ 11, 12.

10. Courts ⇐188(1)

A municipal court supersedes both the justice's court maintained by the county and the police court provided by the city which formerly served the area and it is required to perform the services that were part of the duty of the courts which it supersedes and to exercise an enlarged jurisdiction. Gen.Laws, Act 5238, §§ 1 et seq.; Const. art. 6, § 11.

11. Courts ⇐188(1), 472(6)

The municipal court's jurisdiction extends generally throughout the county, and in a certain class of cases such jurisdiction is exclusive. Gen.Laws, Act 5238, § 1 et seq.; Const. art. 6, § 11.

12. Courts ⇐42(5)

The primary purpose in creating municipal courts was to relieve the conges-

tion in the superior court. Gen.Laws, Act 5238, § 1 et seq.; Const. art. 6, § 11.

13. Courts ⇐187, 189(4)

Municipal courts are courts of record and their process, like that of justices' courts, extends throughout the state. Gen. Laws, Act 5238, § 1 et seq.; Code Civ.Proc. § 84; Government Code, § 26665; Const. art. 6, §§ 11, 12.

14. Counties ⇐137

The county in which a municipal court is established is charged with the cost of its maintenance and is required to pay salaries of judges, officers and attachés, including deputy marshals, and to provide quarters, supplies and equipment for the court. Gen.Laws, Act 5238, §§ 1 et seq., 22; Const. art. 6, § 11.

15. Fines ⇐20

Forfeitures ⇐10

Judges ⇐22(12)

Fines and forfeitures collected by a municipal court are deposited with county treasurer and thereafter divided between the county and city and fees received are paid into the county treasury in the same manner as those collected by salaried county and township officers. Gen.Laws, Act 5238, §§ 1 et seq., 22; Pen.Code, § 1463; Pol. Code, § 4300l; Const. art. 6, § 11.

16. Courts ⇐58

The powers, duties and liabilities of municipal court marshals are generally conferred or derived by reference to laws governing sheriffs and they are required to collect for their services the fees allowed by law to sheriffs and constables. Gen. Laws, Act 5238, §§ 1 et seq., 25a, 25.5; Code Civ.Proc. § 88; Const. art. 6, § 11.

17. Courts ⇐58

Marshals of municipal courts are entitled to participate in the county and township peace officers' retirement or pension system and deemed to be county employees for that purpose. Gen.Laws, Act 5238, §§ 1 et seq., 7½; Government Code, § 31555.

18. Courts ⇐42(5)

Prior to adoption of constitutional amendment in 1950 and supplemental legislation for reorganization of lower courts, a

municipal court could be established in a city only with the consent of the electors thereof expressed by charter provision or popular vote. Gen.Laws, Act 5238, §§ 1-3; Const. art. 6, § 11 and as amended in 1950.

19. Courts ⇨187

The fundamental basis of municipal court, as fixed by the constitution and statutes, indicates that essentially it is a creature of the county, and if the voters of a city elect to establish such a court, they must accept it as thus constituted. Gen. Laws, Act 5238, §§ 1 et seq., 1-3, 7b, 7½, 22, 25a, 25.5; Code Civ.Proc. §§ 84, 88; Pen.Code, § 1463; Pol.Code, § 4300l; Government Code, §§ 26524, 26665, 31555; Const. art. 6, §§ 11, 12.

20. Courts ⇨58, 187

The fact that judges of municipal court were elected by voters of city was not controlling in determining status of court or its employees. Gen.Laws, Act 5238, § 1 et seq.; Const. art. 6, § 11.

21. Courts ⇨58

The marshal of municipal court and not the city civil service commission has the power to initiate the basic and effective action in the matter of employing or discharging a deputy marshal. Gen.Laws, Act 5238, §§ 1-3; Const. art. 6, § 11.

22. Automobiles ⇨187

The county, and not the city or state, was liable for damages resulting from negligent operation of an automobile by deputy marshal of municipal court of City of Los Angeles, while acting within scope of his office and during course of his employment as such deputy marshal. Gen.Laws, Act 5238, §§ 1 et seq., 1-3, 7b, 7½, 22, 25a, 25.5; Code Civ.Proc. §§ 84, 88; Const. art. 6, §§ 11, 12.

23. Courts ⇨187

The County character of municipal courts is further emphasized by the constitutional amendment adopted in 1950 and supplemental legislation for reorganization of the lower courts. Gen.Laws, Act 5238, §§ 1 et seq.; Const. art. 6, § 11 and as amended in 1950.

Everett W. Leighton and Frank E. Carleton, Los Angeles, for appellants.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Dan Kaufmann, Deputy Atty. Gen., Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., George William Adams, John F. Feldmeier, Weldon L. Weber and Alan G. Campbell, Deputy City Attys., all of Los Angeles, for appellants.

EDMONDS, Justice.

In separate actions, Mercy Villanazul is suing the City of Los Angeles, the County of Los Angeles and the State of California to recover damages assertedly caused by the negligence of Muriel C. Gregg in the operation of an automobile. The complaints allege that, at the time of the accident, Gregg was a deputy marshal of the Municipal Court of the City of Los Angeles and acting within the scope and during the course of his employment. By general demurrer the city, the county and the state each disclaimed liability. The demurrers were sustained without leave to amend, and the consolidated appeal from the judgments entered upon these orders presents the sole question as to which political entity is liable for the negligence, if any, of Gregg at the time of the accident.

[1-3] The essential characteristic of employment relationship is the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed. *Industrial Indem. Exch. v. Industrial Acc. Comm.*, 26 Cal.2d 130, 135, 156 P.2d 926. Existence of the right is often tested by determining whether, if instructions were given, they would have to be obeyed. *Riskin v. Industrial Acc. Comm.*, 23 Cal.2d 248, 253, 144 P.2d 16. The right to terminate the service at any time is a strong circumstance tending to show the right to control. *Press Pub. Co. v. Industrial Acc. Comm.*, 190 Cal. 114, 121, 210 P. 820.

[4] In the present case, the city contends that the state had the essential power

of control because the Legislature created the office or position of deputy marshal and prescribed the duties and salary thereof. 2 Deering's Gen.Laws, Act 5238, §§ 7b, 25a. Attention is directed to the constitutional amendment authorizing the establishment of the municipal court which provides that, "The manner in which, the time at which, the term for which the judges, clerks and other attaches of municipal courts shall be elected or appointed, the number and qualifications of said judges and of the clerks and other attaches * * * shall be prescribed by the Legislature." Art. VI, § 11. On the other hand, the county and state contend that the city has the power of authoritative control. They rely upon the provisions of the Municipal Court Act of 1925, 2 Deering's Gen.Laws, Act 5238, under which a deputy marshal is appointed by and may be discharged by the marshal, an appointee of the judges of the court, who in turn are elected by the voters of the city. A deputy of the marshal of the Municipal Court of Los Angeles is appointed from an eligibility list of the city civil service commission. If discharged, the officer may claim the benefit of any rules for a hearing or an appeal that may be provided by the city charter for civil service employees. But under these provisions, neither one of the three governmental or political entities, as such, directly or immediately had the right to supervise the conduct of Gregg or control and direct the manner in which his duties were to be performed. That power was vested in the municipal court.

[5,6] It must be conceded at the outset that a municipal court is a part of the judicial system of the state, and the constitution or control of such courts, except only the question as to whether one shall be established in a given locality, is a state rather than a municipal affair. *Wilson v. Walters*, 19 Cal.2d 111, 119, 119 P.2d 340. It does not follow, however, that a municipal court is an agency of state government, as distinguished from county or city government, in the sense that a deputy marshal is a state employee. Justices' courts and police or city courts are part of the judicial system of the state, Const., Art.

VI, § 1; *People ex rel. Benwell v. Foutz*, 27 Cal.2d 1, 162 P.2d 1; *Elder v. McDougald*, 145 Cal. 740, 79 P. 429; *People ex rel. Richardson v. Cobb*, 133 Cal. 74, 65 P. 325, yet their local character is recognized and their attachés are either county or city officers and employees. *Graham v. Mayor, etc., of Fresno*, 151 Cal. 465, 91 P. 147; *Elder v. McDougald*, supra; *People ex rel. Richardson v. Cobb*, supra; *McClung v. Johnson*, 106 Cal.App. 264, 289 P. 199; cf. *Nicholl v. Koster*, 157 Cal. 416, 108 P. 302. As stated in the Cobb case, "It does not follow * * *, from the peculiar nature of their offices, that justices of the peace or other judicial officers do not constitute part of county or city governments." 133 Cal. at page 77, 65 P. at page 326.

[7,8] The fact that the Legislature created the office of deputy marshal and prescribed the duties and salary of the position does not fix the status of such a person as a state, rather than a county or city employee. The Legislature creates many and varied offices or positions of local government, with specified duties and salaries. See Const., Art. XI, § 5. The clerk of a city justice's court comes within this category but is an officer of the county government. *McClung v. Johnson*, supra.

[9,10] The constitutional and statutory provisions authorizing and governing municipal courts, considered in connection with the purpose and effect of the establishment of such courts, lead to the conclusion that they have been impressed with a local character. To some extent, that character is dual. In some respects, a municipal court has the nature of a county court and, in others, of a city court. Cf. *People ex rel. Richardson v. Cobb*, supra; *People ex rel. Wood v. Sands*, 102 Cal. 12, 36 P. 404. It may be established in a chartered city, or a city and county, containing a population of more than 40,000. Const., Art. VI, § 11. Whenever such a court is established, it supersedes both the justice's court maintained by the county, and the police court provided by the city which formerly served the area. The mu-

municipal court is required to perform the services that were part of the duty of the courts which it succeeded, *Hughes v. Municipal Court*, 200 Cal. 215, 252 P. 575, and to exercise an enlarged jurisdiction.

[11-13] Generally speaking, the municipal court's jurisdiction extends throughout the county, *In re Application of Luna*, 201 Cal. 405, 257 P. 76; *Borden v. Thomas*, 85 Cal.App. 646, 259 P. 1008; *Burge v. Municipal Court*, 84 Cal.App. 425, 258 P. 164, and in a certain class of cases that jurisdiction is exclusive. *Norton v. Baranov*, 4 Cal.2d 443, 50 P.2d 67; *In re Application of Luna*, supra; see *Hopkins v. Anderson*, 218 Cal. 62, 66, 21 P.2d 560. The primary purpose in creating municipal courts was to relieve the congestion in the superior court. *In re Application of Luna*, supra, 201 Cal. at page 412, 257 P. 76; *Cambra v. Justice's Court*, 4 Cal.2d 445, 446, 49 P.2d 1121. They are courts of record, Const., Art. VI, § 12, and their process, like that of justices' courts, extends throughout the state. Code of Civ. Proc., § 84; Gov't.Code, § 26665.

[14,15] The county in which a municipal court is established is charged with the cost of maintenance. It is required to pay the salaries of the judges, officers and attachés, including deputy marshals, and must provide quarters, supplies and equipment for the court. 2 Deering's Gen.Laws, Act 5238, § 22. Fines and forfeitures collected by a municipal court are deposited with the county treasurer and thereafter divided between the county and city. Pen.Code, § 1463; 2 Deering's Gen. Laws, Act 5238, § 22. Fees received are paid into the county treasury in the same manner as those collected by salaried county and township officers. Pol.Code, § 4300L.

[16,17] In various other respects, the law places municipal court officers and attachés, and specifically the marshal, in the same category as recognized county officers and employees. Marshals are required to attend the municipal courts, and "within their counties" must execute, serve and return all writs, processes and notices directed or delivered to them by municipal

courts or other competent authority. 2 Deering's Gen.Laws, Act 5238, § 25a. Their powers, duties and liabilities are generally conferred or defined by reference to laws governing sheriffs, *Ibid.*; Code Civ. Proc., § 88, and they are required to collect for their services the fees allowed by law to sheriffs and constables. 2 Deering's Gen.Laws, Act 5238, § 25.5. The municipal court or judge is represented by the district attorney if the court or judge is a party defendant in an action. Gov't.Code, § 26524. Clerks and other attachés usually are members of the county retirement system although marshals are entitled to participate in the county and township peace officers' retirement or pension system and are deemed to be county employees for that purpose. 2 Deering's Gen.Laws, Act 5238, § 7½; Gov't.Code, § 31555.

[18,19] In comparison with these functions, the city aspects of municipal courts are extremely limited and insignificant. It is true that a municipal court may be established in a city only with the consent of the electors thereof, expressed by charter provision or popular vote. 2 Deering's Gen.Laws, Act 5238, §§ 1-3; see *Bancroft-Whitney Co. v. Payne*, 197 Cal. 551, 241 P. 551. But the character of a municipal court is not affected nor is its nature determined in any way by the requirement that the city must assent to its establishment. The fundamental basis of the court, as fixed by the constitution and statutes, indicates that essentially it is a creature of the county. If the voters of the city elect to establish such a court, they must accept it as thus constituted. *Chambers v. Terry*, 40 Cal.App.2d 153, 158, 104 P. 2d 663.

[20] The fact that the judges are elected by a city's voters is not controlling in determining the court's status. *Graham v. Mayor, etc., of Fresno*, 151 Cal. 465, 473, 91 P. 147; cf. *Ward v. San Diego School Dist.*, 203 Cal. 712, 714, 265 P. 821, or the status of its employees. Cf. *Nicholl v. Koster*, supra, 157 Cal. at page 423, 108 P. 302. The relation of the city to the operation of the municipal court through its civil service commission is remote. The Municipal

Court Act of 1925, *Ibid.*, provides that the appointments of attachés must be made from an eligibility list certified by the city civil service commission, but only if the city has such a commission and list. In cities having no civil service commission, the appointments are subject to confirmation by the judges. In the absence of an eligibility list, temporary appointments may be made, which become permanent if no list is certified within six months.

[21] In conferring authority to discharge, the statute provides that the attachés shall be entitled to the benefits of the civil service provisions of the charter of the city in which the court is situated or of the rules of the civil service commission having jurisdiction of such person. These provisions do not give the city civil service commission the right to employ or discharge a deputy marshal. The "power * * * to initiate the basic and effective action" in this regard is vested in the marshal or the court. Cf. *Fernelius v. Pierce*, 22 Cal.2d 226, 241, 138 P.2d 12, 21.

Insofar as *County of Los Angeles v. Industrial Acc. Comm.*, 123 Cal.App. 12, 11 P.2d 434, is in conflict with the views expressed herein, it is disapproved. That case involved the question of liability under the Workmen's Compensation Act, and the decision that a deputy marshal is an employee of the city wherein the court is situated was based on the unfounded conclusion that the city had the right to employ, control and discharge such a deputy.

[22] There is nothing in *Simpson v. Payne*, 79 Cal.App. 780, 251 P. 324, or *Slavich v. Walsh*, 82 Cal.App.2d 228, 186 P.2d 35, which is inconsistent with the conclusion that the county is liable for damages resulting from the negligent operation of a motor vehicle by a deputy marshal. They hold only that the Legislature, rather than the county board of supervisors, has the power to fix the salaries of municipal court clerks. Those decisions were based upon the language of

the constitution conferring such power on the Legislature and not upon a determination of the status of such attachés as state, county or city employees. The statement in the *Slavich* case that the clerks of the municipal court of the City and County of San Francisco are "municipal employees" was a recognition of their status as employees of local government rather than a determination that they are city, as distinguished from county, employees.

[23] The city asserts that the determination of the present appeals will have a far-reaching effect upon the jurisdiction and administration of municipal courts under the recently adopted plan for the reorganization of the lower courts in this state. Of necessity, the decision is based upon the constitutional and statutory provisions governing municipal courts prior to the adoption of the amendment of Article VI, section 11, of the Constitution, approved by the voters in 1950. Nevertheless, it may appropriately be pointed out that, under the constitutional amendment adopted in 1950 and supplemental legislation, by which the municipal courts are to be reorganized, the county character of such courts is further emphasized. The establishment of a municipal court no longer will be optional with the voters of the city. The judges will be elected by the voters of county subdivisions or judicial districts, the boundaries of which may or may not coincide with city limits, and the county civil service commissions will perform the functions presently performed by city commissions in connection with municipal court attaches.

The judgments in favor of the state and the City of Los Angeles are affirmed. The judgment in favor of the County of Los Angeles is reversed with directions to allow the defendant to answer within a reasonable time.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

OLON v. LICHTENSTEIN.

Civ. 18069.

District Court of Appeal, Second District,
Division 3, California.

Aug. 31, 1951.

Hearing Granted Oct. 29, 1951.*

Action by Frances Sommerfeld Solon against Rose Lichtenstein, individually and as co-executor of the estate of Eugene Parisek, deceased, to establish a constructive trust in property which had been held by defendant and Eugene Parisek. The Superior Court, Los Angeles County, Edwin L. Jefferson, Judge, nonsuited plaintiff and she appealed. The District Court of Appeals, Wood, J., held that there was no evidence that the property held by defendant and deceased in joint tenancy was to be divided equally between plaintiff and defendant.

Affirmed.

1. Trusts ⇨44(3)

The evidence of the existence of a trust must be clear and convincing to overcome legal effect of joint tenancy agreement.

2. Trusts ⇨110

In action by deceased's granddaughter to impose constructive trust on property which had been held in joint tenancy by defendant and her deceased father, evidence was insufficient to establish that defendant was holding one-half of property in trust for plaintiff.

3. Witnesses ⇨198(1)

Where plaintiff sought to impose constructive trust on property which had been held in joint tenancy by defendant and deceased father, conversations by deceased with his attorney were properly excluded as privileged communications.

Perry Bertram, Los Angeles, for appellant.

Irvin C. Evans, Paul J. Otto, Los Angeles, and Fred W. Heatherly, Arcadia, for respondent.

WOOD, Justice.

Action to establish a constructive trust in personal property consisting of money

on deposit in a bank and money and certificates of corporate stock deposited with a stockbroker, which property was held by the defendant and her father Eugene Parisek in joint tenancy. Mr. Parisek died on March 19, 1948. Plaintiff is his granddaughter. Plaintiff's mother, who died about 1938, and the defendant were the only children of Mr. Parisek. Plaintiff appeals from a judgment of nonsuit.

Appellant contends that the evidence shows that the joint tenancies were created for convenience and under an agreement between Mr. Parisek and defendant that, upon the death of Mr. Parisek, the defendant would divide equally all the joint tenancy property between defendant and plaintiff.

In December, 1934, the decedent (Mr. Parisek) transferred his bank account to himself and the defendant as joint tenants. The defendant also signed the card covering the joint tenancy agreement. In April, 1947, the decedent and defendant executed an agreement whereby decedent transferred his investment securities account to himself and defendant as joint tenants. During the lifetime of decedent, the defendant did not deposit or withdraw any money from the bank account and she did not have any transaction with the stockbroker regarding the securities account.

Defendant testified that at the time of the death of decedent there was a balance of \$1,792.20 in the bank account; that there were securities in the account with the stockbroker which were of the value of \$14,239.79, and that \$180 was on deposit in said account. Decedent resided in Los Angeles, and the plaintiff resided in Chicago. It appears that defendant resided in Santa Barbara. Plaintiff testified that each time the decedent came to Chicago they spent their time together; they corresponded with each other weekly, and they wrote in affectionate terms; in 1941, in response to an invitation from the decedent, plaintiff came to Los Angeles to visit him; she remained in Los Angeles six weeks, and during that time she lived near the place where he lived, and they were together constantly; in a number

* Subsequent opinion 244 P.2d 907.

of conversations which they had during that visit decedent told plaintiff that he had made arrangements that everything he owned would be divided equally between the "plaintiff [defendant] and myself"; he even pointed out his furnishings, personal jewelry and collector's items and stated that they would also be divided equally between plaintiff and defendant; during the last four or five years of his life the letters which decedent wrote to her indicated that his health was failing, and a letter written by him to plaintiff in May, 1947, indicated that he had been confined to his room over two weeks by illness.

Mr. Friend, who had known decedent since 1892, testified that he and decedent had been intimate friends from that time to the time of decedent's death; about 1935, after the death of Mrs. Parisek, the decedent told the witness that he was putting his house in order so that plaintiff and defendant, whom he always referred to as his "two kids," would get everything he had; he (the witness) had seen decedent frequently during the last fifteen years of his life; he and decedent had a lot of things in common to talk about, and they always talked about plaintiff and defendant; on several occasions decedent told the witness that whatever property, stock and furniture he had was to be divided between plaintiff and defendant; in 1945 the decedent told the witness that he had approximately \$15,000 in government bonds for each of the girls (plaintiff and defendant) and that those bonds were in the names of decedent and "each of those girls" as joint tenants; in April, 1947, the witness visited the decedent in his room, and they had a conversation concerning decedent's property; decedent told him at that time that whatever he had was to be divided equally between plaintiff and defendant; he stated that his government bonds were taken care of "because they were in his and his daughter's name and his and his granddaughter's name, and all other stock including personal property was to be divided equally between those two because that was all he had in the world"; he also said there

was cash in the bank and there were some stocks which were to be divided equally between plaintiff and defendant; on said occasion decedent stated that some day he would move from the club (where he was then living) into an apartment and that his rugs, paintings and furniture would be divided between plaintiff and defendant; at that time the decedent told the witness that he had been ill about three weeks.

Defendant testified that for a period of approximately 10 years the decedent and the defendant visited with each other from one to several days almost every week.

The stockbroker testified that in 1946 the decedent began to have conversations with him relative to transferring the decedent's securities to some of his heirs; the decedent stated that he was concerned about inheritance taxes, and the broker "pointed out the advantages of a joint tenancy"; about the time the decedent transferred his securities from his personal account to the joint tenancy account, he told the broker that if anything happened to him he wanted to leave the securities to the defendant.

[1,2] The evidence shows, in substance, that decedent told plaintiff and Mr. Friend that, upon decedent's death, his property was to be divided equally between plaintiff and defendant. There was no evidence that decedent mentioned the joint tenancy in the bank account or in the securities account in any conversation with the plaintiff or Mr. Friend. There was no evidence to the effect that the joint tenancy in either the bank account or the securities account was made, or would be made, in order to create a trust for the benefit of plaintiff. There was no evidence that decedent said that the property included in those joint tenancies should be divided equally between plaintiff and defendant. There was no evidence that defendant said that she would hold any part of the property in trust, and there was no evidence that decedent or anyone said in her presence that she should hold a part of it in trust. The evidence of the existence of a trust must be clear

and convincing before it can be deemed sufficient to overcome the legal effect of a joint tenancy agreement. *Estate of Gaines*, 15 Cal.2d 255, 266, 100 P.2d 1055. It is to be noted that plaintiff alleged in the complaint that, by the terms of decedent's will, he gave one-half of his estate to defendant, and he gave one-half to defendant and one Levi as cotrustees for the benefit of plaintiff until she attained the age of 32 years, at which time said one-half should be distributed to her. It might well be that decedent's statement, as shown by the testimony, that his property was to be divided equally between plaintiff and defendant was a reference to the provisions of his will. It is also to be noted that, with respect to making joint tenancies, decedent created a joint tenancy with the plaintiff, and also created a joint tenancy with the defendant, in government bonds of the value of \$15,000.

Appellant cites *Jarkieh v. Badagliacco*, 75 Cal.App.2d 505, 170 P.2d 994, wherein the plaintiff, who was the brother of the defendant, sought to establish a one-half interest in bank accounts which were in the names of their mother and defendant as joint tenants. The facts in that case were quite different from the facts in the present case. In that case there was evidence that at the time said accounts were opened and many times thereafter the mother stated, in the presence of her daughter (defendant), that it was her intention and the intention of the daughter that the accounts were to be divided equally between the son and daughter upon the mother's death. It was held therein that an express oral trust was proved.

[3] Appellant contends further that it was error to exclude the testimony of Mr. Sirota. At the trial the appellant offered in evidence the deposition of Mr. Sirota, who is licensed to practice law in Illinois. Respondent objected to the offer of that testimony on the ground that it was a privileged communication between a client and an attorney. The objection

was sustained. Appellant thereupon offered to prove that if Mr. Sirota were permitted to testify he would testify, in substance, that he was in Los Angeles in August and September, 1947; during that time decedent asked him if he had a little time to discuss a matter which was very personal; he (Mr. Sirota) replied he would be glad to assist him; they went to decedent's room where they talked about decedent's family, and then the decedent told him that he wished to convey title to the graves in Graceland Cemetery to the plaintiff; the decedent also said he would pay to have the graves cared for during his lifetime, and he asked Mr. Sirota to exact a promise from plaintiff, when he returned to Chicago, that she would take care of the graves after decedent's death; decedent then stated that he had everything arranged so that everything in his estate would go to plaintiff and defendant, share and share alike; decedent also stated that he had had several heart attacks and could not get to the bank, and he had an arrangement whereby defendant could draw out the funds he needed "or any stocks or bonds," and she had "access to those"; he had "these in a joint safe account"; he stated further that plaintiff would receive one-half of what he possessed, just as if his own daughter were living—that there was a definite arrangement which he made with defendant and "she [defendant] understands it"; after returning to Chicago, Mr. Sirota gave to plaintiff the instructions which decedent had requested that he give to her, and plaintiff promised to care for the graves; he then prepared the deed, sent it to a bank in California and, after it was returned to him, he delivered it to the plaintiff. The respondent objected to said offer of proof and the trial court sustained the objection. The court did not err in excluding the testimony.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

106 Cal.App.2d 260

ZAMLOCH, For and on Behalf of COWAN et al. v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14699.

District Court of Appeal, First District,
Division 1, California.

Aug. 23, 1951.

Archer Zamloch, for and on behalf of Marion Cowan and Jennifer Wilson, filed petition for writ of mandate to compel Municipal Court of the City and County of San Francisco, and another, to dismiss misdemeanor charges against petitioners. The Superior Court, in and for the City and County of San Francisco, Theresa Meikle, J., granted writ and ordered municipal court to dismiss the misdemeanor charges against petitioners, and the municipal court of the City and County of San Francisco, and John B. Molinari, Judge of said municipal court, appealed. The District Court of Appeal, Peters, P. J., held that where defendants had indicated that they were ready to go to trial upon the misdemeanor charges, but trial was postponed on grounds not constituting legal grounds for continuance, defendants were entitled to writ of mandate directing trial court to dismiss charges.

Order affirmed.

1. Criminal law ⇨251

Statute requiring misdemeanor case in justice court to be brought to trial within thirty days does not apply to proceedings in a municipal court. Pen.Code, § 1382.

2. Constitutional law ⇨33

Constitutional provision that in criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy public trial is self executing. Const. art. 1, § 13.

3. Criminal law ⇨573

Defendants charged in Municipal Court with keeping a house of ill fame, with being an inmate of a house of prostitution, and agreeing to commit indecent acts were entitled to speedy trial. Pen.Code, §§ 315, 681a, 1050; Const. art. 1, § 13.

4. Criminal law ⇨575

Penal statute that court shall set all criminal cases for trial for date not later than thirty days after date of entry of plea

of defendant and providing that no continuance of trial shall be granted except on affirmative proof in open court that ends of justice require continuance, while only directory, declares a policy that should not lightly be disregarded. Pen.Code, §§ 681a, 1050.

5. Criminal law ⇨573, 589(1)

Fact that district attorney did not desire to disclose his witnesses and their testimony in a misdemeanor proceeding, in hope of trying one of misdemeanors on a felony charge, was not a legal ground for continuance, or for denying misdemeanants a speedy trial. Pen.Code, §§ 315, 681a, 1050; Const. art. 1, § 13.

6. Criminal law ⇨589(1)

Representations of district attorney that felony charge was pending against one of defendants charged with misdemeanor, and that if a misdemeanor trial were had first, defendant in felony proceeding might be able to plead *res judicata*, did not constitute legal grounds for continuance of misdemeanor trial. Pen.Code, §§ 315, 681a, 1050; Const. art. 1, § 13.

7. Criminal law ⇨608

Burden rested on prosecution to show good cause in support of motion for continuance.

8. Mandamus ⇨61

Where after numerous continuances by consent, defendants indicated they were ready to go to trial upon misdemeanor charges, but trial was postponed on grounds not constituting legal grounds for a continuance, defendants were entitled to writ of mandate directing trial court to dismiss charges. Pen.Code, §§ 315, 681a, 1050; Const. art. 1, § 13.

Thomas C. Lynch, Dist. Atty., San Francisco, Alfred Del Carlo, Asst. Dist. Atty., for appellants.

Nicholas Alaga, San Francisco, for respondents.

PETERS, Presiding Justice.

This appeal is taken from an order of the Superior Court ordering the Municipal

Court to dismiss misdemeanor charges against Marion Cowan and Jennifer Wilson.

Cowan, on September 28, 1949, was charged by complaint with a violation of section 315 of the Penal Code, that is, keeping a house of ill-fame, a misdemeanor. On the same date, Wilson was charged with a violation of section 220 of the Municipal Police Code, that is, with being an inmate of a house of prostitution, a misdemeanor. On December 1, 1949, Wilson was further charged with a violation of section 240 of the Municipal Police Code, that is, agreeing to commit indecent acts, a misdemeanor. Defendants pleaded not guilty.

There were a series of continuances to all of which defendants agreed up to January 16, 1950. On that date the causes came on for hearing. Defendants waived a jury trial, and the trial date was set for January 25, 1950.

[1] On January 25, 1950, defendants appeared and answered ready for trial. The deputy district attorney requested a continuance to a date beyond February 6, 1950, on the sole ground that there was pending a felony complaint against Cowan, involving the same transaction, and the district attorney did not desire to disclose his witnesses and their testimony in the misdemeanor proceedings. That, admittedly, is not a valid legal ground for a continuance. The attorney for the defendants objected to the continuance, and demanded that the trials proceed. The district attorney refused to go to trial. Thereupon, the attorney for defendants moved to dismiss all charges. This motion was based upon the provisions of section 1382 of the Penal Code, and upon the constitutional guarantee of a prompt and speedy trial. It should be here mentioned that section 1382 does not apply to proceedings in the Municipal Court. *People v. Molinari*, 23 Cal.App.2d Supp. 761, 67 P.2d 767; *Harris v. Municipal Court*, 209 Cal. 55, 285 P. 699. The trial court then ordered the trial and the motions continued to January 27, 1950. This was done over the objections of counsel for defendants who pointed out that no

legal cause for a continuance had been shown, nor had any showing been made that the ends of justice would be furthered by a continuance.

What happened on January 27, 1950, does not appear in the record. On January 28, 1950, the deputy district attorney filed points and authorities to support his contention that section 1382 of the Penal Code was not applicable to these Municipal Court prosecutions, and again moved for a continuance. This time he abandoned the ground urged on January 25, 1950, and now urged that the trial of the misdemeanor cases before the trial of the felony charge against Cowan would permit that defendant to plead double jeopardy or *res judicata* in bar of the felony prosecution. Defendants vigorously objected to a further continuance. No other showing was made. Nevertheless, the trial court continued the trial of Wilson to February 2, 1950, and the trial of Cowan to some indefinite date to be determined after Cowan was tried on the felony charge.

Defendants immediately filed a petition for a writ of mandate to dismiss the charges. The Superior Court granted the writ, and this appeal resulted.

[2, 3] The Superior Court properly granted the writ. The defendants were entitled to a speedy trial. Article 1, section 13 of our state Constitution provides: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial". This section is self-executing. *Harris v. Municipal Court*, 209 Cal. 55, 285 P. 699.

[4] While section 1382 of the Penal Code is not applicable to trials in the Municipal Court, section 681a of that code is applicable to all courts. *People v. Molinari*, 23 Cal.App.2d Supp. 761, 67 P.2d 767; *Harris v. Municipal Court*, 209 Cal. 55, 285 P. 699. That section provides: "The welfare of the people of the state of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and

proceedings to the greatest degree that is consistent with the ends of justice."

In addition, section 1050 of the Penal Code provides: "The court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. * * * No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the court shall enter in its minutes the facts proved which require the continuance. * * *"

While this section is directory only, and contains no provision for a dismissal where compliance is not had with its terms. *People v. Marshall*, 209 Cal. 540, 289 P. 629; *Ray v. Superior Court*, 208 Cal. 357, 281 P. 391; *People v. Perea*, 96 Cal.App. 183, 273 P. 836, it declares a policy that should not lightly be disregarded.

[5, 6] In the present case, after numerous continuances by consent, the defendants indicated that they were ready for trial. On the day set for trial, January 25, 1950, the deputy district attorney asked for a continuance on a ground that did not constitute a legal ground for such continuance. Certainly, the mere fact that a felony charge growing out of the same facts was pending against Cowan, and, if the misdemeanor charge was tried first, the prosecution would be compelled to disclose its evidence, is no legal reason for denying an accused the legal right to a speedy trial. The accused may be very bad persons indeed, but, bad as they may be, they are entitled to a speedy trial and the district attorney has no right to deny them that right simply because he would like to try one of them on a felony charge, and, if unsuccessful in securing a conviction, then try them on the misdemeanor charge. The constitutional guarantee is not to be thus frittered away at the whim, caprice, or convenience of the prosecutor. The prosecutor recognized that this was not a valid ground for a continuance, because on January 28, 1950, this ground was abandoned. It was then urged

that a continuance should be granted because if defendants were first tried on the misdemeanor charges Cowan might be able to plead *res judicata* or double jeopardy to the pending felony charge. This ground was applicable to Cowan alone and did not apply to Wilson. With no showing at all for a delay, her trial was continued to February 2, 1950. The double jeopardy or *res judicata* argument is unsound. Even if a trial on the pending misdemeanor charge might adversely affect the pending felony charge, that would not constitute a legal ground for continuing the misdemeanor trial. The constitutional guarantee is not to be abrogated simply because the prosecutor desires to jockey for position or to gain a technical legal advantage.

[7, 8] While the delay here, after the period of waiver, was not great, the point is that on January 16th the defendants announced their willingness to go to trial and the trial date was fixed for January 25th. On that date the defendants were legally entitled to go to trial unless some legal excuse existed. The prosecution offered two reasons in support of the request for a continuance. Neither constituted a legal ground for the delay. There was no showing that a court was not available, or any other good reason for further delay. The burden rested on the prosecution to show good cause in support of the motion. The prosecution failed to make such a showing. This being so, the defendants were entitled to be then tried or dismissed. *People v. Molinari*, 23 Cal.App.2d Supp. 761, 67 P.2d 767; *People v. Fegelman*, 66 Cal. App.2d 950, 153 P.2d 436; *Dearth v. Superior Court*, 40 Cal.App.2d 56, 104 P.2d 376.

Appellants place considerable reliance on *People v. George*, 91 Cal.App.2d 537, 205 P.2d 464, an opinion by this court. The case is not in point. There, on appeal from felony convictions, it was urged that the trial court had erred in denying defendants motions to dismiss the indictments for lack of a speedy trial. There, the defendants had consented to or acquiesced in continuances for 60 days and for some time thereafter. They argued that under section 1382 of the Penal Code they were automatically entitled to a dismissal if not brought to

trial within 60 days. They were tried within 14 days from the date that they had formally waived their right to a speedy trial. They made no objection to this continuance. Under the circumstances, they had not been deprived of any rights. That case is not here applicable.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



106 Cal.App.2d 350

EDLUND et ux. v. LOS ALTOS BUILDERS
(two cases).

Civ. 14852, 14956.

District Court of Appeal, First District,
Division 1, California.

Aug. 20, 1951.

Carl Leslie Edlund and Laura I. Edlund, his wife, brought an action against Los Altos Builders, a corporation, to secure defendants' involuntary dissolution, and defendant filed a cross-complaint. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., granted plaintiff's motion for appointment of a provisional director and denied defendant's motion to vacate or amend the order and defendant appealed from both orders and plaintiffs moved to dismiss the appeals, and defendant also appealed from orders denying a motion for a preliminary injunction and granting a motion to substitute the attorney for defendant, and plaintiffs moved to dismiss such appeals. The District Court of Appeal, Peters, P. J., held, *inter alia*, that order appointing provisional director was interlocutory and was not appealable as being a final order.

Order in accordance with opinion.

1. Appeal and error ⇐80(1)

Where provisional director of corporation was appointed in proceedings for dissolution of corporation brought under statute permitting trial court, where directors are deadlocked, to appoint a provisional director in an action for an involuntary

winding up and dissolution of corporation, such order was interlocutory and was not appealable as being a "final order". Code Civ.Proc. § 963; Corporations Code, § 4655.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Order".

2. Appeal and error ⇐86

Only those interlocutory orders are appealable that are expressly made appealable by statute.

3. Appeal and error ⇐81

To come within purview of statute authorizing appeals to be taken from final judgment of superior court, the order or judgment need not be the final order or judgment and it is appealable if it is a judgment or order that finally determines a collateral matter distinct or severable from general subject of litigation. Code Civ. Proc. § 963.

4. Appeal and error ⇐81

Order discharging attorney for a corporation and substituting another attorney, which order was made in proceedings for dissolution of corporation brought under statute permitting trial court, where directors are deadlocked, to appoint a provisional director in action for involuntary winding up and dissolution of corporation, was interlocutory and was not appealable as being a "final order". Code Civ.Proc. § 963; Corporations Code, § 4655.

5. Appeal and error ⇐417(3)

Where notice of appeal from order denying a preliminary injunction was signed by an attorney who had been discharged as attorney for defendant corporation by court order, and defendant corporation objected to appeal, appeal would be dismissed. Rules on Appeal, rule 1.

Alfred W. Bowen, Gardner Bullis, W. Gordon Eustice, Los Altos, for appellant.

Moerdyke & Anderson, Palo Alto, for respondent.

PETERS, Presiding Justice.

The Edlunds, husband and wife, as two of the four directors of Los Altos Builders,

a California corporation, and as claimed owners of a one-half stock interest therein, brought an action against the corporation to secure its involuntary dissolution. The complaint alleges that the two plaintiffs cannot agree with the other two directors and owners, the Turners, as to the management of corporate affairs, that the Turners have been guilty of fraud, mismanagement and abuse of authority, and that there is danger that the corporate property and business will be impaired or lost. The corporation's answer denies the material allegations of the complaint, and cross-complains, alleging that the Edlunds had resigned as directors, were indebted to the corporation, and had been guilty of some acts of fraud. The cross-complaint prays that the Edlunds be enjoined from disposing or selling any of the corporate property, and, in connection with the cross-complaint, certain property belonging to the Edlunds was attached.

Several orders and motions have been made in this action that have led to the various motions now pending before this court. After the involuntary dissolution case was at issue, Carl Edlund filed an affidavit calling the attention of the court to the pendency of the dissolution proceedings and to the fact that the four directors were evenly divided and could not agree as to corporate policy, and averring that there was danger that, for such reasons, the corporate business and property might be impaired and lost. Thereupon, the trial court, based upon the complaint and affidavit, issued its order requiring the corporation to show cause "why a provisional director should not be appointed pursuant to the provisions of Section 4655 of the Corporations Code." Thereafter, a counter-affidavit was filed by the accountant of the corporation on its behalf. No hearing was had or other evidence taken. On September 21, 1950, the trial court granted the motion to appoint a provisional director, and appointed one Michael Dowley as such director until further order of the court or until removed by the vote of a majority of the voting shares of the corporation. The defendant then moved to vacate or to amend the order appointing the provisional direc-

tor. This motion was denied on November 10, 1950. The defendant has appealed from both orders. Plaintiffs have moved to dismiss both of these appeals on the ground that they have been taken from non-appealable orders. These appeals are numbered 1 Civ. 14852.

In January of 1951 the Turners secured a temporary restraining order, and an order requiring the Edlunds to show cause on February 5, 1951, why they should not be restrained from doing any act intended, designed or having the effect of interfering, controlling, changing or otherwise obstructing the course and management of the involuntary dissolution proceeding, the existing attachment on the Edlunds property, and including the appeals in 1 Civ. 14852. This order restrained the Edlunds, their servants, agents and attorneys from doing any of the above acts pending the hearing of the order to show cause. The Turners also filed a notice of a motion for a preliminary injunction to restrain the Edlunds, their servants, agents or attorneys from doing the acts mentioned in connection with the order to show cause.

The affidavit of William G. Turner, filed in connection with the motion for the preliminary injunction (and perhaps also in connection with the order to show cause) avers that on January 21, 1951, he received a notice of a directors' meeting of the Los Altos Builders; that he was out of town at that time; that the meeting was called for January 25, 1951; that he had to be away on business that day; that the purpose of the meeting was stated to be to discharge present counsel for the corporation and employ new counsel and to employ a certified public accountant to audit the corporation's books; that he had attorney Bowen so advise Dowley, the provisional director, of the purpose of the meeting, and the attorney also told Dowley that he objected to the Edlunds voting on the matters at the meeting; that on January 26, 1951, Bowen was notified in writing that he was discharged as attorney for the corporation. It is averred that this is a scheme of the Edlunds to tie the corporation up in litigation, and to release the attachment on the Edlunds' property.

The motion for a preliminary injunction was denied by an order dated February 28, 1951, and filed March 2, 1951.

Also on March 2, 1951, the trial court filed another order, also dated February 28, 1951, granting a motion, opposed by the Turners, to substitute Bowen out as attorney for the corporation.

A notice of appeal has been filed purporting to appeal from both of the orders of March 2, 1951. The notice is signed:

"Alfred W. Bowen,

"Gardner Bullis,

"Gordon Eustice,

"By Alfred W. Bowen

"Attorneys for Defendant."

Respondents have moved to dismiss both appeals. These appeals are numbered 1 Civ. 14956.

The appellant has also moved in this court to consolidate the four appeals, and to take some additional evidence.

The Appeals from the Order Appointing the Provisional Director, and from the Order Refusing to Vacate That Order —1 Civ. 14852.

[1] These two appeals must be dismissed because the order appointing a provisional director is, in our opinion, not appealable. This necessarily means that the order refusing to vacate that order is also non-appealable. *Litvinuk v. Litvinuk*, 27 Cal.2d 38, 162 P.2d 8.

[2] In our opinion, the order appointing the provisional director is not appealable, for the following reasons: If that order is interlocutory in nature no appeal will lie therefrom. Only those interlocutory orders are appealable that are expressly made appealable by statute. *David v. Goodman*, 89 Cal.App.2d 162, 200 P.2d 568. It is conceded that there is no statute making an order appointing a provisional director appealable. Therefore, if that order is appealable, it is so only because it is a final order or judgment within the meaning of section 963 of the Code of Civil Procedure. We think that it is not a final order within the meaning of that section.

[3] It is true, as urged by appellant, that to come within the purview of section 963 the order or judgment need not be the final order or judgment. It is appealable if it is a judgment or order that finally determines a collateral matter distinct or severable from the general subject of the litigation. *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39; *Carradine v. Carradine*, 75 Cal.App.2d 775, 171 P.2d 911; *Grant v. Superior Court*, 106 Cal. 324, 39 P. 604; *City of Los Angeles v. Los Angeles C. Water Co.*, 134 Cal. 121, 66 P. 198; *Fish v. Fish*, 216 Cal. 14, 13 P.2d 375. In *Sjoberg v. Hastorf*, 33 Cal. 2d 116, page 119, 199 P.2d 668, page 670, the Supreme Court, in holding that an order finding that there was no agreement to arbitrate was not appealable stated: "An appeal is allowed if the order is a final judgment against a party in a collateral proceeding growing out of the action. [Citing cases.] It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him [Citing cases.] There is no such direction in the present case. If appellants have a right to arbitration they may assert it on the appeal from the final judgment in the contract action. Thus no greater hardship will result than in any case where a party is forced to stand trial because of an erroneous ruling of the trial court."

Appellant cannot bring itself within this rule. Here, the pending proceeding was for the dissolution of the corporation. The order appointing the provisional director was incidental to, and an integral part of, that proceeding. It did not direct the payment of any money by appellant, nor the performance of any act by or against it. The appointment of the provisional director was incidental to the issues raised by the complaint. The order was intended to preserve the assets of the corporation pending the determination of the dissolution proceedings. As such, it was clearly interlocutory in na-

ture, and, since not made appealable by statute, is non-appealable. It is, in many respects, comparable to an order appointing a receiver. Such order, prior to 1897, when expressly made appealable by statute, was held to be interlocutory and not appealable. *Jacobs v. Superior Court*, 133 Cal. 364, 365, 65 P. 826.

Appellant contends that the order appointing the provisional director is appealable under the authority of *Desert Club v. Superior Court*, 99 Cal.App.2d 346, 221 P.2d 766. That case is not in point. There, two directors of a domestic corporation, each owning half of its stock, were unable to agree on corporate policies or upon the selection of a third director. One of them brought a proceeding, the sole purpose of which was to secure the appointment of a provisional director under section 819 of the Corporations Code, which permits such an independent proceeding even though an action for dissolution is not pending. The court ordered such a director appointed. The other director sought to annul that order on *certiorari*. The writ was denied because the order appointing the director was appealable, being a final order under section 963 of the Code of Civil Procedure. Of course, the order there involved was appealable because it finally disposed of the only issue pending before the court. But in the present case the proceeding is under section 4655 of the Corporations Code permitting the trial court, where directors are deadlocked "in an action for an involuntary winding up and dissolution of the corporation," to appoint a provisional director. Under this section the appointment of the director is ancillary and incidental to the main object of the proceedings. It is but one optional step in the winding up process. For that reason the order, when made in an involuntary dissolution proceeding, must be held to be interlocutory in nature, and therefore not appealable.

This does not mean that the minority share holders are powerless to protect their rights in the dissolution proceedings. Section 4653 of the Corporations Code expressly permits any shareholder

of the company to intervene in the involuntary dissolution proceedings. The record here shows that the Turners have intervened in that action. This is the proper way to protect their rights. If the order appointing the provisional director in an involuntary dissolution proceeding were appealable, it would defeat the very purpose of permitting such an appointment in such a proceeding, which purpose is to provide a summary procedure to protect and to preserve the business and assets of the company. The propriety of such an appointment can be reviewed upon the appeal from the order of dissolution, if one is made. For these reasons, the two appeals under discussion must be dismissed.

It should be mentioned that while attorney Bowen took these appeals while attorney for the corporation, he is no longer such attorney, and no longer has power to act for the corporation. The present attorney for the corporation has joined in the request that the appeals be dismissed.

The Appeal from the Order of Substitution of Attorneys, and the Appeal from the Order Denying the Preliminary Injunction—1 Civ. 14956.

[4] The appeal from the order substituting attorneys is sought to be dismissed on the ground that it is not an appealable order. Such an order is not specifically listed as an appealable order in section 963 of the Code of Civil Procedure, so that if it is appealable it must be because it is a final order in a collateral matter. It would appear that such an order is interlocutory, and therefore not appealable. *Telander v. Telander*, 60 Cal. App.2d 207, 140 P.2d 204, where an appeal by the discharged attorney was dismissed; in *Gage v. Atwater*, 136 Cal. 170, 68 P. 581, the problem was left open. The order is interlocutory because it is not aimed at a party to the litigation. A majority of the directors has simply discharged a prior attorney for the company and substituted another one. Now the corporation, through the discharged attorney, purports to attack that order by attacking the au-

thority of the directors. That is one of the basic questions to be settled in the involuntary dissolution proceedings. The order is, therefore, interlocutory, and the appeal therefrom should be dismissed.

[5] The order denying the preliminary injunction is specifically made appealable by statute. Respondent seeks to dismiss this appeal on the ground that it purports to be an appeal by the corporation, but the notice of appeal is not signed by the corporation or by its attorney but by Bowen who has been discharged by the corporation as its attorney. While a notice of appeal need not be signed by appellant's attorney of record as long as it is signed by an attorney in fact empowered to act for the appellant, *Estate of Hultin*, 29 Cal.2d 825, 178 P.2d 756, it cannot be signed by an unauthorized person. It must be signed by the appellant or his attorney. Rule 1 of the Rules on Appeal. Here, it affirmatively appears that the notice of appeal from the order denying the preliminary injunction, as well as the notice of appeal from the order substituting attorneys, was signed by attorney Bowen. The record shows an order discharging Bowen and substituting another attorney for the corporation. The transcript shows an order of substitution, and also that Bowen was served with notice of the substitution. By the order of substitution Bowen became a stranger to the proceeding and has no standing in the litigation, except as attorney for the Turners, whom he represents in the intervention proceedings. *People's Home Sav. Bank v. Superior Court*, 104 Cal. 649, 38 P. 452, 29 L.R.A. 844. Thus, since the notice of appeal was signed by an admittedly unauthorized person, and since the appellant corporation objects to the appeal, the appeals from both orders dated March 2, 1951, must be dismissed.

The Motions to Consolidate and to Take Additional Evidence

Because the four appeals must be dismissed, it is not necessary to pass upon the merits of these motions. They become moot.

For the reasons stated, the appeals from the order appointing the provisional director, the order denying the motion to vacate or amend the order appointing the provisional director, the order of substitution of attorneys, and the order denying the application for a preliminary injunction, and the motions to consolidate and to take additional evidence are all dismissed.

BRAY and FRED B. WOOD, JJ., concur.



106 Cal.App.2d 294

GRASSO et al. v. CUNIAL et al.
Civ. 14618.

District Court of Appeal, First District,
Division 2, California.

Aug. 27, 1951.

Hearing Denied Oct. 25, 1951.

Dennis Grasso, a minor, by his father, J. Grasso, as guardian ad litem, and the father, on his own behalf, sued Antonio Cunial and others for personal injuries sustained in an automobile collision. From a judgment of the Superior Court, Alameda County, A. J. Woolsey, J., for defendants, plaintiffs appealed. The District Court of Appeal, Goodell, J., held that the questions whether named defendant negligently drove across a through street at excessive speed, without having an opportunity to know whether an automobile was approaching thereon so closely as to be an immediate hazard, and to the left of the center of the crossing street, were for the jury on conflicting evidence.

Judgment affirmed.

1. Appeal and error ⇨930(1)

On appeal from judgment on jury's verdict, testimony must be viewed in light most favorable to respondent.

2. Automobiles ⇨245(14)

Whether motorist negligently drove across through street at excessive speed, without having opportunity to know whether automobile was approaching thereon so

closely as to be immediate hazard, and to left of center of crossing street, in violation of statutes, were questions for jury on conflicting evidence in action against him for injuries to driver of and passenger in automobile approaching from right on through street as result of collision with defendant's automobile at intersection. Vehicle Code, §§ 82.5, 525, 552(a).

3. Automobiles ⇨245(14)

One driving automobile to left of center of street in crossing intersecting through street was not guilty of negligence, proximately causing or contributing to collision with automobile approaching from right on through street, as matter of law, in view of evidence that he was forced to keep to left in driving through two lanes of blocking traffic on through street and that collision would have occurred had his automobile been wholly to left or entirely to right center. Vehicle Code, § 525.

4. Automobiles ⇨245(14)

Whether motorist acted with due care or negligently in proceeding across through highway is jury question. Vehicle Code, § 552.

5. Appeal and error ⇨999(1)

On appeal from judgment on jury's verdict for defendant in action for injuries to driver of automobile struck by automobile driven by defendant across through street, jury's implied finding that plaintiff's automobile was not close enough on through street to constitute immediate hazard to defendant is conclusive. Vehicle Code, § 552 (a).

6. Automobiles ⇨171(5)

A motorist, attempting to enter through highway at intersection, does not act at his peril, but has definite rights under statute providing that such a motorist, after yielding right of way to vehicles approaching on through highway by stopping at arterial sign, may proceed, and that drivers of such other vehicles shall yield right of way to vehicle about to enter or cross highway. Vehicle Code, § 552(a, b).

7. Automobiles ⇨168(6), 171(9)

A motorist on through highway, like any other motorist, must maintain proper

lookout and keep his automobile under control.

8. Automobiles ⇨245(78, 80)

Whether motorist on through highway maintained proper lookout and kept his automobile under control is question for jury in his action for injuries sustained in collision with automobile crossing such highway at intersection.

9. Automobiles ⇨206

A motorist, actually entering street intersection before another motorist approaches it, has right to assume that he will be given right of way and permitted to pass through intersection without danger of collision and that other motorist will obey law, slow down, if necessary to prevent collision, and yield right of way. Vehicle Code, § 552(a, b).

10. Automobiles ⇨171(4)

A motorist, approaching street intersection, is not required to yield right of way to motorist approaching at considerable distance therefrom. Vehicle Code, § 552 (a, b).

11. Automobiles ⇨168(1)

An automobile's rate of speed may be negligent, though statutory speed limit is not exceeded.

12. Automobiles ⇨245(78)

In action for injuries to driver of and passenger in automobile colliding with automobile driven by defendant across through street at intersection, whether plaintiff driver was exceeding statutory speed limit of 25 miles per hour was question for jury under evidence.

13. Automobiles ⇨244(11)

In action for injuries to driver of and passenger in automobile as result of collision with automobile driven by defendant across through street at intersection, evidence was sufficient to support jury's verdict for defendant.

14. Automobiles ⇨245(3)

Operation of automobile to left of center line of highway is not negligence as matter of law under all circumstances, but question whether such conduct was negligent is for jury to determine from all facts

and circumstances in evidence. Vehicle Code, § 525.

15. Negligence ⇨6, 136(14)

A court may or may not accept standard of conduct prescribed in criminal statute as basis of civil suit for negligence, and if not, trier of facts must determine whether actor conducted himself as man of ordinary prudence.

16. Negligence ⇨136(14)

Violation of criminal statute may not constitute negligence as matter of law, where it occurs as result of acts in emergencies under proper circumstances.

17. Automobiles ⇨246(47)

In action for injuries sustained in automobile collision at street intersection, instruction to jury that person operating vehicle to left of center line of highway is not negligent as matter of law under all circumstances, but that jury must determine from all facts and circumstances whether such conduct was negligent, was not erroneous, in view of evidence that defendant's operation of automobile to left of center of street simply delayed inevitable collision for split second and hence could not have been approximate cause thereof. Vehicle Code, § 525.

18. Automobiles ⇨208

The statute providing that drivers of vehicles approaching highway intersection on through highway shall yield right of way to vehicle about to enter or cross such highway after driver thereof has stopped at arterial sign imposed on motorist approaching street intersection on through street duty to yield right of way to motorist who was almost entirely across such street on intersecting street. Vehicle Code, § 552 (b).

19. Automobiles ⇨246(25)

In action for injuries to driver of automobile colliding with automobile being driven by defendant across through street, on which plaintiff was driving, instruction to jury that plaintiff owed duty to use reasonable care to look for vehicles on intersecting street before attempting to cross it and that such duty is not fulfilled by looking and failing to see that which is readily and

clearly visible was not erroneous, in view of statute imposing duty on plaintiff to yield right of way to defendant, who was almost entirely across intersection, and duty on driver of vehicle on through highway to keep lookout and maintain control at all times. Vehicle Code, § 552(b).

20. Appeal and error ⇨1064(1)

In action for injuries to driver of automobile colliding with automobile being driven by defendant across through street, on which plaintiff was driving, instruction to jury that motorist is under obligation to exercise ordinary care to avoid accident, though he has right of way, and cannot drive carelessly from place of safety into place of danger merely because he has right of way over another vehicle, was not error of which plaintiff could complain, as defendant, not plaintiff, had right of way, and plaintiff drove from place of safety on through street into place of danger at intersection. Vehicle Code, § 552(a, b).

21. Trial ⇨260(8)

Refusal of plaintiff's requested instruction to jury that he was not negligent, if he was acting as reasonably prudent person would act under like circumstances at time and place of collision between his and defendant's automobiles, was not error, though such instruction would have balanced somewhat similar instruction given at defendant's request, where jury was fully and fairly instructed on whole subject.

D. W. Brobst, Enrico Dell'Osso, Oakland, for appellants.

Dana, Bledsoe & Smith, San Francisco (Morton B. Jackson, San Francisco, of counsel), for respondent.

GOODELL, Justice.

Plaintiff sued on behalf of himself and his six year old son for personal injuries sustained by them when their Chevrolet collided with the Oldsmobile driven by defendant. The jury returned a verdict for defendant and after the denial of a new trial plaintiffs appealed.

The collision occurred in the intersection of Ashby Avenue and Seventh Street

in Berkeley, in the early afternoon of Saturday, September 27, 1947. Ashby Avenue runs approximately east and west, and is 56 feet wide, with its center marked by a double white line, on either side of which are two marked traffic lanes and a parking area. Seventh Street runs approximately north and south and is 46 feet wide, with no mark designating its center and no marked traffic lanes. An arterial stop sign at the southeast corner of the intersection controlled traffic crossing Ashby.

On that day a football game was scheduled and both eastbound lanes on Ashby Avenue were crowded with cars "bumper to bumper" headed toward the stadium.

The plaintiff J. Grasso had taken his son for a ride and was traveling westerly on Ashby Avenue. Defendant was traveling northerly on Seventh Street and riding with him was a family friend.

Appellants' first contention is that the evidence is insufficient to sustain the judgment, their claim being that defendant's "conduct in driving across Ashby Avenue was in clear violation of Sections 525 and 552 of the * * * Vehicle Code."

Ashby Avenue was a "through highway" as defined by § 82.5 Vehicle Code, with a stop sign protecting its traffic.

Subdivision (a) of § 552, Vehicle Code at the time in question read as follows: "The driver of any vehicle shall stop as required by this code at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard."

The following facts are undisputed: the weather was fair, the visibility good, and the streets dry. Defendant stopped at the arterial stop sign for 3 or 4 minutes, his car being headed northerly in the middle of the east (or his right) half of Seventh Street. His progress was blocked by the two lanes of east bound traffic on Ashby. When a break came, a motorist on his left (whose eastbound car on Ashby was partly in the westerly half of Seventh) signalled him to cross over, and he started

up, shifting from low to second gear and driving across Ashby without slackening his speed. His car was wholly north of the center line of Ashby, with its front within 5 feet of its northerly curb line (extended), when appellant's Chevrolet, traveling west on Ashby, struck it squarely in the middle of its right side. The impact smashed in the whole front of appellant's car, shoved respondent's Oldsmobile several feet, and threw Dennis from the back seat over the front seat and against the dashboard.

Just before the collision appellant had turned into Ashby from San Pablo Avenue and the westbound traffic on Ashby was light. His car was ahead of several others. In a signed statement given to the investigating officer he admitted "driving west on Ashby about 25 miles per hour". In court he testified "I wouldn't say exactly, I was going between 15 and 20 or 25 miles an hour." He admitted that he did not see respondent's car at any time approaching from the left, or until it was 10 or 15 feet in front of him. He testified also that as he approached the intersection there was no movement of traffic; "everything was stopped".

A Berkeley police officer who promptly reached the scene placed the point of impact 12 feet 9 inches south of the north curb of Ashby and 24 feet 10 inches west of the east curb of Seventh. His point represented the center of respondent's car at the instant of impact. Since it was about 16 feet long, this put its front about 4 feet 9 inches south of the north line of the intersection, and since Seventh Street is 46 feet wide it put the point of impact 22 inches left of the center of Seventh. The officer's measurements were based on debris found on the scene.

The conflicts are as follows: appellant testified that the accident happened about 1 p. m. while other witnesses, (including the investigating officer), fixed it at 2, 2:10 or 2:15. Respondent testified that his speed in crossing Ashby was approximately 7 or 8 miles an hour, while appellant testified that respondent's car "shot out of there into my—I would say he was going 10, 12, 15 miles an hour, the way he shot

out of there." Appellant testified that before the collision he was driving "maybe four or five feet from the double line" which would put him in the inner or southern lane (westbound) of Ashby, while the investigating officer (appellants' witness) placed the point of impact clearly within Ashby's outer or northern lane.

One of appellant's principal points is that respondent was negligent in crossing Ashby "without having an opportunity to know whether or not an automobile was approaching so closely as to be an immediate hazard". Respondent and his passenger both testified that at the center line of Ashby (as soon as they cleared the two lanes of east bound cars) they looked to the right and saw appellants' car at a distance of from 75 to 100 feet east of the intersection. Respondent when closely questioned testified that the distance was about twice the length of the courtroom, or about 88 feet.

Another one of appellants' main points is that respondent in crossing Ashby drove left of the center of Seventh Street. The witness Rose Bonkofsky, who was driving a car immediately behind respondent gave testimony which lent support to this, and appellant testified that "at the point of impact his [respondent's] whole car was to the west side of the intersection." Mrs. Bonkofsky had testified that when respondent stopped at the arterial sign he was on his right-hand side and in about his proper place. Both respondent and his passenger testified that when he started up he drove in a straight course and never got over the center of Seventh Street.

[1] So far as the conflicts are concerned, it goes without saying that on appeal the testimony must be viewed in the light most favorable to the respondent. If that rule is to be followed, we must assume that the jury found that respondent was traveling at only 7 or 8 miles an hour; that appellant was going 25; that respondent had a proper lookout for "immediate hazards", and that he stayed on the right side of Seventh Street.

[2] We find nothing in this case to distinguish it from any other intersection case

where there is conflicting testimony on questions which are purely for the jury. The verdict shows that the jury resolved all these conflicts in favor of the defendant.

At the time in question § 525, Vehicle Code read: "* * * Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway * * *." (None of the four exceptions found in this section touches this case.)

[3] Let it be assumed that respondent did get over the line in crossing Ashby. There is abundant evidence to show that if he did, he was forced to do so in driving through the two lanes of traffic which had blocked him. See *Henslee v. Fox*, 25 Cal. App.2d 286, 77 P.2d 307; *Fietz v. Hubbard*, 59 Cal.App.2d 124, 128, 138 P.2d 315. Had he not moved through when he had the chance he would have held up everything behind him on Seventh Street. What he did was an ordinary, every-day maneuver for any motorist if no traffic was coming in the opposite direction. Moreover, although appellants lay considerable stress on this point they do not show by argument, citation, or otherwise, how such driving left of center could have been a proximate cause of the accident, or could have contributed to it in any degree. As respondent argues, assuming that the Oldsmobile had been *wholly* over to the left of center the collision would have happened just the same. If it had been entirely to the right of the center the collision would have occurred a split-second earlier and, theoretically at least, the force of the impact would have been greater. With respect to a somewhat similar situation the court said in *Jacobsen v. Vaughn*, 131 Cal. App. 277, 280, 21 P.2d 141, 142, a right angle intersection case: "If, as claimed, a portion of [plaintiff's] car was on her left-hand side of the center of that road, the only effect would have been to give Vaughn [defendant] more time to avoid the accident * * *."

Appellants lay equal if not greater stress on what they claim was respondent's failure to make sure that no vehicles were "approaching so closely on the through highway as to constitute an immediate hazard."

[4-10] Section 552 does "not set a hard and fast rule for the conduct of drivers approaching through highways". Whether a driver acts with due care or negligently in proceeding across a through highway is a jury question. *Wilkinson v. Marcellus*, 51 Cal.App.2d 630, 633, 125 P.2d 584. In *Hershey v. Laswell*, 63 Cal.App.2d 219, 222, 146 P.2d 509, 510, the court said: "The trial court adopted defendants' theory that plaintiffs' car was not close enough to constitute an immediate hazard and that implied finding is conclusive on appeal under such circumstances. *Dickinson v. Pacific Greyhound Lines*, 55 Cal.App.2d 824, 131 P.2d 401." That language fits the instant case. In *Glynn v. Vaccari*, 64 Cal.App.2d 718, 721, 149 P.2d 409, 411, the court says: "As stated in *Casselman v. Hartford A. & I. Co.*, 36 Cal.App.2d 700, 708, 98 P.2d 539, 544: 'This appellant, in common with many users of the highways, seems to have the impression that every motorist who attempts to enter a main highway from a side road, does so at his peril. This misconception of the law is a prolific source of accidents. As we have shown, such motorist has very definite rights granted to him by the provisions of the Vehicle Code, and those users of the main highway who ignore such rights must be prepared to pay the penalty.'" The "very definite rights" are given the motorist by subdivision (b) of § 552 which provides that after the driver has "yielded" by stopping at an arterial sign he "may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway." (Emphasis added). Respondent's conduct must be viewed, of course, in relation to appellant's conduct. As said in *Angelo v. Esau*, 34 Cal.App.2d 130, 137, 93 P.2d 205, 209, "The circumstance that a driver is using a through highway * * * does not absolve him from making ordinary use of his faculties." A driver on a through highway like any other motorist must maintain a proper lookout and keep his car under control. *Marshall v. Klatt*, 19 Cal.App.2d 110, 112-113, 64 P.2d 1105; *Stup v. Higgins*, 41

Cal.App.2d 379, 106 P.2d 931 and whether or not he does so is a question for the jury. *Roller v. Daleys Incorporated*, 219 Cal. 542, 28 P.2d 345; *Morehead v. Roehm*, 118 Cal.App. 312, 4 P.2d 995. The discussion of this phase of the case can be brought to a conclusion by the citation of the leading case of *Couchman v. Snelling*, 111 Cal.App. 192, 195, 196, 295 P. 845, 847, where the court said:

"Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. *Keyes v. Hawley*, 100 Cal.App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. *Whitelaw v. McGilliard*, 179 Cal. 349, 176 P. 679."

The Supreme Court approved and adopted that statement in *Page v. Mazzei*, 213 Cal. 644, 645, 3 P.2d 11, and both the *Couchman* and *Page* cases have been repeatedly followed.

While the *Couchman* case did not involve a "through highway" intersection, several cases have applied the rule to such intersections, e. g., *Demers v. Sutherland*, 117 Cal.App. 489, 494, 4 P.2d 187; *Morehead v. Roehm*, 118 Cal.App. 312, 316, 4 P.2d 995, and at least one has applied it to an intersection controlled by automatic stop-and-go signals. *Shifflette v. Walkup Drayage, etc., Co.*, 74 Cal.App.2d 903, 910, 169 P.2d 996. There can be no doubt of the applicability of the rule in this case in view of the clear language of subd. (b) of § 552. See, also, *Leblanc v. Coverdale*, 213 Cal. 654, 657, 658, 3 P.2d 312.

[11,12] Counsel argue that appellant was not exceeding the legal rate of speed as he drove down Ashby Avenue. In *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125, 127, the court said,

"* * * even though the statutory limitation of speed has not been exceeded, the rate of speed at which an automobile may be traveling may be held under some circumstances to be negligent". And in *Malinson v. Black*, 83 Cal.App.2d 375, 379, 188 P.2d 788, 790, we said, "* * * proof that one did not violate the speed limit does not establish freedom from negligence. One may observe one rule of the road but violate others." Moreover, as respondent points out, the jury might have concluded from all the circumstances that appellant was in fact exceeding 25 miles an hour.

[13] We are satisfied that there was abundant evidence to support the verdict.

[14] Appellants' second contention is that "The court committed prejudicial error in instructing the jury that a violation of section 525 * * * was not negligence as a matter of law".

The instruction reads: "I instruct you that the mere fact, standing alone, if you find it to be true, that a person was operating his vehicle to the left of the center line of a highway, is not, under all circumstances, negligent as a matter of law. On the other hand, it is for you to determine from all the facts and circumstances whether such conduct was, in fact, negligent."

We are satisfied that there was no error in the instruction.

In *Finney v. Wierman*, 52 Cal.App.2d 282, 286, 126 P.2d 143, 146, the court said: "The operator of a car obviously is not guilty of negligence as a matter of law merely because he drives the car into another lane or onto the left side of the highway [citations]."

[15, 16] Express approval was given to the *Finney* case by the Supreme Court in *Mathers v. County of Riverside*, 22 Cal. 2d 781, 785, 141 P.2d 419, 421, where, in discussing an instruction which told the jury that if plaintiff violated § 525 she "was guilty of negligence per se" the court

said: "The rule is elastic. It is not a rigid rule the violation of which under all circumstances constitutes negligence as a matter of law [citations, including *Finney v. Wierman*]. A court may or may not accept the standard of conduct prescribed in a criminal statute as a basis of a civil suit for negligence, and if it does not, the trier of fact must determine whether the actor has conducted himself as a man of ordinary prudence. *Clinkscales v. Carver*, 22 Cal.2d 72, 136 P.2d 777. The standard fixed by a criminal statute is not necessarily under all circumstances the standard in a civil action for negligence. Its violation may not constitute negligence as a matter of law where such violation occurs as the result of acts in emergencies under the proper circumstances. *Finney v. Wierman*, supra; *Jolley v. Clemens*, 28 Cal.App.2d 55, 82 P.2d 51; *Freitas v. Passerino*, supra [131 Cal.App. 585, 21 P.2d 993]; *Hill v. Peres* supra [136 Cal.App. 144, 28 P. 2d 944]."

[17] It is self-evident that if respondent did drive somewhat left of center such action could not possibly have been a proximate cause of the collision, since, as we have pointed out earlier, it simply delayed for a split second an occurrence which was inevitable. For this reason, if for no other, the instruction was not erroneous.

[18, 19] Appellants' third contention is that the court erred in giving the following instruction:

"It was the duty of the plaintiff, J. Grasso, to use reasonable care to look for vehicles on the street before he attempted to cross it. This duty is not fulfilled by looking and failing to see that which is readily and clearly visible. When to look is to see, the mere statement that one did look and could not see will be disregarded as testimony."

Counsel argue that appellant had the right to rely upon the presumption that other drivers would not violate the law. Subdivision (b) of § 552 already discussed

TYLER v. LARSON.

Civ. 17869.

District Court of Appeal, Second District,
Division 3, California.

Aug. 28, 1951.

Hearing Denied Oct. 25, 1951.

Action by James A. Tyler, as administrator of the estate of Jennie Pover, deceased, against Ellen R. Larson to reform a deed from one in joint tenancy to one as tenants in common. The Superior Court, Los Angeles County, Frederick F. Houser, J., gave judgment for the plaintiff and the defendant appealed. The District Court of Appeal, Vallée, J., held that where deceased executed the deed intending and believing that it made defendant a tenant in common and not a joint tenant, plaintiff was entitled to have the deed reformed whether or not defendant knew of or suspected the mistake.

Judgment affirmed.

Prior opinion 229 P.2d 364.

1. Appeal and error ⇨907(3)

Where appeal was on judgment roll, court took facts as found by lower court as true.

2. Reformation of Instruments ⇨19(1)

Under statute providing that when, through mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of the party aggrieved, so as to express that intention, mistake of one of the parties alone is not sufficient ground for reformation. Civ.Code, § 3399.

3. Reformation of Instruments ⇨19(1)

Where deed made freely and voluntarily without consideration was by mistake on part of grantor alone made to herself and another grantee as joint tenants, statute providing that when, through a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express intention of parties, it may be revised on application of party aggrieved so as to express that intention, was not applicable. Civ. Code, § 3399.

4. Reformation of Instruments ⇨26

The "party aggrieved" in the sense of statute providing that when, through fraud,

laid on appellant the duty of yielding the right of way to respondent who was not only in the intersection, but almost entirely across it. We have already cited cases dealing with the duty of a driver in a "through highway" to keep a lookout and maintain control at all times. Those cases and the rule of *Couchman v. Snelling*, supra, and *Page v. Mazzei*, supra, fully answer appellants' attack on this instruction.

[20] Appellants next attack the following instruction:

"You are instructed that even though a person has the right of way he is still under an obligation to exercise ordinary care at all times to avoid an accident. In that connection, I further instruct you that a person cannot drive carelessly and negligently from a place of safety into a place of danger merely and solely because he has the right of way over some other vehicle."

In the first place, appellant did not have the right of way; respondent had it, and it is difficult to see why defendant tendered the instruction since it is based on that false premise. That appellant while driving on Ashby was in a place of safety (to himself) is obvious, and that when he entered the intersection he drove into a place of danger (to all concerned) is equally obvious. There was no error.

[21] Finally appellants complain of the court's refusal to give the following instruction: "If you believe from the evidence that at the time and place of the accident in question the plaintiff, J. Grasso, was acting as would a reasonably prudent person under like circumstances, then and in that event he was not guilty of any negligence," when it would have balanced off a somewhat similar one which was given at defendant's request. We find no merit in this claim since the jury were fully and fairly instructed on the whole subject.

The judgment is affirmed.

NOURSE, P. J., concurs.

mutual mistake, or mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of the party aggrieved so as to express that intention, means one whose pecuniary interest is affected by the mistake, and includes one who paid value for land which by mistake was omitted from the deed. Civ.Code, § 3399.

See publication Words and Phrases, for other judicial constructions and definitions of "Party Aggrieved".

5. Reformation of Instruments ⇨17(1), 18

Equity, at instance of grantor, his heirs, devisees, or representatives, will reform a voluntary conveyance where, by mistake of law or fact, a larger estate or more land has been granted than was intended to be conveyed, and it is immaterial that the grantee is cognizant of the mistake.

6. Reformation of Instruments ⇨16

Where grantor executed deed conveying property to herself and another, without consideration, intending and believing that it made other grantee a tenant in common and not a joint tenant as expressed therein, grantor's administrator was entitled to have deed reformed to comply with grantor's intent, whether or not grantee knew of or suspected the mistake.

7. Appeal and error ⇨654

Where party appealed on judgment roll alone, motion for augmentation of record by which she sought to have certain exhibits introduced in evidence by her made part of record on appeal was denied.

Robert M. Wiley, Hemet, for appellant.

Hobart & Hobart, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal on the judgment roll from a judgment which reforms a deed from one in joint tenancy to one as tenants in common.

Ellen R. Larson, appellant, is the youngest daughter of decedent Jennie Pover. On November 30, 1945, Jennie executed a deed conveying a parcel of realty to herself and

Ellen as joint tenants. From November 1, 1945, or prior thereto, until the death of Jennie, a confidential relation existed between Jennie and Ellen. Jennie was competent and of sound mind at the time she executed the deed. There was no fraud, misrepresentation, duress, or undue influence in connection with the execution of the deed. Ellen did not give Jennie any consideration for the deed. Jennie died on February 1, 1947.

The court found that at the time Jennie executed the deed she believed and understood it would have the effect of giving Ellen only a half interest in the property and she would retain a half interest, and her intent was to make Ellen a tenant in common and not a joint tenant. The only conclusion that can be drawn from the findings is that the deed, made freely and voluntarily, without consideration, was, by mistake on the part of Jennie alone, made to herself and Ellen "as joint tenants." Although an amendment to the complaint filed during the trial alleged that Ellen "knew that the decedent at the time of the execution of said deed did not intend to have said deed convey other than an undivided one-half interest in the property," the court did not so find. There is no finding that Ellen knew of or suspected her mother's mistake at the time of the execution of the deed. The judgment strikes the words "as joint tenants" from the deed and substitutes the words "as tenants in common." Ellen appeals.

[1] The assignment of error is that the findings do not support the judgment. As this is an appeal on the judgment roll, we must take as true the facts found.

[2,3] Appellant relies on Civil Code section 3399, which reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention * * *." Under this section a mistake of one of the parties alone is not sufficient ground for reformation. *Baines v. Zuieback*, 84 Cal.App.2d

483, 489, 191 P.2d 67. Appellant argues that there is no finding that Ellen knew or suspected that Jennie intended a tenancy in common and not a joint tenancy "at the time" the deed was executed, and that therefore the judgment is not supported by the findings. Respondent maintains that section 3399 does not apply to the facts found. We have concluded that respondent's contention must be upheld.

[4] There was no consideration for the deed. It was voluntary, one of gift. Referring to section 3399 in *Enos v. Stewart*, 138 Cal. 112, 115, 70 P. 1005, 1006, the court stated: "The party aggrieved, in the sense of the statute, means one whose pecuniary interest is affected by the mistake. It would include one who paid value for land which by mistake was omitted from the deed. * * * But the section was never intended to overthrow well-settled principles upon which equity has been administered under the common law. The section certainly does not contain all the law with respect to the correction of mistakes in courts of equity. It is only where it clearly appears that a long-established principle is intended to be overthrown that the court will give such effect to a statute. In *re Mills' Estate*, 137 Cal. 298, 70 P. 91."

[5] It is old and well-established law that equity, at the instance of a grantor, his heirs, devisees, or representatives, will reform a voluntary conveyance, where, by mistake of law or fact, a larger estate or more land has been granted than was intended to be conveyed; and it is immaterial that the grantee is cognizant of the mistake. The grantee has given nothing for the conveyance; he is deprived of nothing; and he cannot complain if the mistake is corrected. *Walker v. Armstrong*, 8 De.G. M. & G. 531, 44 Eng.Rep. 495; *Stone v. Hale*, 17 Ala. 557; *Mitchell v. Mitchell*, 40 Ga. 11, 16; *Andrews v. Andrews*, 12 Ind. 348; *Rice v. Hall*, 42 S.W. 99, 19 Ky.L. Rep. 814; *Coale v. Merryman*, 35 Md. 382; *Beckius v. Hahn*, 114 Neb. 371, 207 N.W. 515, 517, 44 A.L.R. 73; *Day v. Day*, 84 N.C. 408; *Delap v. Leonard*, 189 App.Div. 87, 178 N.Y.S. 102; *Lyon v. Balthis*, 24 Ohio App. 57, 155 N.E. 815, 816; *Thompson v.*

Stack, 21 Wash.2d 193, 150 P.2d 387, 390; 45 Am.Jur. 599, sec. 31; *Clark*, Principles of Equity, secs. 341, 342, 361; Anno. 69 A.L.R. 430, 128 A.L.R. 1302, 10 Ann.Cas. 524. We have not found a dissenting voice.

The Restatement of Restitution says that a person is entitled to restitution from another because of mistake of fact if he has transferred land to the other under such circumstances that, had he paid money to the other, he would have been entitled to restitution, and that the rule is applicable to a situation where an interest different from or larger than was intended in land is transferred by the person causing the transfer. Rest., Restitution, sec. 39. The same work says: "A gift which is made as a result of a mistake of law can be rescinded as freely as if the mistake were one of fact. * * * Likewise, restitution is granted if there is an error as to the effect of a deed of conveyance, as a result of which a different or a larger interest is given than intended." Rest., Restitution, sec. 49. An illustration given is: "Intending gratuitously to convey merely a life estate in Blackacre, A executes to B a conveyance in fee, A being mistaken as to the legal effect of the words which he uses. A is entitled to reformation of the deed to accord with his intention." Rest., Restitution, sec. 49, Illustration 4. Comment b of section 163 reads: "*Unilateral mistake*. Where a person in a gift transaction confers a benefit upon another as a result of a mistake of fact, he is entitled to restitution even though the other did not share in the mistake and did not know of or suspect its existence (see sec. 26)."

[6] As the court found that Jennie executed the deed, intending and believing that it made Ellen a tenant in common and not a joint tenant, plaintiff was entitled to have the deed reformed whether or not Ellen knew of or suspected the mistake. We conclude that the findings support the judgment.

[7] Appellant filed a motion in this court for augmentation of the record. She seeks to have certain exhibits introduced in evidence by her made a part of the record.

on appeal. She says these exhibits will show Jennie intended to convey a joint tenancy. If so, the appeal should not have been taken on the judgment roll alone.

The motion for augmentation of the record is denied. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.



106 Cal.App.2d 438

SMOKLER v. CITY OF LOS ANGELES et al.

Civ. 18272.

District Court of Appeal, Second District,
Division 3, California.

Aug. 31, 1951.

Hearing Denied Oct. 29, 1951.

Art Smokler sued to enjoin City of Los Angeles, the Department of Building and Safety of Los Angeles and G. E. Morris, Superintendent of the Department from interfering with operation of automobile wrecking business on certain zoned property. From a judgment of Superior Court, Los Angeles County, Roger Alton Pfaff, J., declaring certain provisions of Los Angeles Municipal code unconstitutional and enjoining defendants from interfering with plaintiff conducting auto wrecking business, defendants appealed. The District Court of Appeals, Vallée, J., held that since the provisions of the Los Angeles Municipal Code prohibiting such use had been amended to permit such use the questions raised were moot.

Reversed with instructions.

1. Appeal and error ☞781(4)

The constitutionality of an ordinance, prohibiting a business in a certain zone, which had been amended during the pending of appeal to permit such a business in the zone involved, was moot.

2. Appeal and error ☞1107

Where there had been a finding by the trial court that ordinance prohibiting business in a certain zone was unconstitutional and the ordinance had been amended to

permit that business in the zone in question, the appellate court would not dismiss the appeal but would order judgment be given in conformity with the amended ordinance.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Alan G. Campbell, Deputy City Atty., all of Los Angeles, for appellants.

George E. Cryer, R. Alston Jones, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment which decreed that certain provisions of the zoning ordinance of the city of Los Angeles (Ord. 90,500 as amended; secs. 12-16.02, Los Angeles Municipal Code), insofar as they operate to prohibit plaintiff from conducting the business of automobile wrecking, as therein defined, on specified parcels of real property, is unreasonable, unconstitutional, and void. The judgment also enjoins defendants from interfering with plaintiff in conducting the automobile wrecking business on said property.

Plaintiff is the owner of several contiguous parcels of real property on San Fernando Road in Los Angeles. He acquired one parcel in 1944, two in 1948, and two in 1949. Since acquiring the several parcels he has continuously occupied them, and during most of the time engaged thereon in the business of buying and dismantling used motor vehicles and selling parts thereof. Plaintiff's property is classified by the zoning ordinance in zone "M2". The use of property for automobile wrecking is not permitted in zone "M2". It is permitted in zone "M3". The court concluded that the ordinance is unconstitutional as a matter of law in excluding automobile wrecking yards from zone "M2".

[1, 2] Since the appeal was taken, and on January 9, 1951, the provisions of the Los Angeles Municipal Code prohibiting the use of property in zone "M2" for automobile wrecking were amended to permit such use therein. The question whether

the ordinance is unconstitutional in prohibiting the use of property in zone "M2" for automobile wrecking is, therefore, moot. The appeal should not be dismissed however. To do so would permit plaintiff to conduct an automobile wrecking business in zone "M2" in any manner whatsoever without limitation or restriction and would restrain defendants from interfering therewith. The ordinance (No. 97,521), adopted January 9, 1951, permits the use of property in zone "M2" for automobile wrecking under conditions therein particularly specified. The judgment should give plaintiff the right to use his property to conduct an automobile wrecking business under the conditions specified by Ordinance 97,521 and any ordinance hereafter adopted applicable to the conduct of an automobile wrecking business.

The judgment is reversed with directions to enter a judgment in accordance with the views herein expressed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.



106 Cal.App.2d 329

HOLT v. PARMER.

Civ. 4247.

District Court of Appeal, Fourth District,
California.

Aug. 28, 1951.

Ione P. Holt sued David W. Parmer to establish and enforce a foreign state court's judgment granting plaintiff a divorce from defendant and providing for support of their minor child by defendant. From a judgment of the Superior Court of San Diego County, C. M. Monroe, J., for plaintiff, defendant appealed. The District Court of Appeal, Barnard, P. J., held that defendant's special defense of invalidity of the support judgment as procured by extrinsic fraud constituted a collateral attack thereon and raised an equitable issue not triable by a jury.

Judgment affirmed.

1. Jury ⇐12(1)

The right to jury trial is determined by character of issues framed by pleadings.

2. Jury ⇐13(7)

When facts constituting fraud and relief sought therefor are cognizable in court of law, parties to action are entitled to jury trial, but where the case made by pleadings involves application of equitable doctrines and granting of relief obtainable only in equity court, parties are not entitled to jury trial.

3. Divorce ⇐330

Jury ⇐13(7)

In divorced wife's suit to establish and enforce foreign state court's judgment granting her divorce from defendant and providing for his support of parties' minor son, special defense of invalidity of support judgment as procured by extrinsic fraud constituted collateral attack thereon and raised equitable issue which could not properly be tried by jury.

4. Divorce ⇐332

A divorced husband, accepting foreign state court's judgment granting wife divorce and marrying another in reliance on judgment as terminating first marriage, with full knowledge of facts, should not be permitted to attack validity of part of judgment providing for his support of parties' minor son on ground that he was prevented by extrinsic fraud from making defense and having benefit of fair adversary trial as special defense in divorced wife's suit to establish and enforce judgment, regardless of whether he is technically estopped from attacking judgment.

H. G. Sloane, H. M. Fisher, San Diego,
for appellant.

White & Condra, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to establish a judgment of a sister state granting a divorce and providing for the support of a minor child.

The facts are not disputed. The plaintiff is the former wife of the defendant. In 1937, she obtained a judgment of di-

voice in the state of Georgia, where the parties resided. The defendant was personally served there and defaulted. The judgment provided for certain "alimony" payments to the plaintiff until she remarried, and further ordered the defendant to pay \$50 per month for the support of a minor son until he reaches the age of 21 years. Both parties have since remarried, and there is no controversy with respect to payments for the benefit of the wife. The defendant left Georgia before the judgment was entered and for some years has resided in California. He has never made any of the payments for support of the child called for by that judgment.

The complaint in this action is in the usual form and the prayer is that the Georgia judgment be established as a foreign judgment; that it be enforced in the manner provided by law; that it be adjudged and decreed that a certain amount, with interest, is due; and for such other equitable relief as is proper.

The defendant set up a special defense, challenging the validity of the judgment on the ground that it was procured by extrinsic fraud in that the trial judge and the wife's attorney, in the Georgia action, did certain things "in the nature of fraud, which dissuaded him from raising a defense on the merits, or contesting the action." In this regard, he alleged that on June 5, 1937, he was served with "process" requiring him to appear and answer in the divorce action on the third Monday in July, 1937, and was also served with an order to appear on June 11, 1937, to show cause why a petition for temporary alimony should not be allowed; that he appeared before the judge on June 11; that in the presence of the judge and of his wife's attorney he "related his defense" and told them of several acts of misconduct on the part of his wife; that the judge said he did not blame him, that he would not grant the application for alimony or maintenance, and that he would trust him to do what was right by his son when he was financially able to do so, and further advised him "to put 3000 miles between himself and the plaintiff"; that his wife's attorney also expressed sympathy

for him and took him out to dinner; that he was thus led to believe that no further proceedings for a money judgment would be taken, if he would leave the state; that "in reliance on such belief" he left Georgia and later came to California, where he has resided since 1938; and that by reason of these facts he "did not have the benefit of a fair adversary trial in such Georgia action." The prayer was that the plaintiff be denied any relief based upon any judgment "purporting to have been rendered in such action."

The court refused the defendant's demand for a jury and proceeded to try the cause, finding in all respects in favor of the plaintiff. Among other things, it found that the Georgia judgment had been duly and properly entered; that the material allegations of the defendant's special defense are all false; that he did not leave Georgia in reliance upon any representations made by the judge or the plaintiff's attorney in the other action; and that he married his present wife in 1940, in reliance upon that judgment as terminating his marriage with the plaintiff, and with full knowledge of all of its terms. As conclusions of law, it was found that the plaintiff is entitled to have the Georgia judgment established as a foreign judgment of divorce and support for the minor son; that she is entitled to recover judgment for such payments thereunder as are not barred by the statute of limitations; and that the defendant is estopped from attacking the Georgia judgment. Judgment was entered accordingly, and the defendant has appealed on the grounds that the court erred in denying him a jury trial, and erred in concluding that he is estopped from attacking any part of the other judgment.

[1,2] The appellant contends that an action based upon a foreign judgment is an action at law; that an issue of fraud may be set up as a defense in a law action; that the character of the action was not changed by the issue of fraud here raised, which was defensive only; that the fact that the respondent would be entitled to the assistance of equity in enforcing the judgment, if entered, is not controlling;

and that no affirmative relief, which might have changed the character of the action, was here sought. The right to a jury trial is determined by the character of the issues framed by the pleadings. *Stern v. Hillman*, 115 Cal.App. 156, 300 P. 972. In *Fish v. Benson*, 71 Cal. 428, 12 P. 454, 457, the complaint was in ejectment and the defendants filed a cross-complaint seeking to cancel certain conveyances on the ground of fraud. The court pointed out that the cross-complaint set up a cause of action and sought relief which could be considered only in a court of equity. The court there said: "Both courts of law and of equity, in proper cases, have jurisdiction in cases of fraud; and, when the facts constituting a fraud and the relief sought are such as are cognizable in a court of law, the parties are entitled to a jury trial; but where the case, is made by the pleadings, involves the application of the doctrines of equity, and the granting of relief which can be obtained in a court of equity, and not elsewhere, the parties are not entitled to a jury trial."

[3] Under the circumstances which here appear, the special defense was something more than a mere negative defense. It attacked the validity of the judgment on which the respondent's sole cause of action was based. The defense was worthless unless it succeeded in setting aside that judgment which had become final. By interposing this defense the appellant sought an affirmative action of the court by holding that the judgment sued on was void and ineffective because it was procured by fraud. This was a collateral attack on the prior judgment, which could be thus attacked only on the ground of extrinsic fraud. Not only was an equitable issue presented but the relief sought was one which could be obtained only in a court of equity. This equitable defense determined, "the character of the issues framed by the pleadings" and, as a practical matter, raised the only real issue in the case. We are unable to see how such an issue, directly involving the setting aside of a final judgment for extrinsic fraud, could properly be left to a jury.

[4] The appellant further contends that the finding and conclusion of an estoppel are erroneous since his remarriage worked no prejudice to the respondent, and since he was not attempting to set aside the part of the judgment which affected the marriage status. The appellant attacked the judgment on the ground that he had been prevented by fraud from making a defense and from having "the benefit of a fair adversary trial." With full knowledge of the facts he had accepted the judgment as being effective, and had remarried. Whether or not an estoppel technically appears, he should not now be permitted to attack part of the judgment, while still relying on the remainder as being in full force. No reversible error appears in this connection.

The judgment appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



106 Cal.App.2d 286

RAINEY v. ROSS et al.

Civ. 14667.

District Court of Appeal, First District,
Division 1, California.

Aug. 24, 1951.

Action by Frederick A. Rainey against Al-
lan R. Ross, and others, for injuries sus-
tained by plaintiff when struck by a motor
vehicle. The Superior Court, Alameda Coun-
ty, O. D. Hamlin, J., rendered judgment for
plaintiff against certain defendants and for
the named defendant against plaintiff for
costs of suit, and plaintiff appealed from that
portion of the judgment. The District Court
of Appeal, Fred B. Wood, J., held that un-
der registration provisions of Vehicle Code,
seller, who sold and delivered possession of
vehicle to buyer and received consideration
therefor, and who endorsed and delivered
certificate of ownership to buyer but who
failed to deliver certificate of registration,

continued as owner to whom liability for the negligent operation of vehicle by another was imputed.

Portion of judgment appealed from reversed.

1. Automobiles ⇐19

Where seller sold and delivered possession of vehicle to buyer and received consideration therefor, and seller endorsed and delivered certificate of ownership to buyer but failed to deliver certificate of registration, which was in possession of Motor Vehicle Department for renewal of registration, buyer lacked indicia of ownership and owed no duty of consummating registration of vehicle. Vehicle Code, §§ 177(1, 2), 178, 179, 402.

2. Automobiles ⇐19

Seller, who sold and delivered possession of vehicle to buyer and received consideration therefor, and who endorsed and delivered certificate of ownership to buyer but who failed to deliver certificate of registration, continued as owner to whom liability for the negligent operation of vehicle by another was imputed. Vehicle Code, §§ 177(1, 2), 178, 179, 402.

3. Automobiles ⇐19

The registration requirements of Vehicle Code concerning the transfer and recordation of transfer of motor vehicles represent and effectuate a plan and procedure in interest of public welfare to protect innocent purchasers and to afford identification of vehicles and persons responsible in cases of accident and injury. Vehicle Code, §§ 177(1, 2), 178, 179, 402.

4. Automobiles ⇐19

Under statute providing that no transfer of title to a vehicle shall pass unless transferor shall have made proper endorsement and delivery of certificate of ownership and registration card to transferee, vehicle of seller, who sold and delivered possession of vehicle to buyer and received consideration therefor, and who endorsed and delivered certificate of ownership to buyer but who failed to deliver certificate of registration which was in possession of Motor Vehicle Department for purpose of renewal of registration, was a registered vehicle, and sale did not effect a transfer

to buyer. Vehicle Code, §§ 150, 151, 156, 159, 160, 161, 164, 177(1, 2), 178, 186, 402.

James A. Johnstone, E. J. Rice, Emeryville, for appellant.

Carroll, Davis & Freidenrich, J. D. Burdick, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff Frederick A. Rainey brought this action to recover damages for injuries sustained by him when struck by a motor vehicle driven by defendant Beulah Maxine Hall. He alleged that Hall and defendants Lowell J. Herzog, Allan R. Ross, and Mrs. Allan R. Ross were the owners of the vehicle. Herzog and Mrs. Ross were served but defaulted. Hall was not served. Mr. Ross answered, denying all of the material allegations of the complaint.

The case was tried before the court without a jury. The court found that the accident occurred on June 22, 1945; that Rainey sustained personal injuries proximately caused by Hall in the operation of the vehicle; that as a result of the negligence of Hall Rainey was damaged in the sum of \$4,653.34; that at the time of the accident the automobile was owned by Herzog and Mrs. Ross, and operated by Hall with their permission and consent, as their agent and within the scope of the agency; that Mr. Ross was not then the owner of the automobile, and that Hall was not his agent, servant, or employee. The court rendered judgment for plaintiff Rainey against Herzog and Mrs. Ross in the sum of \$4,653.54 and costs of suit; that defendant Allan R. Ross have judgment against Rainey for his costs of suit. Plaintiff has appealed from that portion of the judgment which is against him and in favor of Ross.

The appeal presents the question whether or not respondent Ross was, at the time of the accident, the owner of the vehicle within the meaning of that term as used in section 402 of the Vehicle Code, which imputes to the owner the negligence of another person who uses or operates the vehicle with the permission, express or implied, of the owner.

Relevant to this inquiry, the court specifically found (upon evidence which supports the findings) that between March 1 and April 13, 1945, respondent sold and delivered possession of the vehicle to Herzog, receiving the consideration therefor; that it was a bona fide sale and transfer; that at the same time he made proper endorsement of the certificate of ownership and delivered the certificate to Herzog; that prior to the sale respondent had been the legal and registered owner of the vehicle; that at the time of the sale the certificate of registration was not in the possession of respondent; that it was then in the possession of the State Department of Motor Vehicles, to which it had been sent by respondent in connection with his application for renewal of registration of the vehicle for the year 1945, and a new certificate of registration had not been returned to him; that respondent received his 1945 certificate of registration from the department several days after the accident, and he then and there mailed it to Herzog at the latter's address;¹ and that respondent did not either deliver or mail to the Department of Motor Vehicles a notice of the sale of the vehicle or the certificates of ownership and registration pursuant to said sale. The records of the State Department of Motor Vehicles, in evidence, indicate that neither the certificate of ownership nor the 1945 certificate of registration was delivered or mailed to the department until a considerable length of time after the accident. According to those records, Mr. Ross was the legal and registered owner of the vehicle at the time of the accident.

Appellant contends that at the time of the accident, June 22, 1945, respondent was still the "owner" of the vehicle within the meaning of that term as used in section 402 of the Vehicle Code. He predicates this contention upon the fact that respondent chose one of several methods which

the law accorded him, when selling a vehicle, to terminate his imputed liability for subsequent negligent operation, and, assertedly, ineffectually complied with that method because he did not, prior to the accident, deliver to the buyer the certificate of registration in addition to the vehicle and the endorsed certificate of ownership, despite the impossibility of delivering the certificate of registration, which was then in the possession of the Department of Motor Vehicles. In this connection, appellant directs attention to the fact that the law did not impose an impossibility in this regard, for it accorded respondent an alternative method of terminating liability under section 402, that of delivering the vehicle to the buyer and delivering or mailing to the department a notice of the sale, giving the date of the sale, the names and addresses of the owner and the transferee, and a description of the vehicle.

Appellant is correct in his contention. The statutes applicable in 1945 were sections 186, 178, and 177 of the Vehicle Code. The pertinent provisions of section 186 read as follows: "(a) No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements:

"(1) The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the United States mail, addressed to the department, such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration except as otherwise provided in Section 180, or

"(2) The transferor shall have delivered

testified that his wife had a letter on the 21st asking for the white slip, and that as soon as he got the white slip back on his renewal it was sent to Herzog, mailed after the accident but before Ross knew about the accident.

1. Appellant's argument is predicated, in part, upon the assumption that Ross received the new certificate of registration before the accident occurred. Ross did testify that he thought he received it about June 19 or 20, 1945. But he also

to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer except as provided in Section 178." Stats. 1943, ch. 1129, p. 3072.

It is apparent that if the seller relies upon the method of transfer prescribed by subdivision (1) of section 186 he depends upon the buyer to complete the transaction. In the instant case the buyer did not complete the transaction prior to the accident. He neither delivered nor mailed any of the documents to the department prior to the accident. If in this case the seller had sought to avail himself of the provisions of subdivision (2) of section 186 by delivering or mailing the "appropriate documents" directly to the department, he might be in a position to invoke his prior delivery of the certificate of registration to the department as delivery of one of the appropriate documents, a question not involved upon this appeal because the seller did not deliver or mail any document to the department pursuant to this sale.

The concluding clause of subdivision (2) of section 186 expressly recognized the several methods accorded by section 178 to a seller for terminating the further application to him of the provisions of section 402 in respect to imputed liability for negligent operation of the vehicle by any other person thereafter. Section 178 read as follows: "An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements:

"(1) When such owner has made proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code.

"(2) When such owner has delivered to the department or has placed in the United

States mail, addressed to the department, either a notice as provided in Section 177 or appropriate documents for registration of such vehicle pursuant to such sale or transfer." Stats. 1941, ch. 1053, p. 2719, at p. 2720. In respect to the notice (recognized as an alternative method by section 178), the pertinent provisions of section 177 prescribed that "Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department." Stats. 1935, ch. 27, p. 93, at p. 115.

[1,2] By the provisions of sections 178 and 177 the law accorded a bona fide seller, who delivered the vehicle to the buyer, three optional methods of terminating potential future liability under section 402. Two of them (delivery or mailing to the department, by the seller, of the notice or the appropriate documents) would give the state adequate information concerning the transfer that was in process, information which would be available to all who might have occasion to inquire. Respondent chose neither of these methods. The third optional method (delivery of both certificates, one of them endorsed, by the buyer to the seller) was the option which respondent chose to exercise. But he did not comply with the requirements under that option. He merely endorsed and delivered the certificate of ownership, did not deliver the certificate of registration. The impossibility of then delivering the certificate of registration to the buyer, because it was in the possession of the state pursuant to renewal of registration requirements, is of no significance. For the policy of the law in according a seller this method of avoiding future liability under section 402 was that of clothing the buyer with certain indicia of ownership,—possession of the vehicle and both certificates, one of them properly endorsed. When a seller complied with these three requirements the law im-

mediately imposed upon the buyer the duty of completing the transaction by forwarding to the state, within 10 days, both certificates, the proper transfer fee, and his application for a transfer of registration Veh. Code, § 179. Without possession of the certificate of registration the buyer lacked the indicated indicia of ownership, owed no duty of consummating the transaction of record, and the seller continued as "owner" for the purposes of section 402 as well as for other purposes. Nondelivery of the certificate of registration, from whatsoever cause, operated as a failure to meet the several requirements of the option which respondent chose to exercise. His inability to comply with those requirements did not prevent him from accomplishing the desired objective. He could have given the state the notice prescribed by section 177.² Indeed, if he had performed the duty imposed upon him by that section, he would have given timely notice to the state and would have terminated future liability under section 402.

[3] The code sections we have discussed represent and effectuate a thoughtfully evolved plan and procedure concerning the transfer and recordation of transfer of motor vehicles used upon the public highways, in aid of a policy to protect innocent purchasers and to afford identification of vehicles and persons responsible in cases of accident and injury, all in the interest of the public welfare. See *Henry v. General Forming, Ltd.*, 33 Cal.2d 223, 227, 200 P.2d 785, and *Larson v. Barnett*, 101 Cal. App.2d 282, 286, 225 P.2d 297, and cases cited. As said by the Supreme Court in 1924, "The nature of motor vehicle traffic requires that there be a more certain *indicia* of ownership than mere possession, for the protection of the general public in case of accidents or violations of the law and to prevent fraud upon innocent purchasers. In order to effectuate this purpose, registration and identification of motor vehicles is

required. *Parke v. Franciscus*, 194 Cal. 284, 292, 228 P. 435, 438. The plan has evolved into a well ordered system of motor vehicle title registration, and the regulation of ownership rights and duties upon the basis of such registration.

The Legislature began developing this plan as early as 1905, when it provided for registration of motor vehicles. Stats. 1905, ch. 612, p. 816. By 1919 the plan had been enlarged to affect civil rights and liabilities relating to vehicle ownership, through the medium of registration of transfer requirements. Veh. Act of 1915, § 8, as amended by Stats. 1917, ch. 218, p. 382, at pp. 388-392, and by Stats. 1919, ch. 147, p. 191, at pp. 199-202. In 1929 the owner's imputed liability statute was enacted. Stats. 1929, ch. 261, p. 566. In 1931 the Legislature added section 45 $\frac{3}{4}$ to the California Vehicle Act, requiring the owner to give the state immediate notice of the sale of a vehicle, and to permit him to avoid future responsibility under the imputed liability statute by delivering the vehicle and the certificate of ownership, properly endorsed, to the buyer, Stats. 1931, ch. 1026, p. 2099, at p. 2105, provisions which by 1945 had evolved into those now appearing in sections 177 and 178 of the Vehicle Code. Meanwhile, by amendment of section 178, the Legislature imposed the duty to deliver the certificate of registration (in addition to the vehicle and the endorsed certificate of ownership) if a seller desired to avoid future liability under section 402 by exercising the option given him by subdivision (1) of section 178. Stats. 1941, ch. 1053, p. 2719 at p. 2720. The conclusion is inescapable that that subdivision means exactly what it says, and that failure to deliver the certificate of registration inevitably resulted in a failure properly to exercise that option.

Respondent directs attention to section 182.1, added to the Vehicle Code in 1947, and contends it is in effect an implied

was also available to respondent, he having already delivered one of those documents, the certificate of registration, to the department.

2. It is unnecessary to decide, and we do not decide, whether or not the other option accorded by subdivision (2) of section 178 (delivery or mailing of the "appropriate documents" to the department)

amendment of section 178, dispensing with the otherwise required delivery, from seller to buyer, of the certificate of registration when the latter is already in the possession of the Department of Motor Vehicles for an annual renewal of registration. He recognizes that this 1947 enactment came too late to be operative in 1945, but urges it as an interpretation of the intent of the Legislature when it added the delivery of the registration certificate requirement to section 178 in 1941. The weakness of this contention inheres in the fact that section 182.1 says nothing of the kind. It deals with a quite different subject. It simply declares that the department may transfer the registration of a vehicle upon production of certain documents without production of the registration certificate, if the department already has that certificate in its possession upon application for renewal of registration. That is far from saying that a seller may, in such a case, satisfy the requirements of subdivision (1) of section 178 and insulate himself from section 402 without delivering the certificate of registration to the buyer.

Respondent advances the further argument that his was not a "registered" vehicle at the time of this sale, in view of the expiration of the 1944 registration and the delayed consummation of the 1945 registration; that sections 186 and 178 of the Vehicle Code apply only to "registered" vehicles; and that his delivery of the vehicle and the endorsed certificate of ownership, upon receipt of the sale price, effected a transfer of title to the buyer under the provisions of the general laws applicable to an unregistered vehicle, viewed as a tangible piece of personal property not enmeshed in the motor vehicle registration system.

This argument is ingenious but not convincing. The answer is furnished by the applicable provisions of the Vehicle Code. When the Department of Motor Vehicles determines that an applicant is entitled to registration of a vehicle, it "shall register the vehicle * * * and keep a record thereof * * *" Veh. Code, § 150, and

"issue a certificate of ownership to the legal owner and a registration card," § 151, and license plates or devices. § 156. "Every vehicle registration * * * and every registration card issued * * * shall expire at midnight on the thirty-first day of December of each year and shall be renewed annually," but certificates of ownership are not annually renewed, remaining "valid until suspended, revoked or canceled * * * for cause or upon a transfer * * *." § 159. Application for renewal must be made "by the owner" between January 1 and February 4, by presenting "the registration card last issued" and "payment of the full annual fee for such vehicle" § 160, and, when so made, the "vehicle may be operated on the highways" until the new indicia of current registration "have been received from the department" § 161. Upon renewing a registration, the department issues a new registration card and new license plates or devices to the owner. § 164.

[4] When a person's vehicle is registered for a given year (as was respondent's in 1944) and he observes these re-registration requirements for the ensuing year (as did respondent in 1945), there is no period of time during which the vehicle is not "registered." The registration of his ownership continues of record until appropriate information of a transfer reaches the department. The hiatus that occurs incident to the imposition and payment of the annual license fee, checking of appropriate records in the department, and the issuance of the new registration card and the new license plates or devices, is more seeming than real. There is nothing unreal about the payment of the "full annual fee." When, as here, timely application for annual renewal is made, it all relates back to the beginning of the year. We conclude that, at all times here involved, respondent's was a vehicle "registered hereunder" within the meaning of that term as used in section 186 of the Vehicle Code. In view of this conclusion, it is unnecessary to consider the question whether the provisions of section 178 apply only to a registered vehicle or to any motor

vehicle, registered or not, that is operated upon a highway.

The portion of the judgment appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.



106 Cal.App.2d 321

PEOPLE v. CURTIS et al.

Cr. 4651.

District Court of Appeal, Second District,
Division 3, California.

Aug. 28, 1951.

Rehearing Denied Sept. 6, 1951.

Hearing Denied Sept. 27, 1951.

Bernard Edwin Curtis and others were convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of a conspiracy to violate the statute prohibiting book-making. Proceedings were suspended and defendants were placed on probation on condition that each serve one year in county jail. Bernard Edwin Curtis and Jack Hyman appealed from nonexistent judgment and order denying motion for new trial. The District Court of Appeal, Vallée, J., held that the defendants' appeal could not be maintained.

Appeal dismissed; order affirmed.

1. Conspiracy ⇨23

Criminal conspiracy is agreement, express or implied, to commit any crime or to do any of acts specified by statute defining criminal conspiracy. Pen.Code, §§ 182, 184.

2. Conspiracy ⇨23

Gist of offense of criminal conspiracy is unlawful agreement between conspirators to commit offense prohibited by statute, accompanied by overt act in pursuance thereof. Pen.Code, §§ 182, 184.

3. Conspiracy ⇨47

Conspiracy may be proved by direct or indirect evidence, or by both. Pen.Code, §§ 182, 184.

4. Conspiracy ⇨47

To establish conspiracy it is not necessary to prove that parties met and actually agreed to jointly undertake criminal action charged. Pen.Code, §§ 182, 184.

5. Criminal law ⇨427(3)

Order in which testimony is introduced at trial on charge of criminal conspiracy is immaterial so long as conspiracy is ultimately proved. Pen.Code, §§ 182, 184.

6. Criminal law ⇨422(6)

Generally, hearsay rule prohibits reception in evidence of acts done and declarations made by one defendant, out of presence of his codefendant, against such codefendant.

7. Criminal law ⇨422(8)

Act, declaration, or omission of one alleged conspirator in presence of his alleged confederate is not hearsay and is admissible in evidence in prosecution for criminal conspiracy. Pen.Code, §§ 182, 184.

8. Criminal law ⇨422(1)

Act, declaration, or omission of alleged conspirator which forms part of transaction which is in dispute, that is, agreement coupled with overt act, is not hearsay and is admissible in evidence in prosecution for criminal conspiracy. Pen.Code, §§ 182, 184.

9. Criminal law ⇨427(2, 3)

Act or declaration of alleged conspirator, not part of transaction which is in dispute, made out of presence of his alleged confederate, is hearsay, and is not admissible in evidence in prosecution for criminal conspiracy until prima facie proof has been made of existence of conspiracy, subject to power of trial judge to regulate order of proof. Pen.Code, §§ 182, 184.

10. Conspiracy ⇨47

If it is proved that defendants, with view to attainment of same purpose, pursued such purpose by their acts, each performing some part thereof, trier of fact is justified in concluding that they were engaged in criminal conspiracy to effect common object. Pen.Code, §§ 182, 184.

11. Criminal law Ⓒ427(5)

In prosecution for conspiring to violate statute prohibiting bookmaking, evidence supported inference by court, sitting without jury, that initial "C" found on professional betting markers and owe sheets referred to defendant whose name began with letter "C". Pen.Code, §§ 182, 184, 337a, subds. 1-4, 6.

12. Criminal law Ⓒ427(5)

In prosecution for conspiring to violate statute prohibiting bookmaking, though writings in handwriting of defendant were declarations by him that might have been written out of presence of codefendant, court was justified in inferring that writings found in possession of codefendant had been delivered to him by defendant. Pen.Code, §§ 182, 184, 337a, subds. 1-4, 6.

13. Criminal law Ⓒ427(5)

In prosecution for conspiring to violate statute prohibiting bookmaking, evidence established prima facie case of conspiracy. Pen.Code, §§ 182, 184, 337a, subds. 1-4, 6.

14. Criminal law Ⓒ1159(2)

Where there was substantial evidence pointing to criminal conspiracy to violate statute prohibiting bookmaking in prosecution on that charge, appellate court would not question sufficiency of evidence. Pen. Code, §§ 182, 184, 337a, subds. 1-4, 6.

15. Criminal law Ⓒ422(6)

In prosecution for conspiring to violate statute prohibiting bookmaking, evidence of acts and declarations of alleged conspirators in furtherance of conspiracy made out of presence of confederate was properly admitted after prima facie proof had been made of existence of conspiracy. Pen.Code, §§ 182, 184, 337a, subds. 1-4, 6.

16. Criminal law Ⓒ1023(10)

Where proceedings in prosecution for conspiring to violate statute prohibiting bookmaking was suspended after conviction and defendants placed on probation on condition each serve one year in county jail, appeal from nonexistent judgment could not be maintained on behalf of defendants. Pen.Code, §§ 182, 184, 337a, subds. 1-4, 6.

Gerald L. Kales, Hollywood, for appellant Jack Hyman.

Harold Shire, Beverly Hills, for appellant Bernard Edwin Curtis.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendants were convicted by the court without a jury of a conspiracy to violate section 337a of the Penal Code, subdivisions 1 (pool selling or bookmaking), 2 (keeping or occupying a place with papers or paraphernalia for the purpose of recording or registering a bet), 3 (receiving, holding, or forwarding money or memoranda which referred to money bet on a horse race), 4 (recording or registering a bet), and 6 (accepting a bet on a horse race). Proceedings were suspended and the defendants placed on probation on the condition that each serve one year in the county jail. They appeal from a nonexistent judgment and from an order denying their motion for a new trial. As no judgment was pronounced, the appeal from the absent judgment must be dismissed.

Defendants' sole assignment of error is that the corpus delicti was not proved and that therefore the court erred in admitting in evidence acts and declarations of the defendants. They contend, apparently, that acts and declarations of an alleged conspirator are not, under any circumstances, admissible to prove the corpus delicti.

On July 20, 1950, a police officer entered an establishment occupied by defendant Hyman at 4459 East Gage Avenue, in Bell, California. The place was equipped with three telephones; one was numbered LUCAS 8180. The officer found numerous professional betting markers, owe sheets, and scratch sheets used in bookmaking, and racing forms. The handwriting on the betting markers was that of defendant Curtis. The horses shown on many of the betting markers and owe sheets were running on that date on tracks throughout the country. The betting markers contained ABC columns with figures indicating the amount bet—whether for win, place, or

show—and, in a very few instances, winnings. A great many betting markers and owe sheets bore various names followed by "for C." The "C" stood for the agent who placed the bets. One of the scratch sheets had been indexed as to horses by their index numbers throughout the United States, and the results of races at various tracks had been placed on it. A slip of paper on the message form of the the Hollywood Roosevelt Hotel, in the handwriting of defendant Curtis, was found on the floor, torn into "small bits." The name "Curtis" was written on it. The torn slip had the names "Viola," "Janet," "Tommy," "Ted," and "Jordan" on it, with telephone numbers. These names corresponded with names on betting markers. The slip was used in connection with bookmaking. Hyman was not arrested at that time.

On the following day, July 21, 1950, the same officer arrested defendant Hyman at 1215 Viola Street, Glendale. The officer found much betting paraphernalia at this address, including betting markers, a California Digest, and a scratch sheet, the latter two dated July 21, 1950. The betting markers were in the handwriting of Curtis, and were similar to those found at the Bell address. One had "Janet for C" on it; another "Viola for C"; another "Jordan for C"; others with various names for "C." Figures on the betting markers corresponded with figures written on the California Digest and the scratch sheet. The digest had been indexed as to horses by their index numbers throughout the United States, and the results of races at various tracks had been placed on it. Hyman told the officer that the betting markers were not in his handwriting and that this was the first time "he'd been caught making book."

During the time the officer was at the Glendale address a number of telephone calls came in; the persons calling placed bets on horses running that day.

Other officers arrested defendant Curtis in rooms 618 and 619 of the Hollywood Roosevelt Hotel in Los Angeles on July 21, 1950. Curtis had occupied rooms 618 and 619 for a considerable period of time prior to July 21, 1950, and police officers had

listened to his telephone calls. The calls indicated that Curtis was referring persons to Hyman for the purpose of placing bets. In one of them he told the person calling to telephone LUCAS 8180 to place a bet. An owe sheet, in the handwriting of Curtis, was found in his coat pocket in room 618. This owe sheet contained a bookmaking record for the week ending July 15; the name of each agent, the amount each owed, the amount the book owed to each, the payments to the various agents, a list of expenses, and gross and net profits. The initials of defendant Hyman appeared in the items of expense thus: "J H ———150 —." Numerous names on this owe sheet corresponded with the names on the betting markers found at the Bell and Glendale addresses. While the officers were in Curtis' room a number of persons telephoned in to make bets on horse races.

There was evidence of a telephone conversation between defendants Curtis and Hyman as follows: "Mr. Curtis says, 'Always open the door.' Jack says, 'Bernie, I had the door open like this, about a foot.' Mr. Curtis says, 'Always be as nice and polite as you can when those guys come in.' Jack says, 'It sure was nice, it was pretty nice of them, they didn't take any bets.' * * * Jack says, 'I don't care what you say, we had a hell of a day, even if you don't collect a penny.'"

Defendants did not testify and did not offer any evidence.

[1-5] A criminal conspiracy is an agreement, express or implied, to commit any crime or to do any of the acts specified by the statute. Pen.Code, sec. 182. The crime is not complete by the mere agreement, there must be an overt act. Pen. Code, sec. 184. The gist of the offense is the unlawful agreement between the conspirators to commit an offense prohibited by statute, accompanied by an overt act in pursuance thereof. A conspiracy may be proved by direct or indirect evidence, or by both. Usually the only way it can be proved is by circumstantial evidence. To establish a conspiracy it is not necessary to prove that the parties met and actually agreed to jointly undertake the criminal action charged. The

order in which the testimony is introduced at the trial is immaterial so long as the conspiracy is ultimately proved. These are commonplaces which require no citation of authority.

[6-9] Generally, the hearsay rule prohibits the reception in evidence of the acts done and the declarations made by one defendant, out of the presence of his codefendant, against such codefendant. One of the exceptions to the hearsay rule is provided by section 1870(6) of the Code of Civil Procedure, which reads: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * *. 6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy." The section refers to declarations made by an alleged conspirator out of the presence of his confederate. Section 1870 also provides that evidence may be given of "[t]he act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty." Subd. 7. Section 1850 reads: "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction." An act, declaration, or omission of one alleged conspirator in the presence of his alleged confederate is not hearsay and is admissible in evidence. An act, declaration, or omission of an alleged conspirator which forms a part of the transaction which is in dispute—the agreement coupled with an overt act—is not hearsay and is admissible in evidence. An act or declaration of an alleged conspirator, not a part of the transaction which is in dispute, made out of the presence of his alleged confederate, is hearsay, and is not admissible in evidence until prima facie proof has been made of the existence of the conspiracy, subject to the power of the trial judge to regulate the order of proof. The very existence of a conspiracy is generally a matter of inference deduced from acts of the persons accused, and frequently from their declarations, written and verbal.

The distinction between admissible and inadmissible acts and declarations of alleged conspirators is lucidly explained in *People v. Collier*, 111 Cal.App. 215, 240, 295 P. 898, 909: "Now it must be apparent that when an agreement is not in writing parol evidence is admissible to prove its contents. And, when the agreement is in parol, evidence of the conversations of the parties tending to disclose the agreement made is evidence of the very fact to be proved and hence is evidence of the *res gestae*. Hence, when the conspiracy charged in the indictment is an 'agreement' to do or not to do a certain act, evidence of the conversations and acts of the conspirators which constitute the agreement is admissible to prove the agreement. Thus, when, as a part of the agreement, one or more of the conspirators undertakes to ask for a bribe, one or more agrees to accept a bribe, one or more agrees to do or not to do some act for the purpose of effectuating the compact, and one or more of the conspirators gives his assent to the compact either by express words or by actions from which such assent might be implied, evidence of such facts, when the agreement is in parol, is competent evidence of the acts or declarations which form 'a part of the transaction' which is in dispute, and, as such is admissible under the express provisions of section 1850, Code of Civil Procedure. On the other hand, if a witness were asked to relate a conversation which he had had with one of the alleged conspirators such testimony would be hearsay and would not be admissible under section 1870, subdivision 6, Code of Civil Procedure, until after the conspiracy had been proved, and, by thus permitting evidence of the acts and declarations of a conspirator against his co-conspirator, this subdivision becomes an enlargement of rather than a limitation upon the ordinary hearsay rule." Cf. *People v. Raze*, 91 Cal.App.2d 918, 921, 922, 205 P.2d 1062. In *People v. Daener*, 96 Cal.App.2d 827, page 831, 216 P.2d 511, page 514, we said: "The agreement may be inferred from the declarations, acts and conduct of the alleged conspirators. *People v. Benenato*, 77 Cal.

App.2d 350, 358, 175 P.2d 296. 'If in any manner the conspirators tacitly come to a mutual understanding to commit a crime, it is sufficient to constitute a conspiracy. *People v. Yeager*, supra [194 Cal. 452, 229 P. 40]; *People v. Sisson*, 31 Cal.App.2d 92, 87 P.2d 420. It may result from the actions of the defendants in carrying out a common purpose to achieve an unlawful end. *People v. Montgomery*, 47 Cal.App.2d 1, 117 P.2d 437.' *People v. Torres*, 84 Cal.App.2d 787, 794, 192 P.2d 45."

[10] If it is proved that the defendants, with a view to the attainment of the same purpose, pursued such purpose by their acts, each performing some part thereof, the trier of fact is justified in concluding that they were engaged in a conspiracy to effect a common object. *People v. Lawrence*, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193.

[11-15] Hyman was operating a book-making establishment in Bell. Curtis was operating a bookmaking establishment in the Hollywood Roosevelt Hotel. Professional betting markers in the handwriting of Curtis were found in the Bell establishment. A message form of the Hollywood Roosevelt Hotel, used in connection with bookmaking, torn into small pieces, with the names "Curtis," "Viola," "Janet," "Tommy," "Ted," and "Jordan" on it, all in the handwriting of Curtis, was on the floor. These names corresponded with names on betting markers in the handwriting of Curtis found at the same place. Many of the betting markers and owe sheets bore various names followed by "for C." After the officers visited the Bell address on July 20, Hyman moved his establishment the next day to the Glendale address on "Viola" Street. Professional betting markers with "Janet for C," "Viola for C," and other names "for C" were found at the Glendale address. Some of these names appeared on the torn slip found the previous day at Bell in the handwriting of Curtis. "C" stood for the agent who was placing the bets. The court could infer that the "C" in the words "—— for C" referred to Curtis. If they did not, defendants could and should have denied it. *People v. Steccone*, 36 Cal.2d 234, 239, 223 P.2d 17. While these writings in the

handwriting of Curtis were declarations of Curtis—and, so far as appears, may have been written out of the presence of Hyman—the court was justified in inferring, since they were found in Hyman's possession, that they had been delivered to Hyman by Curtis. The owe sheet found in the possession of Curtis contained some of the same names as appeared on the torn slip found at the Bell establishment and on betting markers found at the Bell and Glendale addresses. Curtis and Hyman had a telephone conversation which clearly referred to the visit of the officer to the Bell address on July 20. The telephone conversations had by the officers at the Glendale address and at the rooms of Curtis were evidence that the premises were occupied for the purpose of book-making. The foregoing evidence pieced together was adequate to establish a prima facie case of conspiracy. *People v. Steccone*, 36 Cal.2d 234, 238, 223 P.2d 17; *People v. Gonzales*, 20 Cal.2d 165, 173, 124 P.2d 44. Where there is substantial evidence pointing to a conspiracy, it is not for this court to question its sufficiency. The court did not err in admitting against both defendants evidence of the acts and declarations of the alleged conspirators in furtherance of the conspiracy made out of the presence of his confederate.

[16] The appeal from the nonexistent judgment is dismissed. The order denying the motions of the defendants for a new trial is affirmed.

SHINN, P. J., and WOOD, J., concur.

On Petition For Rehearing.

PER CURIAM.

In their petition for rehearing defendants say "that no where in the record is there any evidence that the so-called betting markers were written by the defendant, Curtis." This is a flagrant misstatement of the fact. An examiner of questioned documents employed by the Police Department of Los Angeles, who qualified as an expert, testified that in his opinion betting markers found at the Bell and Glendale bookmaking establishments were in the handwriting of Curtis.

Rehearing denied.

106 Cal.App.2d 271

PEOPLE v. CLARK.

Cr. 4597.

District Court of Appeal, Second District,
Division 1, California.

Aug. 23, 1951.

Ferne E. Clark was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of manslaughter with gross negligence, a felony and she appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain finding that defendant's gross negligence while driving automobile was the proximate cause of the victim's death.

Order affirmed.

1. Homicide $\Rightarrow$ 6

Penal Code, providing that to make a killing either murder or manslaughter party must die within a year and a day after stroke received or cause of death administered, cannot be invoked to avoid responsibility where victim dies within prescribed year and a day but his demise is hastened by actions of third persons, but for which victim allegedly would have lived longer than a year and a day. Pen.Code, § 194.

2. Statutes $\Rightarrow$ 176

Courts may not, under the guise of construction, add to or detract from the expressed legislative intent. Code Civ. Proc., § 1858; Pen.Code, § 194.

3. Homicide $\Rightarrow$ 6

The requirement under the Penal Code that it must appear that victim died within a year and a day after stroke received or the cause of death administered to make the killing either murder or manslaughter is a rule of evidence. Pen.Code, § 194.

4. Homicide $\Rightarrow$ 6

Under Penal Code provision that to make a killing either murder or manslaughter party must die within a year and a day after the stroke received or cause of death administered, where victim's death occurs subsequent to a year and a day of act charged against accused, a conclusive presumption arises that victim died from some

cause other than act of accused, but where victim dies within time prescribed by code only question is whether act of accused was proximate cause of victim's death. Pen. Code, § 194.

5. Homicide $\Rightarrow$ 341

In prosecution for manslaughter based on death occurring less than year after accident, refusal of defendant's requested instruction that to find defendant guilty jury must find from evidence not only that her conduct was a proximate cause of the death involved but that jury must also find that death occurred within one year and one day from and after certain date as a result of the defendant's conduct was not prejudicial.

6. Homicide $\Rightarrow$ 236(1)

In prosecution for manslaughter, evidence was insufficient to establish that conditions under which victim was removed from hospital 31 days after hospitalization accelerated his death or were supervening causes thereof. Pen.Code, § 194.

7. Automobiles $\Rightarrow$ 355(13)

In prosecution for manslaughter, evidence was sufficient to sustain finding that defendant's gross negligence while driving automobile was the proximate cause of victim's death.

8. Criminal law $\Rightarrow$ 457

Opinion testimony as to intoxication may be expressed by any witness and such testimony is not limited to experts.

9. Homicide $\Rightarrow$ 270

In prosecution for manslaughter, whether defendant was intoxicated at time of alleged offense was question for jury.

10. Criminal law $\Rightarrow$ 661

In prosecution for manslaughter, prosecution was not required to call physician who administered sobriety test to defendant to testify as to the result of test.

11. Automobiles $\Rightarrow$ 355(13)

In prosecution for manslaughter, evidence was sufficient to sustain implied finding that defendant was grossly negligent while driving automobile, without reference to intoxication.

J. Russell Myers, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of manslaughter, a felony, in that on or about the 9th day of June, 1950, she wilfully, unlawfully, feloniously, and without malice, while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, with gross negligence, and while in the commission of a lawful act, which might produce death in an unlawful manner with gross negligence, killed Phil R. V. H. Porter; the information further alleged that the death of said decedent was the proximate result of the driving of said vehicle by defendant.

Following a plea of not guilty the cause proceeded to trial before a jury which returned a verdict finding defendant "guilty of manslaughter with gross negligence, a felony". Motion for a new trial was denied. Upon arraignment of the defendant for judgment, proceedings were ordered suspended and she was granted conditional probation. This is an appeal by defendant from the conviction and sentence, and from the order denying her motion for a new trial. The attempted appeal from the conviction and sentence, being unauthorized, must be dismissed. *People v. D'Elia*, 73 Cal.App.2d 764, 766, 167 P.2d 253; *People v. Becerra*, 104 Cal.App.2d 295, 297, 230 P.2d 872.

Epitomizing the evidence necessary for consideration of the ground urged for reversal of the order denying defendant's motion for a new trial, the record reflects that shortly after 2 o'clock on the morning of June 9, 1950, one Nathan Elkins was backing a loaded truck out of the driveway on the west side of San Pedro Street between 66th and 67th Streets in the city of Los Angeles. While backing the truck out of the driveway onto the street Elkins looked to the south and saw an automobile proceeding north on San Pedro Street sev-

eral blocks away. All the lights of the truck were on, including the tail light and two reflectors. The street lights were also burning on San Pedro Street. Elkins backed the truck out of the driveway, made a left turn, straightened the vehicle out so that it headed north and was about in the center of San Pedro Street proceeding north at approximately 10 miles an hour.

The truck proceeded forward about ten feet when it was struck just back of the right front fender by the automobile driven by the defendant. The truck caught fire and defendant's vehicle careened into a lamp post. The night was clear, the street was dry and in good condition. Defendant was driving about 50 miles an hour. The witness Elkins testified that he heard no sound of any brakes being applied nor did he hear the sound of a horn. He also testified that in observing defendant's automobile prior to the impact, "it never slowed down".

Police officers arrived shortly after the accident and observed that Elkins' truck was demolished by fire; that there was dirt and debris in the street where the two vehicles had come together; that there was a dark brush mark indicating the point of impact 18 feet west of the east curb, and that the light standard struck by defendant's car was broken. One of the police officers asked defendant if she was hurt and she replied that her knee was cut. He asked defendant if her passenger was hurt, to which she responded, "No, he was just out drunk." The officer asked defendant to get out of the car and he smelled a strong odor of alcohol. Upon inquiring of her as to what happened, defendant said, "I think that tanker hit us head-on." Defendant told the officer that her injuries were not such that she needed or wanted medical treatment. The police officer testified concerning the defendant, "Well, she was sort of, seemed very joyous, I mean, over the fact that she knocked over that ornamental light standard. She said she was jumping—said, 'Look what I done to that ornamental light standard'." This officer testified that in his opinion defendant was under the influence of intoxicating liquor.

She and her passenger were taken in an ambulance to the Receiving Hospital. Upon inquiry of the hospital physician as to whether defendant was in condition to undergo a sobriety examination, the doctor answered in the affirmative. The officers then gave her a sobriety test consisting of what is characterized as the "line test", to ascertain if she was able to walk a line, "placing her heel and toe down the line". In this examination, according to the officer's testimony, defendant failed, being able to take only approximately two or three steps before staggering off the line one way or the other. A second test was given defendant consisting of her "standing with her heels and toes together, placing her arms outstretched, taking her right forefinger and touching her nose, and doing the same with her left". According to the officer she failed to pass this test. At the time of the giving of these tests the police officers detected the odor of alcohol on the defendant's breath. When asked if she was driving the car she responded that she was. When asked if she had been drinking defendant responded in the affirmative. When inquiry was made as to where she had been drinking, she replied that she and her companion had been drinking at a couple of places; that she bought a bottle and was drinking in a cafe in the 7300 block on San Pedro Street. She stated that she and the decedent went to this cafe, ordered some beer, using it as a "chaser" while they consumed the bottle of whiskey. That when they left this place the decedent was "in pretty bad condition" and defendant decided it would be better for her to drive. That she put him on the right hand side of the driver's seat and that he fell over against her several times. That she proceeded north on San Pedro Street but was unable to estimate her speed. She further said that "something loomed up in front of her and hit her head-on, and she thought it was some kind of a diesel—she said she couldn't understand why he would hit her head-on." The officer further testified that at this time her speech was "slurred" and, "she was very hilarious and very cocky."

A second officer, who accompanied the one above referred to, testified that in his opinion the defendant "was drunk."

The record further reflects that the victim was admitted to the Los Angeles County General Hospital on June 9, 1950, where he was examined by a resident physician. The doctor found that the victim was suffering from cerebral concussion and probable fracture and dislocation of the cervical spine with cord injury. The doctor prescribed a head halter in order to put some traction on the neck, aimed at immobilizing the neck and preventing further dislocation. The doctor also informed the family of the decedent that his condition was serious and that he would not want to accept the responsibility for the decedent's removal, advising the family to leave him in the hospital. The hospital records indicated that the victim remained at the hospital until the 10th of July when he was released to his mother and taken away by her in a private ambulance.

On the following day, July 11, the victim died. An autopsy surgeon gave as his opinion that the cause of death was spinal cord injury due to fracture of the cervical vertebra, this being the spinal vertebral column in the neck region, or in ordinary language, a broken neck.

The autopsy revealed that just above the cervical swelling of the spinal cord it was reduced to a yellowish, pulpy mass, held together by only a few strands of the forward portion, and this indicated to the autopsy surgeon that extensive damage had been done to the spinal cord and that the prospects of survival after such an injury to the cord were practically nil.

As the first ground for reversal appellant contends that the trial court committed error in refusing to give the jury the following instruction: "To find the defendant guilty you must find from the evidence not only that her conduct was of the kind described as essential to constitute involuntary manslaughter, and that such conduct was a proximate cause of the death involved in this case, *but you must also find that the death occurred within one year*

and one day from and after June 9, 1950 as a result of the defendant's conduct." (Emphasis added.)

Appellant's contention appears to be that but for intervening causes, viz., removal of the victim from the General Hospital by his mother, contrary to the advice of the physician in charge of the case, approximately one month after hospitalization, the victim "may have lived indefinitely"; that the foregoing intervening event, "resulted in the death and/or accelerated the death". This claim is predicated upon testimony given by the autopsy surgeon that during the month elapsing between the date of injury and the removal there would "normally" be "some healing process"; that in the opinion of the witness the aforesaid removal of the victim "would injure his chances" of surviving. There is also testimony by Dr. James St. John, a resident physician at the Los Angeles County General Hospital, as follows:

"Q. By Mr. Myers (Appellant's counsel). Well, Doctor, as I understand, it is your opinion, is it not, that a patient with this type of injury should not have been moved, is that right? A. Yes.

"Q. Well, I will ask this, you testified, Doctor, that you advised that this patient should not be released from the hospital? A. Yes.

"Q. What was the reason for giving that advice? A. Because his condition was critical and I would not want to assume responsibility for anything that might happen to him were he not under my care.

"Q. And was that the only reason, or was it with regard to the possible movement of the spine? A. Possible movement of the spine during transportation could accelerate his death."

Dr. Edgar L. Tversky gave the following testimony:

"Q. In your opinion, Doctor, would it be advisable to move a man that had the type of injury discussed from one hospital to another a month and a day after the injury? A. If that happened to me, I certainly wouldn't countenance, permit or entertain the idea for one instant."

It would seem fair to say that the medical testimony was to the effect that in the type of injury with which we are here concerned, death would be expected immediately, and if not, as Dr. St. John testified, "It seems that the most critical period may be within the first few hours and the first week. If they make it after that period the patient may die any time within months or years of a recurrent infection."

The only authority cited by appellant to support her claim is Section 194 of the Penal Code which in so far as here pertinent, reads: "To make the killing either murder or manslaughter, it is required that the party die within a year and a day after the stroke received or the cause of death administered; * * *".

[1, 2] We fail to perceive in Penal Code section 194 any language making it applicable to the situation which appellant contends exists in this case, viz., that although the victim died within the prescribed year and a day, his demise was hastened by the actions of third persons, and but for these actions he would have lived longer than a year and a day. As we view appellant's contention, she is attempting to read into the statute an additional requirement, that not only must death have occurred within the year and a day, but that death must not have been accelerated to a date within that period by some cause other than the act of the accused. Under the guise of construction, courts may not add to or detract from the expressed legislative intent. We are not authorized to insert qualifying provisions in nor rewrite a statute to conform to an assumed legislative intention which does not appear from the language of the statutory provision. Code Civ.Proc., sec. 1858.

[3] The reason for both the common-law rule and Penal Code, section 194 also precludes the construction contended for by appellant. The requirement that it must appear that the victim died within a year and a day is merely a rule of evidence. In other words, unless the party dies within that time the prosecution will not be permitted to show that he died of the injury

allegedly received. *People v. Murphy*, 39 Cal. 52, 55; *State v. Huff*, 11 Nev. 17.

[4] Where death of the victim occurs subsequent to a year and a day of the act charged against the accused, there arises a conclusive presumption that the victim died from some cause other than the act of the defendant. However, where the victim dies within the time prescribed by the statute, the reason for the application of the presumption vanishes, and there remains only the question of whether or not the act of the accused was the proximate cause of the victim's death. The fact that death may have been accelerated becomes unimportant unless it be shown that the accelerating cause was also a supervening cause, in which latter case, the defendant is relieved of responsibility for the death in that such act was manifestly not the proximate cause. If the victim dies within a year and a day, and if the act charged against the accused be the ultimate, though not the immediate cause of death, it is criminal. *Eden's Principles of Penal Law*, pp. 233-234.

Thus, in *People v. McGee*, 31 Cal.2d 229, 240, 187 P.2d 706, it was held that where the wound inflicted by the accused operates as a cause of death, the fact that the malpractice of attending surgeons may have had some causative influence will not relieve the accused from full responsibility for the ultimate result of his act. Applying the same reasoning to the instant case, it cannot be held under the facts here present, that the removal of the victim from the General Hospital by his mother, thirty-one days after his hospitalization is in fact an intervening force, and it cannot in law amount to a supervening cause. See also *People v. Cobler*, 2 Cal.App.2d 375, 379, 37 P.2d 869, and *State v. Myers*, 59 Ariz. 200, 125 P.2d 441.

[5] Furthermore, even though we concede the applicability of Penal Code section 194 notwithstanding the fact that the decedent did die within a year and a day of appellant's act, nevertheless, the record does not support her contention that although the victim sustained serious injuries, he may have lived indefinitely ex-

cept for intervening events, and that there were supervening causes which resulted in the death or accelerated the death of the victim. Therefore, refusal to give the requested instruction did not amount to prejudicial error. There is a total absence of any evidence to show that the conditions under which the victim was removed accelerated his death or were supervening causes thereof. While expressing the opinion that removal of the victim was fraught with danger, none of the medical witnesses were in possession of the actual facts surrounding such removal or which occurred in connection with the victim following such removal, nor were any of the hypothetical questions propounded to the doctors based upon an assumption showing the conditions under which the victim was removed, or what occurred thereafter. Although some of the doctors testified they would not recommend such removal, when pressed for an opinion as to whether such action might hasten death, one of the physicians replied: "Well, I would say that is quite possible. I would have to know all the conditions of the manner of his removal and so forth to express an exact opinion."

When the attending physician at the General Hospital was similarly interrogated, his response was: "I can't answer the question as you have asked it because it would depend on the conditions of his removal and on the degree of injury that he had suffered and probably on the stability that you felt he had at the time of the removal."

Again, in answer to a similar question the same witness replied: "That is a difficult question to answer, I repeat. As you said, he died eight to twelve hours after he was removed and that would depend to a certain extent on the treatment that he received after he arrived at the other hospital and to the treatment or care he received in being transported."

[6] The record is totally barren of any evidence showing that under the actual conditions of the victim's removal his death had been hastened.

[7] In the final analysis, appellant's contentions amount to a claim that the victim's

death was not proximately caused by the former's act. The court fully and fairly instructed the jury upon the issue of proximate cause, and upon that issue the triers of fact found against appellant. Under the state of the record before us it cannot reasonably be held that the finding of the jury upon this issue was without substantial support in the evidence.

Finally, appellant earnestly urges that the testimony of the police officers is insufficient to establish a finding of intoxication when there was expert medical testimony that appellant had received injuries which impaired her ability to undergo sobriety tests.

Two police officers testified that appellant was under the influence of liquor when they examined her after the accident. It is her contention that she was not under the influence of liquor and she produced medical testimony that her behavior as testified to by the officers, as well as her inability to respond to physical tests, were occasioned by reason of injuries received by her in the accident.

[8] It is now well settled that opinion testimony as to intoxication is not limited to expert testimony and is a matter about which any witness may express an opinion. *People v. Moore*, 70 Cal.App.2d 158, 164, 165, 160 P.2d 857; *People v. Hernandez*, 70 Cal.App.2d 190, 192, 160 P.2d 564.

[9] The testimony given by the officers merely created a conflict with that given by the doctor who testified in appellant's behalf. It was for the jury to determine the value and weight of the evidence, as well as the credibility of the respective witnesses. Appellant's complaint goes to the weight rather than to the admissibility of the challenged testimony.

[10] During the cross-examination of police officer Beckhelm it was brought out that while appellant was at the Receiving Hospital following the accident a sobriety test was given her by Dr. Arnold of the hospital staff. At the trial no effort was made by appellant to ascertain what the result of such test was, but she now claims that

no evidence was offered by the prosecution "as to any findings of the physician who performed such sobriety test". The prosecution was not required to call Dr. Arnold, and further, if appellant believed that his testimony would be helpful to her cause, the process of the court was available to her to secure his presence and the benefit, if any, of his testimony.

[11] Appellant argues that the jury's finding of gross negligence was based upon the implied finding that she was under the influence of liquor. While there was substantial evidence, if believed by the jury, to support an implied finding that appellant was intoxicated, it cannot reasonably be said that the verdict was not founded upon the actions and conduct of appellant in the driving of the motor vehicle, without regard to the question of her claimed intoxication. In his instructions to the jury the trial judge clearly, fairly and correctly defined negligence and gross negligence, and further instructed the jury of the necessity of the existence of the latter in order to convict. Neither the information nor the instructions contained any mention of the fact that the charge was based upon appellant's intoxication. Disregarding the claimed intoxication there was evidence showing that on a clear night, driving upon a dry street, fairly well lighted, appellant, operating her vehicle at a high rate of speed, collided with a slow-moving vehicle from the rear; that she had ample opportunity to avoid the last-mentioned vehicle, but made no attempt to slow down or sound her horn. From these and other facts shown, the jury was entitled to infer that appellant was grossly negligent without reference to her intoxication. In fact the verdict of the jury found appellant "guilty of manslaughter with gross negligence, a felony."

For the foregoing reasons, the attempted appeal from the conviction and sentence is dismissed. The order denying defendant's motion for a new trial is affirmed.

DORAN and DRAPEAU, JJ., concur.

106 Cal.App.2d 412

DICCO, Inc., et al. v. FARRAR.

Civ. 4330.

District Court of Appeal, Fourth District,
California.

Aug. 30, 1951.

Action by Dicco, Inc., and another against Jerry Farrar for damages for breach of contract. Defendant cross-complained for balance of price for material furnished. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment for defendant on the cross-complaint and plaintiffs appealed. The District Court of Appeal, Barnard, Justice, held that the allegations of the cross-complaint were supported by evidence.

Judgment affirmed.

1. Appeal and error ⇐991

In action by construction corporation against party for breach of contract to furnish materials, exercise of due diligence to furnish minimum quantity of 1000 tons of mineral aggregate per day for construction corporation was factual question for trial court.

2. Sales ⇐417

In action by construction corporation against party for breach of contract to furnish mineral aggregate, evidence sustained findings that party had not wilfully failed and refused to perform contract, that no damage had been caused by his failure to comply with terms of contract and that material delivered had been furnished according to terms of contract.

3. Sales ⇐353(1), 359(1)

In action by construction corporation against party for breach of contract to furnish materials, counterclaim, for balance of price for material furnished, which alleged that under terms of contract more than 95,000 tons of material had been furnished, that certain amount had been paid, and that certain amount remained due, was properly pleaded and was supported by evidence.

William R. Hulsey, Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiffs, as joint venturers, had a contract with the State Highway Department for certain work on Highway 99, south of Bakersfield. They entered into a contract with the defendant by which he agreed to furnish "the aggregate and screenings" for this job, the estimated amount being 92,600 tons. The contract further provided that the defendant should "exercise due diligence to furnish a minimum quantity of 1000 tons of mineral aggregate per day."

The plaintiffs installed a "hot plant" for the purpose of treating material supplied from the defendant's rock crusher plant near by. During the earlier part of the contract period the plaintiffs' "hot plant" had an unusual number of breakdowns, causing the defendant to shut down his rock crusher because of lack of storage space. During the latter part of that period the defendant's rock crusher had an unusual number of breakdowns, causing the "hot plant" to shut down for lack of material. The defendant delivered to the plaintiffs a total of 95,577 tons. The plaintiffs' contract with the state was completed and they were paid in full by the state. A balance of \$7691.72 was admittedly due to the defendant, unless the plaintiffs had a valid claim against him for damages.

The complaint alleged that the plaintiffs had fully performed, but that the defendant had failed and refused to perform his agreement to furnish a minimum of 1000 tons of material per day; that on many occasions he had failed to furnish any material for a period of one to three days; that as a consequence of his failure to thus comply with his agreement the plaintiffs had incurred a loss of time of thirty-seven days during the contract period; and that the plaintiffs were thereby damaged in the sum of \$18,500. The defendant answered, denying that he had refused to comply with the agreement, and alleging that he had at all times used due diligence in that regard; that at times when his plant broke down he

West, Vizzard, Howden & Baker, Bakersfield, for appellants.

had used all of his abilities and worked his crews twenty-four hours a day in making repairs; that the plaintiffs had at times urged him to exceed 1000 tons per day, and on many days he had delivered 1600 tons per day; and that for three-fourths of the contract period he had delivered an average of 1078 tons per day. He also filed a cross-complaint seeking to recover the balance of the contract price for the material furnished.

The court found that the material allegations of the complaint were not true, except that it was true that the defendant did not furnish a minimum of 1000 tons of material per day. In effect, the court found that the defendant had not violated the agreement, and that the plaintiffs had not been damaged as the result of any such violation. The court found in favor of the defendant on his cross-complaint and entered judgment in his favor, from which the plaintiffs have appealed.

It is first contended that two of the court's findings are not supported by the evidence. In the first of these the court found that it was not true that the defendant had wilfully failed and refused to perform the contract by furnishing at least 1000 tons of material per day, and not true that any damage was caused by his failure to comply with the terms of the contract. In the second, the court found that the material delivered had been furnished in accordance with the terms of the contract.

[1,2] The entire controversy is as to whether the respondent used due diligence with respect to the furnishing of 1000 tons per day. The appellants admit that there is a conflict in the evidence regarding the use of due diligence in maintaining and repairing respondent's plant and equipment, and such a conflict amply appears from the record. They contend, however, that the respondent failed to use due diligence in that he should have worked night shifts at such times as were necessary to create a sufficient stock pile to keep the "hot plant" going steadily. There was some evidence that in such work it was

reasonable practice to run a double shift when necessary. The respondent testified that in nine years of experience in working for others he had seen this done only once, and this during the war when the work was being done on a cost-plus basis. There was evidence that the respondent followed the usual custom in operating and maintaining his plant; that during a part of the time he did operate a double shift, at appellant's request; and that this resulted in practically no increase in production because it interfered with the normal greasing and maintenance of the plant, and caused too much loss of time in making repairs. There was also evidence that the accumulation of a stock pile was limited by the space available. The respondent did operate on a 24-hour basis at all times when necessary in making repairs or in maintaining the plant. "Due diligence" is a relative term, and that issue presented a factual question for the trial court. Nothing more than a conflict in the evidence appears and the disputed findings are sufficiently supported.

[3] The final contention is that the respondent failed to plead or prove a cause of action since he failed to plead or prove that he had performed the contract by delivering 1000 tons of material per day. The cross-complaint alleged that under the terms of the agreement more than 95,000 tons of material had been furnished, that a certain amount had been paid, and that a certain amount remained due, including the 10% which was to be withheld until the completion of the work. These things were proved and the appellants' defense to the cross-complaint was based on an attempted offset because of the damages they claimed. The court held, in effect, that the respondent had not breached the contract and found against the appellants on their claim for damages. Neither a failure of proper pleading nor a failure of proof appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

106 Cal.App.2d 281

**DI PASQUA v. CALIFORNIA WESTERN
STATES LIFE INS. CO.**

Civ. 14652.

District Court of Appeal, First District,
Division 1, California.

Aug. 24, 1951.

Hearing Denied Oct. 22, 1951.

Action by Mary DiPasqua against California Western States Life Insurance Company, to recover as beneficiary of a life policy issued by defendant, wherein defendant filed a cross complaint to cancel the policy. The Superior Court for the City and County of San Francisco, Leo A. Cunningham, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Agee, J. Pro tem., held that written report obtained from an independent source before issuance of policy put insurer upon notice that insured's answers to questions in application for life policy could not reasonably be relied upon and hence insurer was not entitled to avoid policy on ground of insured's failure to give material information in application as to his hospitalization and medical treatment during preceding year.

Judgment affirmed.

1. Insurance ☞261

Failure to give material information in response to direct questions in application for life insurance ordinarily entitles insurer to avoid life policy. Insurance Code, §§ 330, 331, 334.

2. Insurance ☞377(3)

Written report obtained by insurer from independent source before issuance of life policy showing that applicant had been confined to hospital for examination and observation within the year preceding application, though such information was not given in response to direct questions in application, put insurer upon notice that insured's answers could not reasonably be relied upon and under such circumstances, insurer had a duty of further inquiry which would have fully revealed all of the pertinent facts and hence insurer could not rely upon failure to give such information as ground to avoid policy after death of insured. Insurance Code, §§ 330, 331, 334.

3. Insurance ☞377(3)

Where insurer conducts an independent investigation which reveals the falsity in material respects of answers to questions in application for life policy, insurer cannot rely solely upon insured's answers in such application.

4. Insurance ☞377(3)

Where insurer could not reasonably rely on insured's answers to questions in application for life policy in view of independent investigation conducted by insurer disclosing the falsity of such answers, insurer could not rely upon the failure of insured to advise it of any errors or omissions in application after policy with attached photostatic copy of application had been received by insured.

Peart, Baraty & Hassard, San Francisco,
for appellant.

Raymond J. O'Connor, Regis J. Swetmann, San Francisco, for respondent.

AGEE, Justice pro tem.

On September 23, 1945, defendant and appellant issued a policy of insurance on the life of Domenico DiPasqua naming his wife, Mary DiPasqua, as beneficiary. The insured was committed as a mentally ill person on January 15, 1947, and was an inmate of Napa State Hospital at the time of his death on January 29, 1947. Judgment for the widow on her complaint, and against the insurance company on its cross-complaint to cancel the policy, followed a non-jury trial.

The cause of death was diabetes. This condition was not known to the insured at the time of the issuance of the policy nor was it found in the two separate medical examinations had by the company prior thereto, although each examination had included an urinalysis. (The condition of diabetes was first discovered in 1946.) In its brief on appeal, appellant states that it "denied liability because of wilful and false answers of insured to a series of questions on applying for the insurance." (App.Op. Br. p. 2.) These answers were made by the insured to two medical examiners for

the company and have to do with his medical treatment and condition of health in the period of approximately one year prior to the issuance of the policy.

The company's complaint, specifically, is that the following information was not revealed to it by the insured: from September 12, 1944, to November 16, 1944, Dr. Rosberg saw insured at his office on thirteen occasions. His complaints were nervousness, worry, indigestion and fatigue. A series of examinations resulted in nothing being found. The insured then went into the University of California Hospital for four days of observation. Dr. Mattier was the consultant there. Nothing was found. The insured then went back to Dr. Rosberg. At his suggestion, the insured entered St. Luke's Hospital on December 13, 1944, and remained there until December 23, 1944. Another series of tests was made, but again nothing was found. Upon leaving St. Luke's Hospital, the insured asked Dr. Rosberg: "Do you find anything?" and the reply was: "No, we are both leaving this hospital both none the wiser." All of the laboratory tests, including blood and urine, had been negative. The insured was advised to rest and cut down on the amount of work he was doing. He followed this advice, and the record supports the finding that he was in good health at the time of the issuance of the policy.

The first medical examination for the insurance company was by Dr. Apostolides on August 16, 1945. The regular medical examiner for the company was away at the time. Question 18 was: "For what conditions have you consulted a physician or other practitioner within five years?" The answer of the insured was: "None." However, in answer to Question 16: "What illness, disease, accidents or operations have you ever had and for what conditions have you consulted a physician?", the answer included "history of vertigo a year ago—diagnosed as overwork." Dr. Apostolides testified: "Q. Did he give you a history of having been examined by other doctors the year before? A. He said he had doctors, and I don't remember, he gave me a history of what the doctors told him.

"Q. You didn't put down the names of any doctors? A. No."

On August 23, 1945, Dr. Dunn, the regular medical examiner for the company, examined the insured. DiPasqua again answered, as he had on the previous examination, that he had not been a patient in any hospital except for an appendectomy many years before. In answer to Question 18, however, he stated: "For overworked condition." Question 23 was: "Have you now, or have you ever had a nervous breakdown, etc.?" The answer was: "In 1944 I had asthenic condition caused by overwork, and was advised to take a vacation for two weeks; good recovery. No pathology found." The answer to Question 16 included: "asthenia in 1944 for two weeks—Dr. Gottschalk." This doctor had been consulted by the insured shortly before he went to Dr. Rosberg:

"Asthenia" was described at the trial as being the term used when a patient complains of being tired and worn out, has loss of appetite, and is not able to sleep.

Prior to either of the two medical examinations, the insurance company had ordered and obtained an investigation report from the Retail Credit Company. This report was in writing and contained the following: "He had suffered from overwork about six months before and had been confined to U. of C. (University of California) Hospital and was confined there, taking tests; that it was learned that he had no organic illness but his trouble was only caused from overwork and worry; that he was now in excellent health."

On January 13, 1947, respondent signed a petition that the insured was mentally ill and that the "first symptoms of mental disturbance occurred about two years ago." The commitment to Napa State Hospital followed. There is no evidence that the insured ever knew or realized that he was mentally ill.

[1] Respondent's counsel makes an able argument that there was no concealment or withholding by the insured, that he did not consider his brief hospital stays in 1944 as being a patient in a hospital because it was merely for observation and examination,

and nothing pathological was found. However, the fact is that material information was not given to the company in response to their direct questions. Ordinarily, this would entitle the company to avoid the policy. Insurance Code, §§ 330, 331 and 334. Section 334 provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

In response to Question 20, the insured answered each time that he had not been a patient in any hospital except for an appendectomy many years ago, when, in fact, he had been a patient in two hospitals within the past year.

[2,3] Prior to both medical examinations the insurance company had before it a written report obtained by it from an independent source which plainly stated that the insured's answer in response to this very vital and material question was not true. It had in its possession an authorization signed by the insured to obtain any medical information pertaining to him. It would not have been unreasonable or difficult for the company to have contacted the University of California Hospital and thus would have ascertained the truth. This would have revealed the fact that the insured *had* been a patient there within recent months and that, what is of vital importance, the insured was either deliberately lying and concealing material facts, or that he was not a responsible person capable of correctly stating the facts. The company was put upon notice prior to issuance of the policy that the answers of the insured could not reasonably be relied upon. We believe that under such circumstances the company had a duty of further inquiry and that such inquiry would have fully revealed all of the pertinent facts. In other words, the insurance company cannot rely solely upon the insured's answers in his application where it conducts an independent investigation which reveals the

falsity of such answers in material respects. The trial court expressly found that the company did not rely upon the statements of the insured, "but on the contrary, conducted an independent investigation of its own to discover the truth or falsity of the answers made by Domenico T. DiPasqua to the questions contained in said application for life insurance." After reciting the result of such investigation, the findings continue: "that despite the knowledge of the falsity, if any, of the said Domenico T. DiPasqua's statements in failing to make such disclosure, to said defendant, said defendant, with knowledge of the falsity of said answer, or the inadvertence and mistake of Domenico T. DiPasqua to reveal such information, said defendant issued said life insurance policy on or about September 17th, 1945." These findings are supported by the record. As was said in *Weir v. New York Life Ins. Co.*, 91 Cal. App. 222, at page 226, 266 P. 996, at page 998: "* * * the conclusion is irresistible that the company did know that some of the applicant's representations were untrue, and that it issued the policy for a reduced amount in spite of that fact." The point there involved was the insured's answer that he only drank a moderate amount of wine. He died three months and ten days after the issuance of the policy, with alcoholism being a material cause of death. The company knew of his addiction to alcohol prior to issuance of the policy.

[4] Since, as we have held, the company could not reasonably rely upon the answers of the insured referred to above, it follows also that it could not rely upon the failure of the insured to advise it of any errors or omissions in the application after the policy with attached photostatic copy of the application had been received by him.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SPENCE, J., dissenting.

HALL et al. v. COYLE et al.

Civ. 4243.

**District Court of Appeal, Fourth District,
California.**

Aug. 29, 1951.

Rehearing Denied Sept. 25, 1951.

Hearing Granted Oct. 25, 1951.*

Kenneth W. Hall and another brought tort action against William Coyle, and Clyde Truss, individually and doing business as Ramona Liquid Gas & Appliance Company, and others, for damages to plaintiffs' house caused by fire which occurred when agent of defendants was transferring butane gas to plaintiffs' containers. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment for plaintiffs and defendants appealed. The Court of Appeals, Mussell, J., held, inter alia, that judgment of nonsuit entered in prior action which was based upon contract with defendants' agent, who did not have authority to contract, was not a bar to this tort action.

Affirmed.

1. Pleading $\S$ 53(2)

Where plaintiffs' house was destroyed by fire when defendants transferred butane gas to plaintiffs' containers and plaintiffs accepted offer of agent of defendants to pay stipulated amount therefor, plaintiffs had right to allege various counts in the complaint, even though inconsistent.

2. Judgment $\S$ 713(2), 725(1)

A judgment in a prior action between the same parties, on the identical cause of action, is res judicata, and bars a second suit thereon, not only as to issues actually determined but also as to issues necessarily involved, and even though the causes of action be different, the prior determination of an issue is conclusive, in a subsequent suit between the same parties, as to that issue and every matter which might have been urged to sustain or defeat its determination.

3. Judgment $\S$ 725(1)

A judgment adjudicates only that which appears upon the face of the judgment to have been adjudged or that which was necessarily included therein or necessary thereto, and when it affirmatively appears that an issue was not determined by

the judgment, the judgment is not res judicata upon that issue. Code Civ.Proc. $\S$ 1911.

4. Appeal and error $\S$ 1010(1)

Findings of trial court supported by substantial evidence were binding upon appellate court.

5. Judgment $\S$ 589(1)

If judgment in former action was rendered because of plaintiffs' misconception of the remedy available or of the proper form of proceeding, the doctrine of res judicata is not available as a bar to subsequent action.

6. Election of remedies $\S$ 14

Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts.

7. Election of remedies $\S$ 11

Where plaintiff mistakenly brings action for remedy to which he is not entitled, this is not an election of remedies and does not prevent plaintiff from subsequently availing himself of a remedy to which he is entitled.

8. Election of remedies $\S$ 11

Judgment $\S$ 570(5)

Where plaintiffs' house was destroyed by fire, which occurred when defendants' agent transferred butane gas to plaintiffs' containers, plaintiffs' only remedy was an action in tort, and suit based on supposed agreement of agent to pay, though aided by attachment, did not constitute an election of remedies, and judgment of nonsuit because of absence of authority of agent to contract did not bar subsequent tort action, though order in judgment did not specify that question of tort liability was not passed upon. Code Civ.Proc. $\S$ 581c:

Raymond F. Feist, Oceanside, and Henry F. Walker, Los Angeles, for appellant.

Charles B. Provence and Brooks Crabtree, San Diego, for respondents.

MUSSELL, Justice.

Defendant Clyde Truss, individually and doing business as Ramona Liquid Gas and

* Subsequent opinion 241 P.2d 236.

Appliance Company, appeals from a judgment in favor of plaintiffs in an action for damages occasioned by the negligence of defendants in the handling of butane gas. It was alleged in the complaint, filed July 28, 1948, that plaintiffs were the owners of a house and contents, located in San Diego county; that appellant was in the business of supplying butane gas to the public for use as a household fuel; that on October 28, 1947, appellant, through an employee, was in the act of delivering butane gas to plaintiffs' residence when the employee negligently and carelessly transferred butane gas to containers on plaintiffs' premises; that by reason of the negligence of defendants' employee and as a proximate result thereof, plaintiffs' house and contents were destroyed by fire.

The trial court gave judgment for plaintiffs in the sum of \$7,000 and no question is here raised concerning negligence, contributory negligence or proximate cause. The controversy is principally as to the effect of a judgment rendered in a prior action between the parties, pleaded as a bar to the present action.

The record shows that on December 5, 1947, plaintiff Kenneth W. Hall filed an action entitled "Complaint on Express Contract" against appellant and others in which it was alleged, among other things, that plaintiff's house and contents were of a reasonable value of \$7,000; that on October 28, 1947, defendants negligently and carelessly transferred butane gas into said house; that by reason thereof and as a direct and proximate result of such negligence, said house and contents were destroyed by fire, to plaintiff's damage in excess of \$4,000; that defendants, in consideration of such damage and destruction, promised to pay \$4,000 in settlement of the claims arising from said negligence, which promise and offer was accepted; that demand had been made for the sum of \$4,000 from defendants, who failed to pay the same or any part thereof. The prayer was for \$4,000, with interest, for costs and for "such other relief as to the court seems just."

Defendants answered and denied the allegation of negligence, admitted that de-

fendants were in the business of supplying butane gas to the public, admitted the delivery of the gas and the occurrence of the fire and denied the allegation that "the defendants in consideration of such damage and destruction promised to pay plaintiff at once the sum of \$4,000 in full and complete settlement of all of plaintiff's claim for damages by reason of such negligence, which promise and offer the plaintiff accepted forthwith." It was admitted that a demand for \$4,000 had been made, and contributory negligence was pleaded as an affirmative defense.

Trial was had without a jury and at the conclusion of plaintiff's case, the trial court granted defendants' motion for a nonsuit since it appeared that the person making the promise to pay had no authority to bind the partnership. Judgment was thereupon entered against the plaintiff. No appeal was taken therefrom and said judgment became and is final.

In the instant action, the defendants, by answer, alleged that plaintiff, in the 1947 action, sought to recover compensation from these defendants for the loss alleged to have been suffered by the plaintiff by reason of said fire; "that said cause came on regularly for trial; that thereafter, on or about the 29th day of July, 1948, judgment was entered in said cause, adjudicating the merits thereof in favor of these defendants, and against the plaintiff, and that such judgment has become final and constitutes a bar to any and all proceedings in the instant cause."

Appellant's contentions are that the judgment of nonsuit constitutes an adjudication on the merits; that the issues of negligence, proximate cause and damages were before the court in the former action and the judgment of nonsuit is a bar to the instant cause; and that the prior action constituted an election of remedy which debars the maintenance of the present action.

Section 581c of the Code of Civil Procedure, as amended in 1947, provides that if the motion for judgment of nonsuit is granted "unless the court in its order for judgment of nonsuit otherwise specifies, such judgment operates as an adjudication upon the merits." In the 1947 action it

was "adjudged and decreed that the motion of defendants for a nonsuit be and the same is hereby granted." While the trial judge therein, judging from his remarks made upon the submission of the case, evidently believed that a tort liability existed in favor of plaintiff and that it was not too late to file an action therefor, he apparently based his judgment of nonsuit on a failure of plaintiff to establish liability against the defendants on the contract set forth in the complaint. The court failed, however, to specify in his judgment that it was based only on the cause of action on contract and that the tort liability was not passed upon.

In May of 1949, plaintiff filed a motion for an order "correcting a mistake in the judgment" and to modify it so as to include the following words: "This judgment of nonsuit is not an adjudication upon the merits." This motion was denied and no appeal was taken from the order of denial.

[1-3] The remarks of the trial court, the testimony in the 1947 action, and the plaintiff's complaint filed therein indicate that the action was tried on the theory of a contract liability, and that the tort liability was not passed upon by the trial court. Plaintiff had the right to allege various counts in the complaint, even though inconsistent, *Goldwater v. Oltman*, 210 Cal. 408, 423, 292 P. 624, 71 A.L.R. 871, and the general rule is that a judgment in a prior action between the same parties on the identical cause of action is *res judicata*, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved, and even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination. *Krier v. Krier*, 28 Cal.2d 841, 843, 172 P.2d 681. It is also the rule that only that is adjudged in a former judgment which appears upon its face to have been adjudged or which was necessarily included therein or necessary thereto, *Code of Civ.Proc.*, sec. 1911, and when it affirmatively appears that an issue was not determined by the judgment, it is not *res judicata* upon that issue. *Stark v. Coker*,

20 Cal.2d 839, 843, 129 P.2d 390; *Estate of Williams*, 36 Cal.2d 289, 292, 223 P.2d 248.

[4] The uncontradicted evidence in the instant case is that the tort liability of the defendants was not actually determined in the 1947 action. The trial court's findings that the 1947 judgment does not constitute a bar to any of the proceedings in the instant cause nor to the cause of action contained in the complaint herein and that the issues involved in the present action were not involved and were not tried or determined in the former action are supported by substantial evidence and are binding upon us. *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689.

It is argued that since the plaintiff procured an attachment in the original action, he was thereafter estopped to pursue his remedy in tort and the case of *Steiner v. Rowley*, 35 Cal.2d 713, 720, 221 P.2d 9 is cited as authority for this contention. However, the pleading in the 1947 action contained only one cause of action which was primarily based upon the negligence of the defendants, and while the complaint contained allegations that the defendants promised to pay the plaintiff the sum of \$4,000 for the damage occasioned and the prayer was for that sum, the court held that a cause of action on contract was not stated or proved, as is evidenced by the granting of a nonsuit. The judgment of nonsuit having been granted on the theory that no contractual liability was alleged or proven, was not a determination of liability for the tort and the trial court so stated. It is apparent from the record that the plaintiff had but one remedy available to him and mistakenly believed that a cause of action existed by reason of the alleged promises of one member of the limited partnership to pay the damages occasioned by the tort.

[5] As is said in 30 Am.Jur. page 946, sec. 210: "The doctrine of *res judicata* is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available or of the proper form of proceeding. In such situation, the plaintiff is entitled to bring the proper proceeding to enforce his cause of action."

In *Miller v. Ambassador Park Syndicate*, 121 Cal.App. 92, 9 P.2d 267, in an action on a promissory note, where the defense of res judicata was presented, defendants claimed that plaintiff was precluded from maintaining the action because a former action between the same parties involving identical subject matter was dismissed on the merits. The court there said, 121 Cal. App. at pages 99-100, 9 P.2d at page 269: "An examination of the complaint in each of the two actions reveals the fact that the former action was based upon alleged tort, and that the plaintiff therein sought damages against the several defendants therein because of their alleged fraudulent acts as against the plaintiff; whereas the cause in the instant action arises from the alleged breach by the defendants of an express contract, to wit, their failure to pay the promissory note when due. Although a mere difference in the form of the action will not necessarily prevent a bar, if the cause of action is the same and 'the same evidence will support both actions' (*Taylor v. Castle*, 42 Cal. 367, 372), the principle of law is well established that, 'if the plaintiff has mistaken his legal remedy or the proper form of action, and the judgment goes against him for that reason, it is no bar to a second action rightly brought.' 15 Cal.Jur. 173, and cases there cited."

In *Williams v. MacDonald*, 180 Cal. 546, 547, 182 P. 29, the court said: "A judgment in order to operate strictly as a bar to a subsequent action must have gone to the merits of the subsequent action. This is the full extent of the doctrine of such cases as *Taylor v. Castle*, 42 Cal. 367; *South San Bernardino, etc., Co. v. San Bernardino [Nat.] Bank*, 127 Cal. 245, 59 P. 699, and *Heilig v. Parlin*, 134 Cal. 99, 66 P. 186, cited on behalf of the plaintiff. If, for example, the plaintiff has mistaken his legal remedy or the proper form of action, and judgment goes against him for that reason, the judgment is no bar to a second action rightly brought."

[6, 7] As was said in *Waters v. Woods*, 5 Cal.App.2d 483, 489, 42 P.2d 1072, 1075, in an action for rescission and/or damages: "Respondent urges that since the case was tried on the theory that rescission was the

only relief open to plaintiffs, they made an irrevocable election of remedies and must accept the consequences of such choice. It is true that where the law allows two distinct modes of procedure on the same state of facts, one of which is inconsistent with the other, a party is compelled to choose between them. This is said to be an application or extension of the doctrine of estoppel. *Mailhes v. Investors Syndicate*, 220 Cal. 735, 32 P.2d 610. The rule, however, is grounded on the assumption that there are two or more procedural courses actually open to the party; if eventually it develops that such party misconceived his remedy and the one on which he expected to rely had never been available, the estoppel does not apply. The rule is well stated in the case of *Agar v. Winslow*, 123 Cal. 587, 591, 56 P. 422, 423, 69 Am.St.Rep. 84: "Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts." Before one can exercise an option or preference between two things, both these things must have an actual existence. * * * If plaintiff was mistaken, and undertook to avail himself of a remedy that he was never entitled to, this does not prevent him from subsequently availing himself of a remedy that he is entitled to under the facts of the case.' See, also, *Restatement of the Law of Contracts*, § 383 [vol. 2, p. 717]; 20 *Corpus Jur.* 21; 9 *R.C.L.* 962."

[8] In the instant case the evidence is that the plaintiffs could not elect between two remedies because the only one available to them was an action in tort. The trial of the instant action was the only adjudication on the merits of plaintiffs cause of action for negligence. The sufficiency of the evidence to sustain the court's findings with respect to the negligence of the defendant and his responsibility therefor is not here questioned, and the circumstances presented by the record do not justify a conclusion that the plaintiffs were estopped to maintain the present action because an attachment was issued in the former suit.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

CLARK v. LESHER et al.

Civ. 7969.

District Court of Appeal, Third District,
California.

Aug. 30, 1951.

Rehearing Denied Sept. 24, 1951.

Hearing Denied Oct. 25, 1951.

Action by Howard A. Clark against Dean S. Leshner and others brought to recover damages suffered as result of illegal conspiracy among defendants. The Superior Court, Madera County, Edward L. Kellas, J., entered judgment against the plaintiff and he appealed. The District Court of Appeal, Van Dyke, J., held that the complaint sufficiently alleged a cause of action and that the surviving partner could maintain the suit as an individual.

Judgment reversed for further proceedings.

1. Monopolies ⚖️28(1)

Under statute declaring unlawful any combination of capital, skill or acts by two or more persons with purpose, among other things, of creating or carrying out restrictions in trade or commerce or to increase price of merchandise or any commodity, damages from partial destruction of partnership assets to permit purchase at lower price by group causing destruction could not be recovered. Business and Professions Code, §§ 16700-16758.

2. Monopolies ⚖️28(1)

Damages recoverable by private persons under statute which makes certain combinations illegal are such as result directly from fact of existence of unlawful combination or trust and solely from restrictions in trade or commerce fostered thereby. Business and Professions Code, §§ 16700-16758.

3. Monopolies ⚖️28(6)

Where complaint showed that damages sued for arose not because of any restriction in trade or commerce, but by alleged wrongful acts of defendants, whereby, anticipating sale of partnership property, they, through fraud, partially destroyed value thereof, complaint failed to show right to maintain action under statute making certain combinations illegal. Business and Professions Code, §§ 16700-16758.

4. Pleading ⚖️49

Where complaint states cause of action, it is immaterial that party misconceived theory of his suit.

5. Conspiracy ⚖️1

Generally, liability for conspiracy to commit tort exists where there has been formed and operated conspiracy to accomplish by concerted action criminal or unlawful purpose or lawful purpose by criminal or unlawful means which results in actual damage.

6. Conspiracy ⚖️1

Where parties in pursuance of conspiracy or combination for that purpose fraudulently make use of legal proceedings to injure another, action lies against them, at suit of person injured, to recover damages sustained.

7. Conspiracy ⚖️18

In action to recover damages suffered as result of illegal conspiracy to destroy partnership assets, allegations of complaint were sufficient to state cause of action for conspiracy to commit tort.

8. Appeal and error ⚖️917(1)

Upon appeal from order sustaining demurrer to sufficiency of complaint, reviewing court, to determine sufficiency of allegations, accepts them as true.

9. Judgment ⚖️948(1)

Whether action is barred by prior judgment and whether issues tendered in action are subject to plea of res judicata are matters of defense, generally regarded as affirmative, and such as must be presented either by pleading or evidence by one relying on it.

10. Partnership ⚖️258(6)

Where partnership was ended by death of partner and winding up had been substantially completed, with all assets reduced to money, all debts paid and nothing remaining but to distribute parties' distributive shares, and only surviving partner and one of defendants owned distributive shares, though they had never been partners, and it was by such defendant's tort that distributive shares had been reduced in amount, surviving partner, as individual,

could maintain suit for partial destruction of partnership assets to permit their purchase at reduced price.

H. A. Savage, Fresno, for appellant.

Green, Chandler & Green, Madera, for respondents Leshar & Holcomb.

E. L. Coffee, Madera, for respondent Roy Wolfe.

VAN DYKE, Justice.

Defendants in the trial court had judgment that plaintiff take nothing against them after their demurrers to the third amended complaint had been sustained without leave to amend. Plaintiff appeals.

The action purports to be brought to recover damages suffered by appellant as the result of a conspiracy among the defendants in violation of the Cartwright Act. Gen.Laws Act 8702. That act, which now appears in Sections 16700 to 16758 of the Business and Professions Code, declares unlawful any combination of capital, skill or acts by two or more persons with the purpose, among other things, of creating or carrying out restrictions in trade or commerce or to increase the price of merchandise or any commodity. The allegations of the third amended complaint may be summarized as follows: In 1920 appellant and his father formed a partnership which became the owner of the Madera Daily Tribune and Mercury, a newspaper published in Madera. Each owned a half interest in the partnership. Appellant's father died in 1944 and appellant, as surviving partner, continued the business of publishing the newspaper. Appellant's father left surviving him three children, and each by inheritance, and subject to probate, succeeded to a one-sixth interest in the partnership property. About that time respondent Leshar purchased the Madera Daily News, another newspaper published in Madera, which paper competed with the Tribune and Mercury. Leshar appointed respondent Halcomb as manager. The two then conspired to eliminate the Tribune and Mercury as a competitor to the News so

that Leshar would be able to monopolize the publishing business in Madera County and unreasonably advance advertising prices and subscriptions. In furtherance of the conspiracy, Leshar purchased the two-sixths interest in the Tribune and Mercury from the other heirs of appellant's father. R. S. Jay, then public administrator for Madera County, was appointed administrator of the father's estate and later, at the instigation of defendants, brought action against appellant as surviving partner asking that a receiver be appointed to act in winding up the partnership affairs. In that action the court entered an interlocutory decree declaring that appellant herein was, as surviving partner, no longer entitled to continue in possession of the paper and ordering that a receiver be appointed, with directions to inventory the assets of the business, continue publication of the paper and to sell the partnership assets, as a going concern, during publication. This decree was appealed and was affirmed. See Jay v. Clark, 85 Cal.App.2d 88, 192 P.2d 462. After affirmance, the court named one and then another receiver, both of whom failed to qualify. In the meantime appellant was continuing publication of the paper. On June 24th respondents Leshar and Halcomb, carrying out their original conspiracy, further conspired and agreed with respondent Roy Wolfe that he would be appointed receiver and as such would contrive to cease publication of the paper. He was appointed and qualified. On June 25, 1948 he took possession of the business and assets of the partnership and "ousted plaintiff therefrom." On July 7th following, Wolfe, as receiver, presented to the judge who presided in the receivership action a supplemental order which directed the receiver to inventory the assets of the partnership business and to sell the same as soon as possible, but not later than thirty days from the date of the order; and in the meantime to cease publication of the paper. This order to cease publication was alleged to have been procured by Wolfe by falsely stating to the judge that there were no funds available to continue publication,

whereas in fact such funds were available. These representations of Wolfe, alleged to be part of the conspiracy among respondents, were made, knowing that when the paper ceased publication its status as an established newspaper and its good will dependent thereon would be lost. Wolfe proceeded to publish notice of sale of the assets of the partnership and Leshar bid the same in for \$30,750. Before publication ceased, the good will of the paper was worth \$50,000 and the value of its status as an established newspaper for the publication of legal notices and the like was worth \$25,000. These assets it is alleged were lost through cessation of publication, so that respondent Leshar was able to purchase at the depreciated value represented by his bid. Finally, on the subject of damages which appellant seeks to recover it is alleged that by the wrongful conspiracy the value of the assets of the partnership business was partially destroyed and lost when the publication of the paper ceased and that by reason of these matters appellant suffered damage in the sum of \$50,000, which pursuant to the provisions of the Cartwright Act, he asked be duplicated and that he be awarded judgment for such augmented sum.

[1,2] It is to be noted that the damages which appellant seeks to recover are by his pleading expressly limited to those which flow from the partial destruction of the partnership assets. Such damages, however, are not recoverable under the provisions of the Cartwright Act and it follows, therefore, that if the Cartwright Act be the sole source to which the court must look in determining whether or not appellant's complaint states a cause of action, then this Court must declare that no such cause is stated. The Cartwright Act, in so far as it authorizes private persons to sue for damage does so in these terms: "Any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, * * *

and to recover twofold the damages by him sustained." It was early pointed out by the appellate courts of the state that the damages recoverable under the foregoing provisions of the act must be such, and could only be such, as resulted directly from the fact of the existence of the unlawful combination or trust and flowed solely from restrictions in trade or commerce fostered thereby. We quote the following from *Munter v. Eastman Kodak Co.*, 28 Cal.App. 660, 665, 153 P. 737, 739: "'* * * while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, *did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.*'" (Italics added.) See, also, *Overland Publishing Co. v. Union Lithograph Co.*, 57 Cal.App. 366, 207 P. 412.

[3] The application of the foregoing interpretation of the provisions of the Cartwright Act authorizing suit by private persons is obvious. The complaint makes it quite clear that the damage sued for arose not because of any restriction in trade or commerce, but by the alleged wrongful acts of respondents, whereby, anticipating a sale of the partnership property, they, through fraud practiced upon the court in the receivership action, partially destroyed the value thereof. This loss could not in any way be said to have flowed from restrictions in trade or commerce carried out by the alleged unlawful trust. Indeed, it is clear that the damage alleged occurred before the respondents had in the pursuit of their conspiracy arrived at a point where by elimination of the competing newspaper that had been published by the partnership they would be able to create and maintain restrictions in the publishing business in the Madera area.

We conclude, therefore, that in so far as the appellant has sought to state a cause of action under the Cartwright Act he has failed to show any right to maintain such action and is relegated to his ordinary legal remedies.

[4] It remains, however, to consider whether or not the complaint states a cause of action without necessarily calling the Cartwright Act to its aid, for if it states a cause of action then under familiar principles it is immaterial that appellant may have misconceived the theory of his suit. Leaving the Cartwright Act out of consideration, as we now must, appellant has alleged that first Lesher and Halcomb, and later Wolfe, conspired to injure appellant and his co-owners of the partnership business who were, first, the other two heirs of his father, and shortly after the father's death the respondent Lesher, who purchased the other heirs' interest. All that respondents are alleged to have done is embraced within the orbit of the receivership action.

[5] It appears from the allegations of the complaint that at this point Lesher and Halcomb took Wolfe into their conspiracy and that the three then conspired to obtain Wolfe's appointment as receiver, agreeing among themselves that when he had been so appointed and had qualified he would cease publication of the newspaper, prior to a sale of its assets. It is further alleged that in order to do this he falsely represented to the court that early cessation of publication was necessary for lack of funds and by such representation secured an order that such publication cease and that it cease at a time anterior to the selling of the partnership assets. It further appears that the three men, still acting in concert and by design, by means of such fraud brought about the actual cessation of publication and it is alleged that upon such cessation the interests of appellant in the partnership assets were depreciated and damaged. Civil liability for conspiracy to commit a tort has long been recognized in this State. The subject is treated in 5 California Jurisprudence, page 528. Generally speaking, the liability exists where there

has been formed and operated a conspiracy to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means which results in actual damage. *Wells v. Lloyd*, 6 Cal.2d 70, 82, 56 P.2d 517. The necessary elements are thus stated in *Neblett v. Elliott*, 46 Cal.App.2d 294, 302, 115 P.2d 872, 877: " * * * It is only when plaintiff can show that a defendant has united or cooperated with others to inflict a wrong upon him that he is entitled to a joint recovery of damages against such defendants. *More v. Finger*, 128 Cal. 313, 60 P. 933; *Nevin v. Gary*, 12 Cal.App. 1, 106 P. 422; *Herron v. Hughes*, 25 Cal. 555. To accomplish this, plaintiff must show (1) concert of action between Elliott and the other defendants to accomplish the purpose of the conspiracy, i. e., the publication of the libel; (2) that respondent's actions were illegal and in furtherance of a common scheme or design to achieve the unlawful purpose of the conspiracy; and (3) that respondent had knowledge of the conspiracy and its unlawful purpose. *Angelus Securities Corp. v. Ball*, 20 Cal.App.2d 423, 432, 67 P.2d 152.

[6] The fact that the conspiracy involved action by the receiver in fraudulently obtaining from the court an order to cease publication does not shield the defendants from liability for their wrong. "Where parties in pursuance of a conspiracy or combination for that purpose, fraudulently make use of legal proceedings to injure another, an action lies against them, at the suit of the person injured, to recover damages sustained." 15 C.J.S., Conspiracy, § 16 page 1027; see also *Kalb v. Luce*, 239 Wis. 256, 1 N.W.2d 176; *Aker v. Sears-Roebuck & Co.*, D.C. Idaho, 38 F. Supp. 741.

[7,8] We think the allegations of the complaint here measure up to the tests imposed by the authorities referred to. We are not concerned with the truth of those allegations; on this appeal they are presumed to be true. Clearly the alleged actions of the conspirators were not only unlawful but were of such a nature that if they were successful in their evil design

then the damage done would be irremediable, for by the cessation of publication an established newspaper with a valuable good will was disestablished and destroyed as a newspaper and the assets of the business of the former partnership were seriously depleted.

[9] It is respondents' contention that the allegations under discussion, since they involve the propriety of a court order made in the receivership action, tender issues that must be considered as having been passed upon adversely to appellant's contention in that proceeding. They argue that the issues sought to be raised for litigation by appellant's complaint in this respect have been rendered *res judicata*. But we think this contention is not sound. Whether or not an action is barred by a prior judgment and whether or not issues tendered in an action are subject to the plea of *res judicata* in estoppel are matters of defense, generally regarded as affirmative, and such as must be presented either by pleading or evidence by the one relying on it. *Rideaux v. Torgrimson*, 12 Cal.2d 633, 638, 86 P.2d 826.

[10] It has been contended from the beginning by the respondents that the appellant lacked legal capacity to bring the action under review. This was a ground of demurrer as to each complaint as filed and from the memorandum of the trial court filed preparatory to sustaining the demurrers interposed to the first complaint it is apparent that this ground of demurrer has been steadily sustained. The argument is the familiar one that a partner cannot bring an individual suit because of injury inflicted upon the property of the partnership and that on the contrary, since the right is joint, that all joint owners must join in the suit. As a corollary it is argued that the right of action in case of injury to partnership assets is in the surviving partner or partners acting in their representative capacity and not as individuals and finally that, since the receiver was acting in lieu of the surviving partner under the order of the court in the receivership action, the right of action was in him.

We are of the opinion that appellant herein is entitled to pursue this action in his individual capacity. At the time the alleged wrong was committed the partnership had been dissolved by the death of one partner, and the process of winding up the partnership affairs was substantially completed. The amended complaint sets forth these facts clearly. It is alleged that all the assets of the partnership have been reduced to money and all of its debts paid. If that be so, then nothing remains to be done but to distribute to the parties entitled their distributive shares. According to the complaint the only persons owning a distributive share are the appellant and the respondent Leshar. Under such circumstances, the joint interest in the partnership property is, for all practical purposes, severed.

The reasons for the rule relied on have been variously stated. Thus the rule is said to arise from the inconvenience and inability of courts of law to examine and adjust complicated accounts; that it is justified because until there has been an accounting and settlement of partnership affairs no cause of action can be ascertained to exist; that in such a suit a partner is in effect suing himself, which is not to be permitted. But none of the reasons given apply in such a situation as is alleged to exist in the case before the Court. Appellant and the respondents have never been partners. There is, according to the allegations, no account to be settled for that has all been done, and while Leshar has succeeded by purchase to the distributive shares of the heirs of the deceased partner other than the appellant, nevertheless it is by his own tort, if the allegations be true, that the amount which would otherwise have been distributable to appellant has been diminished. We think that no reason exists why this action cannot be maintained in its present form.

The judgment is reversed for further proceedings in the cause in accordance herewith.

PEEK, J., and SCHOTTKY, Justice pro tem., concur.

106 Cal.App.2d 304

MILLER et al. v. CONTRA COSTA COUNTY.

Civ. 14694.

District Court of Appeal, First District,
Division 2, California.

Aug. 27, 1951.

Robert H. Miller, Jr., and Warren Boggess sued the County of Contra Costa for personal injuries to plaintiff Miller and damages for destruction of plaintiff Boggess' airplane as the results of a crash on defendant's airport while plaintiff was flying the plane. From a judgment of the Superior Court, County of Contra Costa, Harold Jacoby, J., awarding damages to plaintiff Miller and denying recovery by plaintiff Boggess, defendant and plaintiff Boggess appealed. The District Court of Appeal, Goodell, J., held that the evidence supported the trial court's findings that defendant's invitation of plaintiff Miller to use the airport included the part thereof where the accident occurred, that the presence of a mound of dirt paralleling a runway was a proximate cause of the crash, that plaintiff Miller made a reasonable choice in attempting to regain the air instead of riding out a ground loop, and that he was not negligent in relaxing his back pressure on the controls while on the runway, but was insufficient to support a finding that plaintiff Boggess' negligence in failing to warn plaintiff Miller of the dirt mound's presence proximately contributed to the accident.

Judgment affirmed as to plaintiff Miller, and reversed as to plaintiff Boggess with directions.

1. Negligence ⇨22½

The standard of care in operation of airplane on airport must be judged by general laws and rules of negligence, in absence of legislation on subject.

2. Counties ⇨223

In action for injuries to pilot of airplane colliding with mound of dirt paralleling runway on defendant county's airport, evidence supported trial court's implied finding that county's express or implied invitation of plaintiff to use airport included part of premises where accident occurred.

3. Counties ⇨223

In action for injuries to pilot of airplane, colliding with mound of dirt paralleling runway on defendant county's airport when he attempted to regain air after going into ground loop on runway, evidence supported trial court's finding that presence of such mound was a proximate cause of crash.

4. Counties ⇨224

Whether airplane pilot's attempt to regain air instead of riding out ground loop on county airport runway in sudden emergency would have been choice of reasonable man in his predicament was question for trier of facts, under imminent peril rule, in action against county for injuries to pilot as result of collision with mound of dirt paralleling runway.

5. Counties ⇨223

In action against county for injuries to airplane pilot as result of collision with mound of dirt paralleling county airport runway when he attempted to regain air instead of riding out ground loop after landing on runway, testimony of experienced pilot, who conducted flying school at such airport, that he would probably have done what plaintiff did, was sufficient to support trial court's implied finding that plaintiff's choice was that of reasonable man under circumstances.

6. Appeal and error ⇨931(1)

On appeal, facts must be viewed in light most favorable to respondent.

7. Counties ⇨223

In action against county for injuries to pilot of airplane colliding with mound of dirt paralleling county airport runway when he attempted to regain air after going into ground loop on runway, plaintiff's testimony that his loss of directional control of plane was due to a quartering gust of wind supported trial court's implied finding that plaintiff was not guilty of negligence, causing loop, in relaxing back pressure on controls after landing on runway.

8. Counties ⇨223

Witnesses ⇨246(2), 414(1)

In action against county for injuries to pilot of airplane and damages for de-

struction thereof as results of collision with mound of dirt paralleling county airport runway, questions by the court on plaintiff pilot's counsel's direct examination of coplaintiff, from whom pilot rented plane, as to whether he knew of dirt's presence, told pilot about it, and was present when pilot came to airport to get plane, were relevant to inquiry whether pilot knew or had notice of such hazard, and witness' affirmative answers to first and last questions and statements in answer to other questions that he did not recall and would not say whether he told pilot about dirt were admissible as tending to corroborate pilot's testimony that he had no knowledge or notice of hazard and establish coplaintiff's negligence in failing to warn pilot thereof.

9. Appeal and error ⇨206(2)

Error in questions asked witness without objection cannot be urged for first time on appeal.

10. Counties ⇨223

In action against county for injuries to pilot of airplane and damages for destruction thereof as results of collision with mound of dirt paralleling county airport runway when pilot attempted to regain air after going into ground loop on runway, evidence was insufficient to support trial court's finding that negligence of coplaintiff, from whom pilot rented plane, in failing to warn pilot of mound's presence, proximately contributed to accident, in view of testimony of coplaintiff, who was expert flyer, that he probably would have done what pilot did even with full knowledge of mound's presence.

Tinning & DeLap J. Vance Porlier, Richmond, for defendant appellant.

Granville T. Burke, Oakland, for plaintiff-appellant, Warren Bogess.

Carlson, Collins, Gordon & Bold, Robert V. Collins, Steven H. Welch, Jr., Richmond, for plaintiff-respondent, Robert H. Miller, Jr.

GOODELL, Justice.

On Sunday, September 26, 1948 respondent Miller while flying an airplane onto

Buchanan Field, near Concord, crashed and was injured about the face and head. He sued the county as owner and operator of the airport, for his injuries. Appellant Bogess owned the plane, which was demolished, and sued in the same action for its value. Miller had judgment for \$1,093.-80, while Bogess was denied a recovery. Both the county and Bogess appeal on the same record.

Miller is a licensed pilot who had been flying from that field since June, 1947, and had more than 100 flying hours experience. He had taken up aviation "in lieu of a hobby, and partly to conduct business." He and others had made a group flight and were returning to the airport shortly after noon. The plane was a single-engine "Aeronca Chief" which had been rented by Miller from Bogess on that Sunday as on other occasions.

The area designated for landing was runway 32, which was about 4,600 feet long. Its "improved" strip was 150 feet wide and had a hard, paved surface. Adjoining and paralleling it on each side had been a shoulder of oiled dirt 75 feet wide, but these 75-foot shoulders had just been widened by the county to 105 feet.

In grading the additional 30-foot strips the machines had left a mound of dirt running along the outer edges thereof for their entire length. These mounds were of uneven height, varying from 6 to 18 inches. Bogess testified that "The dirt was left where it fell off the blade of the grader along the edge of the shoulder." It had solidified and was completely concealed by weeds about 2½ feet high. Miller testified that he had received no warning of this condition orally, by bulletin, red flag, or otherwise.

As he flew in, Miller set his plane down on runway 32 and after taxiing in the usual way down the center thereof for about 100 feet the plane suddenly veered to the left and went into a ground-loop, out of directional control. He was being followed onto the runway by other planes which created a hazard to all concerned, and instead of letting his plane "ride out" the ground-loop and risk collision with those following, he gave it "full throttle" in an attempt to re-

gain the air and make a new landing. This application of full power caused the plane to taxi, at an angle of approximately 80 degrees left of the runway's center line, across the runway, the 75-foot shoulder, and its new 30-foot addition. Just before reaching the mound of dirt at the outermost edge the plane became air-borne, but, although a few inches off the ground it still had not enough altitude to clear the mound of dirt. Its under-carriage struck the mound, which caused the plane to stall and crash.

The County's Appeal.

The county denied any negligence and pleaded Miller's contributory negligence. It contends that he lost control "through his own negligence" and used "erroneous recovery tactics".

[1] The case of *Parker v. James Granger, Inc.*, 4 Cal.2d 668, 677, 52 P.2d 226, followed by *Pignet v. City of Santa Monica*, 29 Cal.App.2d 286, 287, 84 P.2d 166, holds that in the absence of legislation the standard of care in airport cases such as this is to be judged by the general laws and rules of negligence.

[2] First, with respect to the county's negligence:

The county concedes that Miller was its invitee but attempts to limit that status to certain parts only of the 530-acre field.

The court found that the plane "ran into and collided with a mound of dirt which paralleled said runway * * *; that said mound of dirt was negligently and carelessly maintained by said defendant, and plaintiff * * * had no notice or knowledge of its existence; that the airplane * * * was caused to strike said mound of dirt as a proximate result of the carelessness of said defendant."

The grading of the widened shoulders started on September 15th. Two days later, on the 17th, a girl student-flyer "veered off the shoulder just slightly, and started out toward the weeds, and hit the mound of dirt on that north-south runway, and peeled the landing gear off." (This was not runway 32, but both runways were being widened.) Boggess, who owned her plane, vehemently complained to the airport mana-

ger. Notice of the dangerous condition, then, had been brought home to the county nine days before Miller's crash.

The airport manager admitted that the mound of dirt was a hazard, but qualified his answer by saying "but it was completely off the runway." After admitting that he knew student-pilots were using the runways and "frequently went into ground-loops" he was asked "And you felt that that mound of dirt then was a definite hazard, did you not, and it should be properly flagged?" and answered "Yes, sir, that is why we notified all fixed base operators of that fact." He then testified that " * * * the job was not completed at the time of the second accident [Miller's]. * * * We were working continuously there, trying to get the scrapings to feather out, but because of the straw and weeds, and everything like that, we were having trouble in getting them to feather out into the field."

The county admits that it was its duty "to warn respondent of known dangers and to exercise ordinary care in keeping the land in a reasonably safe condition", but it contends that such duty "applies only to that portion thereof where the invitee would, under the circumstances and conditions of his invitation, *naturally* be likely to go."

However, Boggess testified that "The ground rules at Buchanan Field specify the landing area to include the shoulders * * the hard surface and shoulders" and this was not contradicted. He testified also that the widening of the 75-foot shoulders had been completed and "there was no differentiating there between the old and new shoulders, when you are talking about landing areas." He was asked "And in the area that is plowed, are planes able to taxi over the area?" and answered "It is not the normal thing. However, in a recovery from a situation like this, that area could be utilized for recovery under normal conditions" which testimony was not contradicted.

All this testimony was clearly sufficient to support an implied finding of fact that, as was said in *Gastine v. Ewing*, 65 Cal. App.2d 131, 140, 141, 150 P.2d 266, 270, "the invitation, express or implied, included

that part of the premises where the injury occurred". After all, it occurred on the very border-line of the over-all landing area (according to the "ground rules") and not within the plowed area, which, in any case, was also available under the "Any port in a storm" theory testified to by Boggess.

[3] With respect to proximate cause:

In electing to try to regain the air Miller, according to all the witnesses, did it the hard way, as the saying goes, but the fact remains that he almost succeeded. After the crash the airport manager retraced the plane's path and found that it had become air-borne about 10 feet before it reached the mound of dirt. Since the mound of dirt intercepted the plane's undercarriage, it is fair to say that had it not been there, Miller would have safely completed his difficult, emergency "take-off". The finding that the mound of dirt was a proximate cause of the crash is thus amply supported by the evidence.

[4, 5] With respect to Miller's contributory negligence:

The court found that at the time of the collision plaintiff "was exercising ordinary care for his own safety, and no negligence on the part of plaintiff * * * proximately, or in any manner, contributed to the happening of said accident."

It is self-evident that plaintiff was confronted with a sudden emergency when his plane veered and went into the ground-loop. He was being followed into the airport by several other planes and he had their safety and his own to consider. Nobody could tell where the ground-loop, willy-nilly, would take him. The record shows that he then had two alternatives—either to "ride out" the ground-loop or to attempt to regain the air, and it is undisputed that the latter was the more difficult of the two. Under the imminent peril rule it was a question for the trier of fact to determine whether the alternative which he chose would have been the choice of a reasonable man in his predicament. *Kirk v. Los Angeles Ry. Corp.*, 26 Cal.2d 833, 841, 161 P.2d 673, 164 A.L.R. 1; 19 Cal. Jur. 598, 599-600. Boggess testified "if

there were a mound of dirt there, I certainly would probably do what he did." This testimony, given by an experienced flyer (who conducted a flying school at this field), was sufficient to support the implied finding that Miller's choice was that of a reasonable man under the circumstances.

[6, 7] The finding that Miller was not negligent also settles the county's contention that Miller was negligent in relaxing the back pressure on the controls while on the runway and that this might have thrown him into the ground-loop in the first place. Plaintiff attributed his loss of directional control to "the quartering gust of wind". Various theories are advanced as to what caused the ground-loop, but it seems to be one of those things which cannot be determined with any degree of certainty in the absence of a mechanical failure, of which, it is conceded, there was none. Boggess, when questioned about a ground-loop testified that "you get it in any airport" which, we take it, is a flyer's way of saying that it is a mishap which might befall the best of pilots and planes from some cause or other, difficult to pin down or analyze. From plaintiff's testimony the court could have found that the plane was sent into the loop by "the quartering gust of wind", which would be neither "pilot error" nor negligence. On appeal, it goes without saying, the facts must be viewed in the light most favorable to the respondent. Plaintiff's testimony supports the findings in this respect, with only speculations opposed to it.

Following the rule of *Parker v. James Granger, Inc.*, supra, and applying the standard rules of negligence, it must be concluded that the findings are fully supported by the evidence.

The Boggess Appeal.

[8, 9] There was no plea of contributory negligence on this branch of the case. Nevertheless the court found that Boggess, with knowledge of the mound of dirt, was negligent in failing to warn Miller of it, and that "such negligence * * * proximately contributed to the happening of said accident * * *".

The principal basis for this finding was the testimony of appellant himself, elicited by questions asked by the judge while Boggess was under direct examination by Miller's counsel as a witness for *both plaintiffs*. The questions and their answers were:

"The Court: Q. You knew * * * that dirt was there? A. Yes. I found it out the hard way 2 weeks before."

"The Court. Q. You didn't tell Mr. Miller about the dirt, did you? A. I don't recall whether I did or not. * * *

"The Court. Q. And you didn't say anything to Miller about this pile of dirt being there? A. Sir, I wouldn't say yes or no to that * * *.

"The Court. Q. Were you there when he came there to get the plane that morning? A. Yes, sir."

Appellant contends that as contributory negligence was not pleaded, it was not in issue, hence the court erred in asking these questions.

There was no error or impropriety in the questions. *McClure v. Donovan*, 33 Cal.2d 717, 736, 205 P.2d 17; *Estate of Dupont*, 60 Cal.App.2d 276, 290, 140 P.2d 866, and cases cited; 27 Cal.Jur. § 49, pp. 65-66. Moreover, there was no objection and "it is too late to urge it as error for the first time on the appeal". *People v. Ottey*, 5 Cal.2d 714, 721, 56 P.2d 193, 196, and cases cited. All four questions were relevant to the inquiry whether Miller (whose case was being tried with that of Boggess) had knowledge or notice of the hazard, and their answers tended to corroborate Miller's testimony that he had no knowledge or notice. The plaintiffs elected to combine their cases in one action and Boggess was testifying for *both plaintiffs*. Had the two cases been tried separately the present problem might never have arisen, or if it had, it would have been more sharply defined than it is now. The answers, while relevant to Miller's case, tended at the same time to establish Boggess' negligence in not warning Miller.

[10] We are satisfied that the evidence was sufficient to support the finding of negligence against Boggess, but we are not

satisfied that it was sufficient to support the finding that his negligence "proximately contributed to the * * * accident * * *."

We have already discussed Miller's peril and the two alternatives he had. Under cross-examination Miller was asked: " * * * As a matter of fact, in the position that you were attempting to take off there, it was a completely improper position for that runway, was it not?" and answered "not in the condition that was existing." Further: "Well, you don't take off at the side of the runway?" and answered "Well, if it is a matter of your life or death, you take off in any direction you can, sir. If it is your neck, you are going to do the thing you think best to do." He then spoke of the peril which was present because of the planes following him onto the field, describing what might have happened had he ridden out the ground-loop and concluded with the remark "I didn't like it", which is readily understandable.

The inquiry whether Boggess' failure to warn Miller was a proximate cause of the crash naturally raises the question whether *with* warning Miller would have acted any differently. There is no evidence to indicate that he would have, and in its absence the question remains within the realm of speculation and conjecture. If Boggess had warned Miller or if a line of red flags had told him of the hazard, he might still have weighed one danger against the other, and done exactly the same thing.

Appellant Boggess was cross-examined as follows:

"Q. And his recovery from the ground loop is contrary to what you would instruct a student to do? A. Contrary to what I teach—not contrary to what some instructors teach. As I say, it is an elective thing.

"The Court: It is a matter of opinion? A. Yes.

"Mr. Porlier: Q. It is contrary to what you teach, however? A. Yes, it is.

"Mr. Porlier: Q. It is your opinion that the better thing to do in that instance

is to let it roll itself out of the loop?
A. Is to ride it through, yes."

On re-direct the examination was as follows:

"Q. Having in mind the mound of dirt there, and you were veering off toward that mound of dirt, would not give any—having in mind the condition of the field, would you give different instructions? A. Well, if there were a mound of dirt there, I certainly would probably do what he did."

For whatever it was worth, there was thus before the Court without objection the testimony of an expert flier that even with full knowledge of the mound of dirt there he "certainly would probably do what he did."

That part of the judgment which awards respondent Miller \$1,093.80 and costs is affirmed.

That part of the judgment which denies appellant Boggess a recovery is reversed, with the direction to the trial court to make a finding that Boggess' negligence was not a proximate cause of the accident, and to enter judgment in his favor against the county.

Both plaintiffs to have their costs on appeal.

NOURSE, P. J., concurs.



106 Cal.App.2d 440

WILSON v. CITY & COUNTY OF SAN FRANCISCO.

Civ. 14659.

District Court of Appeal, First District,
Division 1, California.

Sept. 4, 1951.

May Wilson sued the City of San Francisco for the wrongful death of her brother Reverend Dennis Wilson. The Superior Court, County of San Francisco, Thomas M. Foley, J., entered judgment for plaintiff for

two thousand dollars and plaintiff appealed. The District Court of Appeals, Peters, P. J., held the award was insufficient and not supported by law.

Reversed.

1. Appeal and error ⇨1004(1)

The question of damages is primarily a question for the trial court and the power of the appellate court to review on appeal is strictly limited.

2. Appeal and error ⇨1001(1)

Verdict must be supported by the evidence.

3. Death ⇨85, 88

The pecuniary value of loss of comfort, protection and society is an element of damage for wrongful death.

4. Death ⇨31(5)

Collateral heirs may recover for wrongful death where they show loss of support and a reasonable probability that the society, comfort and protection of the decedent was of pecuniary advantage.

5. Death ⇨58(2)

Where collateral heirs sue for wrongful death, they must prove their pecuniary loss or they will be limited to nominal damages.

6. Death ⇨98

Award of two thousand dollars to sister of decedent for wrongful death where sister was wholly dependent upon decedent, and where decedent shared income with sister, saved approximately twelve hundred dollars per year for their joint use and where sister was decedent's housekeeper, companion, and hostess and had immigrated to United States upon decedent's promise to support and care for her and where sister had paid funeral expenses of nine hundred dollars, was insufficient.

7. Death ⇨91

The amount received by collateral heir from decedent's estate or joint tenancies cannot be considered as an offset to award for wrongful death.

George Devine Jr., San Francisco, for appellant.

Dion R. Holm, City Atty., C. Wesley Davis, Deputy City Atty., San Francisco, for respondent.

PETERS, Presiding Judge.

The Reverend Dennis Wilson, a Catholic priest, was killed as a result of the admitted negligence of a motorman of a city-owned streetcar. His sister May Wilson, who was his constant and close companion, and his housekeeper and hostess, brought this action for his wrongful death. The evidence shows that she expended over \$900 for funeral expenses. The jury brought in a verdict for \$2,000. From the judgment entered on that verdict plaintiff appeals, her main contention being that the award is inadequate as a matter of law. With this contention we agree.

Father Wilson was 50 years old at the time of his death in 1948, in good health, and with a life expectancy of 20.91 years. Appellant was 55 years of age at the time of trial (1950), in good health, and with a life expectancy of 18.79 years. Both were born in Ireland, there being three other brothers and three other sisters. Their mother and father are dead. Dennis was educated in Ireland and England and came to the United States in 1917 to attend a seminary in Minnesota. He was ordained in 1921. Thereafter, he served as assistant pastor in several parishes in Minnesota. In 1926 he was appointed to his own parish in that state. At that time appellant was still living in Ireland. She was his favorite sister. It had been understood between them for many years that, when Dennis got his own parish, appellant would come to the United States and take care of the parish house. After Dennis was appointed pastor he wrote several letters to appellant urging her to come to the United States. He promised that, if she would take care of his home, he would take care of her, and would take care of her future. In 1927 appellant, in response to these requests and promises, came to the United States and took up her residence in the parish house. From the beginning of this arrangement until the death of Dennis the relationship was a close and loving one. Appellant was far more than a housekeep-

er. She took care of the house and participated in the social life of her brother. She received no specific salary, but everything Dennis earned went into one joint pocketbook for their joint use. She received her food, clothing, shelter and medical care from this source. Anything she desired, her brother purchased for her. He liked to sing, and for their joint pleasure he purchased a piano so that she could play for him and for their own amusement, and to entertain their guests. When Father Wilson had guests appellant was one of the party and was always referred to as "sister" or "hostess." When Father Wilson accepted invitations to eat out, or went out to eat, she always accompanied him. The relationship was loving and affectionate on both sides, she relying upon him for advice and consultation.

As pastor, Father Wilson was given a furnished house, and the utilities were paid from parish funds. He received about \$1600 a year as pastor, and, in addition, earned, and was permitted to keep, about \$1,000 a year received as fees for performing marriages and officiating at funerals. Prior to 1948 the pastor was required to pay for his housekeeper out of his own funds, but since that year an allowance from parish funds of between \$50 and \$60 per month has been permitted. However, even after 1948, appellant did not receive a salary as such, all the income of her brother being available to her for their joint use.

Beginning in 1944 Father Wilson was able to save, net, about \$100 a month. Part of this went into a joint savings account with his sister, which account had a balance of \$3,346.50 at the time of his death. Some of these savings were invested in government bonds, jointly owned, of a face value of \$2,475. In addition, Father Wilson left an estate of \$4,600, of which appellant was sole beneficiary, her brothers and sisters waiving their rights thereto.

Early in 1948 Father Wilson, in the company of another priest, came to California to attend an ordination ceremony. It was while he was on this trip that he visited San Francisco and was killed through the admitted negligence of respondent. Ap-

pellant paid the funeral expenses, totalling \$909.74.

After the death of her brother, appellant was unemployed for about a year. During this period she lived with another brother, who is a doctor in St. Paul and who is married and has four children. One of her other brothers also lives in the United States but he, too, is married and has four children. Her other brother and her sisters still live in Ireland. She is now employed as a housekeeper by a priest in Minnesota at a salary of \$50 per month, plus room and board. She must buy her own clothing, pay her own medical expenses, and pay all of her other expenses from this meager salary. She can save nothing from this salary. She is not trained to do any other kind of work. On her present job she has the status of a domestic servant. She does not participate in any way in the social life of her employer.

This is a fair summary of the evidence. On this evidence the jury brought in a verdict of \$2,000. If the funeral expenses be deducted, this means an actual award of less than \$1,100 as the pecuniary measure of the financial loss, loss of society, comfort, care, advice, assistance and protection here shown to exist. We have no hesitancy in stating that such an award shocks the conscience, is inadequate as a matter of law, and must be reversed.

[1,2] We are well aware of the rule that the question of damages is primarily a question for the trial court, and that the power of the appellate court over the award is strictly limited. *Finley v. Steiner*, 40 Cal.App.2d 331, 104 P.2d 819. But, of course, if the award, as a matter of law, is not supported by the evidence, a reversal should be ordered, as it would if any other material finding is unsupported. *Weiskopf v. Smith*, 44 Cal.App.2d 438, 112 P.2d 665; *Price v. McComish*, 22 Cal.App. 2d 92, 70 P.2d 978. That is this case.

[3] Here we have more than a brother-and-sister relationship. Factually, it resembles a father-and-daughter relationship. Appellant lived with her brother. She shared his social life and his hours of relaxation. She acted as his housekeeper

and hostess. There was a fond, kindly, gracious, and loving relationship between them. Appellant was dependent upon her brother for her support and for the protection of her future. She had left her home in Ireland and came to the United States upon his promise to keep her and to protect her future. The decedent was saving \$1,200 a year at the time of his death, and this was used for their joint protection. During her life expectancy (which was shorter than her brother's) he would have saved over \$20,000. She could have anticipated that, had anything happened to him, these savings would belong to her—in fact, a major portion of the savings were in their joint names. Legally, of course, it must be presumed that the financial contributions and benefits would continue, *Foerster v. Direito*, 75 Cal.App.2d 323, 170 P.2d 986, during the life expectancy of the survivor. It is obvious that decedent's capacity to earn would not, reasonably, have decreased in his lifetime. Appellant was, and reasonably could assume she would continue to be, the recipient of decedent's bounty and support. In addition, the pecuniary value of the loss of comfort, protection and society is an element of damages. *Foerster v. Direito*, 75 Cal.App.2d 323, 170 P.2d 986; *Gilmore v. Los Angeles Ry. Corp.*, 211 Cal. 192, 295 P. 41; *Holder v. Key System*, 88 Cal.App.2d 925, 200 P.2d 98.

[4,5] Usually wrongful death cases are brought by children for the death of the parent, or one spouse for the death of the other, where a legal obligation to support exists and need not be proved. But a sister or brother may maintain such an action where pecuniary loss has resulted from the death. *Montanez v. Beard*, 207 Cal. 379, 278 P. 858; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 57 P. 1065. Collateral heirs may recover when, as here, they show loss of support and a reasonable probability that the society, comfort and protection of the decedent was of such a character that it was of pecuniary advantage to the plaintiff. (See cases collected 8 Cal.Jur. p. 1007, § 53.) Collateral heirs must prove their pecuniary loss or their recovery will be limited to nominal damages. But here the proof showed such loss, far in

excess of the award, by evidence that was clear and uncontradicted.

[6,7] After funeral expenses are deducted the award is for but about \$1,100. Funeral expenses are, of course, an element of recovery. *Adams v. Southern Pacific Co.*, 4 Cal.2d 731, 53 P.2d 121. The amount received by appellant from the estate of her brother or from the joint tenancies cannot be considered as an offset against the award. *McLaughlin v. United Railroads*, 169 Cal. 494, 147 P. 149, L.R.A. 1915E, 1205. There is no logical interpretation of the evidence that could possibly support the allowance of such an award. The award is totally unsupported by the evidence, is inadequate as a matter of law, and must be reversed.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD., JJ., concur.



106 Cal.App.2d 430

**CLOPTON v. SCHARRENBURG, Director
of the Department of Industrial
Relations et al.**
Civ. 18258.

District Court of Appeal, Second District,
Division 3, California.
Aug. 31, 1951.

Mort L. Clopton filed a petition against Paul R. Scharrenberg, Director of the Department of Industrial Relations for the State of California, and others, for writ of mandate to command defendant to pay petitioner his salary as a referee of the Industrial Accident Commission for the month of January, 1946, and to restore to petitioner vacation and holiday privileges as a referee of the Commission for period from August 14, 1942, to and including January 30, 1946. The Superior Court of Los Angeles County, W. Turney Fox, J., entered a minute order of dismissal and the petitioner appealed. The District Court of Appeal, Vallee, J., held, *inter alia*, that right to maintain

action for salary was not barred by statute of limitations.

Affirmed in part and reversed in part.

1. Army and navy ☞51

Section of Military and Veterans Code entitling officers and all employees of State who are members of reserve corps or force in federal military, naval or maritime service, to absent themselves from their duties or service while engaged in performance of ordered military or naval duty, is to be liberally construed to encourage enlistment in the armed forces and to insure restoration to enlistees of their positions upon return to civil life. Military and Veterans Code, § 395.

2. Army and navy ☞51

Section of Military and Veterans Code entitling officers and employees of State while members of reserve corps or force in federal military, naval, or maritime service, to absent themselves from their duties or service while engaged in performance of ordered military or naval duty, includes ordered service in wartime as well as in peacetime. Military and Veterans Code, § 395.

3. Army and navy ☞51

Policy of Legislature in enacting section of Military and Veterans Code entitling officers and employees of State who are members of reserve corps or force in federal military, naval, or maritime service, to absent themselves from their duties or service while engaged in performance of ordered military or naval duty, was to expedite and encourage enlistment of public employees in armed forces of United States in time of war. Military and Veterans Code, § 395.

4. Army and navy ☞51

Under section of Military and Veterans Code entitling officers and employees of State who are members of reserve corps or force in federal military, naval or maritime service, to absent themselves from their duties or service while engaged in performance of ordered military or naval duty, during period of leave, holding or occupancy of office or position is suspended and such officer or employee of

State retains right to reassume office or position in termination of his period of leave with like seniority, and all right to compensation attached to office is suspended for duration of leave, except as otherwise provided by section. Military and Veterans Code, § 395.

5. Time ↻4

A "calendar year" is the period from January 1st to December 31st next, both inclusive.

See publication Words and Phrases, for other judicial constructions and definitions of "Calendar Year".

6. Limitation of actions ↻58(1)

Where referee of Industrial Accident Commission who was also a commissioned officer of the United States naval reserves returned from ordered naval duty and reassumed his duties as referee in January, 1946, referee could not know that his absence would exceed thirty days in calendar year 1946 prior to January 1, 1947, and could not make demand for January 1946 salary as referee, to which he was entitled under statute if his absence did not exceed thirty days during calendar year 1946, until January 1, 1947, and three year statute of limitations did not begin to run against right to maintain action for such salary until January 1, 1947, and did not begin to run on January 30, 1946. Code Civ.Proc. § 338, subd. 1; Military and Veterans Code, § 395.

7. Army and navy ↻51

Constitutional law ↻208(3)

Section of Military and Veterans Code entitling officers and employees of State who are members of reserve corps or force in federal military, naval, or maritime service, to absent themselves from their duties or service while engaged in performance of ordered military or naval duty, is not unconstitutional because not having general application. Military and Veterans Code, § 395.

8. Army and navy ↻51

Section of Military and Veterans Code providing that a member of the reserve corps or force on leave, if he has been in service of State for period of not less than one year prior to his absence on ordered

military or naval duty, shall not be subjected by reason of his absence to any loss or diminution of vacation or holiday privilege, means that upon reassuming his office he shall not be subject to any loss or diminution of vacation or holiday by reason of his absence, and does not give him vacation or holiday privilege during his absence and does not entitle him to compensation for vacations and holidays during period of absence. Military and Veterans Code, § 395.

Mort L. Clopton, pro per.

Edmund G. Brown, Atty. Gen., Bayard Rhone and Gilbert Harelson, Deputies Atty. Gen., for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a minute order of dismissal entered pursuant to an order sustaining a demurrer to an amended petition for a writ of mandate to command the defendants 1) to pay petitioner his salary as a referee of the Industrial Accident Commission for the month of January, 1946, and 2) to restore to petitioner vacation and holiday privilege as a referee of the commission for the period from August 14, 1942, to and including January 30, 1946.

The amended petition is in two counts. The first count alleges:

Petitioner was a referee of the Industrial Accident Commission from February 1, 1940, to May 10, 1948. At all times after July 11, 1942, he was a commissioned officer of the United States Naval Reserve. He was absent on ordered naval duty from August 14, 1942, to and including January 30, 1946. His absence on such naval duty did not exceed thirty days in the calendar year 1946. On February 11, 1947, he made written demand on defendants for his salary for the month of January, 1946. His demand was refused.

The second count alleges the same facts except those with reference to salary for January, 1946, and also alleges:

When petitioner resigned his employment as a referee on May 10, 1948, defend-

ants, for the first time after August 14, 1942, rendered to him an account of vacation and holiday privilege credited to him, in which account no such credit was given him for the period from August 14, 1942, to and including January 30, 1946. He had never enjoyed, or been paid for, said vacation and holiday time. From and after May 10, 1948, defendants wrongfully and unlawfully subjected petitioner to loss of all vacation and holiday privilege accruing to him from August 14, 1942, to and including January 30, 1946.

The demurrer was on two grounds: 1) the petition does not state facts sufficient to constitute a cause of action, and 2) the cause of action alleged is barred by the provisions of section 338(1) of the Code of Civil Procedure. The order sustaining the demurrer does not specify the ground on which it was sustained.

During the period in question section 395 of the Military and Veterans Code provided: "Every officer and employee of the State * * * who is a member of * * * the reserve corps or force in the Federal military, naval, or marine service, shall be entitled to absent himself from his duties or service while engaged in the performance of ordered military or naval duty and while going to and returning from such duty.

"If he has been in the service of the State * * * for a period of not less than one year prior to the date upon which his absence begins, no such officer or employee shall be subjected by any person directly or indirectly by reason of such absence to any loss or diminution of vacation or holiday privilege or be prejudiced by reason of such absence with reference to promotion or continuance in office, employment, reappointment to office, or re-employment.

"During the absence of any such officer or employee, while engaged in the performance of ordered military or naval duty as a member of the * * * reserve corps or force in the Federal military, naval, or marine service, he shall receive his salary or compensation as such officer or employee, if the period of such absence in any

calendar year does not exceed thirty days and if he has been in the service of the State * * * for a period of not less than one year prior to the date upon which his absence begins."

Appellant argues that section 395 is definite, certain, and not ambiguous, and that the facts alleged bring the case squarely within it. Respondents argue that section 395 is the successor of a statute enacted in 1929 in time of peace, the title of which read: "An act permitting state officers and state employees to attend military training encampments without deduction of pay"; St. 1929, p. 204, that the statute was codified in 1935 in time of peace; that its obvious purpose was to encourage reservists in time of peace to participate in reserve training, and that it applies only where an employee "was called into or engaged in ordered military or naval duty for short periods of instruction or brief periods only." Respondents cite us to section 395.5 of the Military and Veterans Code, which reads: "Any officer or employee of the State having civil service status who is ordered on active duty in time of war shall retain all civil service rights to his position and shall be reinstated to such position upon application at any time within ninety days after the termination of such duty." They argue that if it had been the intention of the Legislature that section 395 applied to employees who were members of a reserve component and were ordered on active duty in time of war there would have been no necessity for the passage of section 395.5, and that the enactment of the two sections "evidences an intent that Section 395 was to be applicable to employees who were members of the enumerated reserve components and who served short tours of duty in time of peace; and that Section 395.5 applied to all employees whether members of the reserve components or not, who were called into extended service in time of war."

[1] Section 395 is to be liberally construed to encourage enlistment in the armed forces and to insure the restoration to enlistees of their positions upon return to civil life. *People ex rel. Happell v. Sischo*, 23 Cal.2d 478, 486, 144 P.2d 785,

150 A.L.R. 1431; *McCoy v. Board of Supervisors*, 18 Cal.2d 193, 196, 114 P.2d 569.

[2,3] The privileges and benefits accorded by section 395 are not limited to those who became members of the reserve corps or force in time of peace, nor are they limited to those who were called into or engaged in ordered military or naval duty "for short periods of instruction or brief periods only." The contention made by the attorney general in this regard was made with respect to a similar statute in *Williams v. Walsh*, 289 N.Y. 1, 43 N.E.2d 498. The Court of Appeals held it to be groundless. Whatever may have been the intent of the Legislature in enacting the predecessor of section 395, nevertheless the section is broad enough to, and it in fact does, include "ordered service" in war-time as well as in peacetime. And the policy of the Legislature was to expedite and encourage the enlistment of public employees in the armed forces of the United States in time of war. In *People ex rel. Happell v. Sischo*, supra, 23 Cal.2d 478, 485, 144 P.2d 785, 789, the court said that the section recognized "the paramount obligation, immediate or potential, of all citizens to render military service in the armed forces of the Nation during times of war or declared national emergency."

[4] The rights of an officer or employee of the state on leave of absence, with the possible exception of a constitutional officer, are purely statutory. Section 395 grants a leave of absence to a member of the reserve corps or force while he is engaged in the performance of ordered military or naval duty. During the period such officer or employee is on leave of absence from his office or position he is not performing any of the duties of his office or exercising any of the powers of that office or performing any state function, and he is not entitled to claim or draw any compensation except as the statute expressly so provides. During the period of his leave, his holding or occupancy of the office or position is suspended; he merely retains the right to reassume the office or position at the termination of his period of leave with like seniority, status, and pay. *McCoy v. Board of Supervisors*,

18 Cal.2d 193, 197, 198, 114 P.2d 569. In *People ex rel. Happell v. Sischo*, supra, 23 Cal.2d 478, 485, 144 P.2d 785, 789, it was said that such a military or naval leave "amounts, in effect, to an interruption of the tenure or exercise of the office." The office or position is temporarily vacant in relation to the actual holding or exercise thereof by the officer or employee member of the reserve corps or force on ordered military or naval duty. All right to the compensation attached to the office is suspended for the duration of the leave. *Idem* 23 Cal.2d at pages 495, 496, 498, 144 P.2d 785. Referring to sections 395 and 395.5 of the Military and Veterans Code in *Cutts v. Tinning*, 81 Cal.App.2d 423, 429, 184 P.2d 171, 175, it was said that "these enactments concern only the retention of rights already acquired and do not provide for the acquisition of new ones during absences and military duty."

Salary. A state officer or employee, member of the reserve corps or force, engaged in the performance of ordered military or naval duty, is entitled to his salary as such officer or employee during his absence if the period of such absence in any calendar year does not exceed thirty days and if he was in the service of the state for not less than one year prior to the date his absence began. Petitioner had been in the service of the state more than one year prior to the date his absence began. His absence terminated and he reassumed his duties as referee on January 30, 1946. Thus, the period of his absence in the calendar year 1946 did not exceed thirty days.

[5,6] Respondents argue that the first count for salary is barred by section 338 (1) of the Code of Civil Procedure as it is an action upon a liability created by statute and under that section is barred if not brought within three years after the cause of action accrued. The petition was filed December 28, 1949. Respondents say that the salary accrued January 30, 1946; therefore the action was commenced more than three years after the cause of action accrued. The premise is erroneous. The cause of action did not accrue on January 30, 1946. Respond-

ents apparently concede that the statute began to run from the date petitioner could first demand payment of salary for the month of January, 1946. *Santa Cruz, etc., Cement Co. v. Young*, 56 Cal.App.2d 504, 507, 133 P.2d 32. Section 395 says that an officer or employee absent on ordered military or naval duty shall receive his salary as such officer or employee "if the period of such absence in any calendar year does not exceed thirty days". A calendar year is the period from January 1st to December 31st next, both inclusive. *Earl Ranch, Ltd. v. Industrial Acc. Comm.*, 4 Cal.2d 767, 768, 53 P.2d 154. Since petitioner could not know prior to January 1, 1947, that his absence would not exceed thirty days in the calendar year 1946, he could not make demand for the January, 1946, salary until January 1, 1947. Demand prior to that date would have been premature. The cause of action for the January, 1946, salary accrued on January 1, 1947. As the petition was filed within three years of that date, the first count was not barred by the statute of limitations.

[7] Without the citation of authority, it is suggested that section 395 is unconstitutional "in that it would not have general application." The argument is that if the section applies to officers and employees who are members of the National Guard, Naval Militia, or reserve corps or force, in time of war, it gives them benefits which officers and employees who are inducted into the armed forces in time of war and who are not members of the National Guard, Naval Militia, or reserve force or corps, are not entitled to. The contention is without merit. The same point was made in *Williams v. Walsh*, supra, 289 N.Y. 1, 43 N.E.2d 498. The court was there concerned with a statute almost identical with section 395 of the Military and Veterans Code. It said at page 501 of 43 N.E.2d: "There was reasonable ground for the determination by the Legislature that the State would receive adequate benefit from such a grant to all within the class defined by the Legislature. No person, within or without that class, is deprived of the equal pro-

tection of the law, even if we assume that with equal reason the Legislature might now grant the same privilege to other classes or might conclude to deny it to all. Determination of such questions is, under the Constitution, confided to Legislature."

We conclude that the first count of the petition states a cause of action and that it is not barred by the statute of limitations.

[8] *Vacation or Holiday Privilege.* Section 395 says that a member of the reserve corps or force on leave, if he has been in the service of the state for a period of not less than one year prior to his absence on ordered military or naval duty, shall not be subjected by reason of his absence "to any loss or diminution of vacation or holiday privilege". We do not construe this section to mean that such person is entitled to compensation for vacations and holidays during the period of his absence. The section means that upon reassuming his office he shall not be subject to any loss or diminution of vacation or holiday privilege by reason of his absence. Application of the principles to which we have referred preclude any other construction of the section. The Legislature was seeing to it that at the termination of the leave he should start right where he left off and not have to begin anew. If he had accrued vacation or holiday privilege at the time his absence began, it could not be lost or diminished by reason of his absence. He is entitled to it on reassuming his office. The section merely preserves the status quo; it does not give him vacation or holiday privilege during his absence. What petitioner seeks is to be compensated for the vacation and holiday time he would have been entitled to had he not been on leave of absence at all. He has not been subjected to the loss or diminution of vacation or holiday privilege. The statute does not say, nor can it be construed to say, that an officer or employee shall acquire vacation or holiday privilege during the period he is on ordered military or naval duty.

We conclude that petitioner is not entitled to compensation for vacations or holidays during the period he was on ordered naval duty and that the second count of the petition does not state facts sufficient to constitute a cause of action.

The minute order, insofar as it dismisses the petition as to count 1 thereof, is reversed. Insofar as it dismisses the petition as to count 2 thereof, it is affirmed. Appellant to recover costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.



106 Cal.App.2d 364

GARCIA v. VENEGAS et al.

Civ. 14944.

District Court of Appeal, First District,
Division 1, California.

Aug. 30, 1951.

Action by Julia Maria Garcia against Jose Venegas and others to be declared owner of a one-half interest in real and personal property acquired by named defendant while he and plaintiff, though unmarried, lived together as man and wife. The Superior Court, Santa Clara County, M. G. Del Muto, J., rendered judgment for plaintiff against named defendant for the amount by which the value of plaintiff's services exceeded the value of maintenance and support furnished by named defendant and named defendant appealed. The District Court of Appeal, Wood, J., held that there was no evidence of agreement to compensate plaintiff for her services and that the record afforded no basis for an implied or quasi contractual obligation to compensate plaintiff for such services, but that the evidence sustained finding that plaintiff and named defendant had lived together for 62 months as man and wife under agreement that everything they acquired would belong to both of them and that hence plaintiff was entitled to an undivided one-half interest in the realty acquired by named

defendant as a result of their joint contributions of money and services.

Judgment reversed with directions.

1. Contracts ⇨28(3)

Declaratory Judgment ⇨329

In action to be declared owner of a one-half interest in real and personal property acquired by plaintiff and defendant while the parties, though unmarried, lived together as man and wife, no express agreement, oral or written, to compensate plaintiff for her services was within the issues presented by the pleadings and the evidence failed to show any such agreement.

2. Work and labor ⇨28(2)

In action to be declared owner of a one-half interest in real and personal property acquired by plaintiff and defendant while the parties, though unmarried, lived together as man and wife, the record afforded no basis for an implied or quasi contractual obligation of defendant to compensate plaintiff for her services.

3. Tenancy in common ⇨4

In action to be declared owner of a one-half interest in real and personal property acquired by plaintiff and defendant while the parties, though unmarried, lived together as man and wife, the evidence sustained findings within the issues framed by pleadings that the parties had lived together as man and wife for 62 months, that defendant had agreed with plaintiff during such relationship that everything they acquired would belong to both of them and that during such period plaintiff had contributed money and services and that as a result of their joint contributions of money and services they had accumulated the realty mentioned in complaint.

4. Tenancy in common ⇨3, 28(1), 32, 38(13)

Where a man and woman, unmarried, lived together as man and wife for 62 months under agreement that everything they acquired would belong to both of them, the woman owned a one-half interest in realty acquired by man as a result of their joint contributions of money and services subject to a lien against her interest in the realty for one-half of the

proper expenditures made by the man after their separation in perfecting title and preserving and protecting the common property less the woman's share of any rents, issues and profits received by the man, and the woman would be entitled to a money judgment for the amount of any excess of such rents, etc., over the amount of expenditures by the man.

5. Marriage ⚭54

Where a man and woman live together as man and wife knowing that they are not married, the law will leave them in the position in which they have placed themselves, unless they entered into an agreement concerning property acquired during the relationship or compensation for services rendered while living together.

6. Contracts ⚭112

Where a man and woman, unmarried but living together as man and wife, enter into a contract to pool their work and earnings and share equally in the property accumulated therewith, and the illicit relationship is not so involved in the contract as to render it illegal, the law recognizes the contract and enforces the rights arising out of it.

7. Equity ⚭66

Limitation of actions ⚭5(3)

Tenancy in common ⚭38(7)

In declaring the interest and quieting the title of one co-tenant against another, equity should declare a lien against the interest so declared for a due proportion of proper expenditures made by the other co-tenant in preserving and protecting the common property, though no demand for such lien is pleaded, since the party invoking equitable relief must do equity, and the statute of limitations would not necessarily run against the right of lien in such a case.

8. Tenancy in common ⚭38(13)

Where equity, in declaring the interest and quieting the title of plaintiff against his co-tenant, declares a lien against plaintiff's interest for a due proportion of proper expenditures made by defendant co-tenant in preserving and protecting the common property, equity should also determine plaintiff's right to share in the

defendant, since such right has a significant rents, issues and profits received by debearing by way of potential reduction of the amount of defendant's lien.

9. Justice of the peace ⚭36(7)

A justice's court may try title to realty when properly involved in a forcible entry or forcible or unlawful detainer action as provided by statute. Code Civ.Proc, § 112, subds, 1(b), 2(b).

10. Judgment ⚭956(5)

Justice's court judgment in forcible detainer action for restitution of unidentified premises was insufficient to show that the right, title and interest of defendant therein in realty acquired by plaintiff while he and defendant, though unmarried, lived together as man and wife, were or could have been properly involved and adjudicated in forcible detainer action and hence judgment did not estop defendant from subsequently asserting her interest in the realty. Code Civ.Proc, § 112, subds. 1(b), 2(b).

Marcus E. Gracia, Ralph Bancroft, San Francisco, for appellant.

Manny C. Gomez, San Jose, for respondent.

FRED B. WOOD, Justice.

Defendant Jose Venegas appeals from a judgment against him and in favor of plaintiff Julia Maria Garcia in the sum of \$1,860, representing the amount by which the value of her services exceeded the value of the maintenance and support which he furnished to her during the period of time these parties, unmarried, lived together as man and wife.

Appellant claims that the finding of an obligation upon his part to compensate respondent for her services is without support in the evidence because of asserted lack of proof of an agreement, express or implied, to so compensate; that said finding is not within the issues framed by the pleadings; and that his motion for nonsuit should have been granted.

The amended complaint, filed by leave of court to conform to the proof and the

theory upon which the case was tried, embraced two causes of action. In one, respondent alleged that she and appellant lived together as man and wife from about May 15, 1942, to July 23, 1947; that during said period she contributed money work and services equally with him; and that as a result of joint contributions of money, work and services they jointly accumulated real and personal property. In the second count, respondent incorporated by reference the allegations of the first count and in addition alleged that on many occasions during the period between May 15, 1942, and July 23, 1947, appellant orally agreed with her that in consideration for her contributions of money, work and services said property and all of the properties by them accumulated would be owned by appellant and respondent. In the prayer of the complaint respondent requested that she be declared the owner of a one-half interest in said property, and asked for general relief.

The trial court found that appellant and respondent lived together as man and wife during the period of May, 1942, to July, 1947, a period of 62 months; that during said period respondent contributed money, work and services equally with the appellant; that appellant agreed with respondent during said relationship that everything they acquired would belong to both of them; that as a result of joint contributions of money, work and services they jointly accumulated real and personal property; that the reasonable value of respondent's services during said period of 62 months exceeded in value the maintenance and support furnished by appellant to respondent by the sum of \$30 per month, or a total sum of \$1,860.

The court concluded that respondent was not entitled to an undivided one-half interest in the property mentioned in the complaint; the property accumulated during said period of 62 months, but was entitled to recover from appellant the sum of \$1,860, the amount by which the reasonable value of her services furnished to the appellant exceeded in value the maintenance and support furnished by appellant to respondent, and that said sum of \$1,860 be

a lien on the real property mentioned in the complaint, and rendered judgment in accordance with these conclusions.

[1,2] Appellant is correct in his contention that no express agreement, oral or written, by appellant to compensate respondent for her services was within the issues presented by the pleadings. Nor is there any evidence of such an agreement. And we find in the record no basis for an implied or quasi-contractual obligation upon the part of appellant to compensate respondent for her services.

[3] However, the evidence is sufficient to support the findings that these parties lived together as man and wife during the period of May, 1942, to July, 1947, a period of 62 months; that appellant agreed with respondent during said relationship that everything they acquired would belong to both of them; that during such period respondent contributed money, work and services, and that as a result of their joint contributions of money, work and services they accumulated the real property mentioned in the complaint; findings that were within the issues framed by the pleadings.

Respondent testified that they began living together on May 15, 1942, and continued to do so until July 23, 1947; that neither of them had any money when they started living together and that appellant then and many times thereafter said that everything was both for him and for her, that everything was for both of them, that all he bought was in her power or in her possession; that he used to tell her all the time that all that was there was theirs, and that all the furniture was hers; that during most of that time she took in boarders and part of the time she rented rooms to tenants; that she paid the rent with, and she and appellant lived off of, the earnings of rooms which she sublet and the money she received from the boarders; that the money he earned when he worked out was saved for the purpose of buying property; that out of the proceeds of pay checks which he thus saved he bought three lots for \$375 in 1943 and later sold the lots for \$900; that he then bought a house and lot, applying the \$900 toward the purchase

price; that she sold her furniture for \$200 and this sum also was applied toward said purchase price; that when appellant bought said real property he said to her that all they had there was for both of them; and that all the time he used to repeat that to her. The evidence shows without conflict that by an agreement dated July 27, and acknowledged August 14, 1945, appellant contracted for the purchase of said real property for \$3,500, paying \$1,500 down and agreeing to pay the balance at the rate of \$50 per month, plus interest; that by July 23, 1947, when these parties ceased living together, all but \$850 of the purchase price had been paid; and that at the time of the trial the principal sum had been reduced to \$30.

[4] From these findings that are within the issues and are supported by the evidence, it follows that respondent has a one-half interest in the real property acquired by appellant pursuant to his contract of purchase dated July 27, 1945.

[5, 6] This was not a putative marriage. The parties knew they were not married. Accordingly, if there were no agreement between them concerning property acquired or compensation for services rendered while living together, the law would leave them in the position in which they placed themselves. *Oakley v. Oakley*, 82 Cal.App.2d 188, 190-192, and cases cited, 185 P.2d 848. But when, as here, they entered into a contract to pool their work and earnings and share equally in the property accumulated therewith, and the illicit relationship was not so involved in the contract as to render it illegal, the law recognizes the contract and enforces the rights arising out of it. Such a joint business enterprise, somewhat akin to a partnership, is one which any two persons (two women or two men, for example) might undertake. In *Bacon v. Bacon*, 21 Cal.App.2d 540, 69 P.2d 884, an action brought by the woman against the man to establish an equitable interest in and quiet title to certain real property, it appeared that when they began living together they mutually agreed that their future earnings and all property acquired therewith should be owned in common. A certain portion of the real

property mentioned in the complaint was acquired with such common funds. The court held that the plaintiff was entitled to a decree quieting title to an undivided one-half interest in the real property so acquired. The applicable principle involved in the *Bacon* case, though not expressly stated therein, was later expressed by the Supreme Court in these words: "Plaintiff's lack of good faith in alleging the belief that she had entered into a valid marriage would not, however, preclude her from recovering property to which she would otherwise be entitled. If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. [Citations.]" *Vallera v. Vallera*, 21 Cal.2d 681, 685, 134 P.2d 761, 763. Among the cases cited was *Bacon v. Bacon*, supra, 21 Cal.App.2d 540, 69 P.2d 884.

[7, 8] Hence, it appears that respondent is entitled to a determination that she has an undivided one-half interest in the real property mentioned. However, it also appears that since July 23, 1947, appellant has reduced the residue of the purchase price from \$850 to \$30 and has paid some interest thereon. He may have made other expenditures in perfecting title or in preserving and protecting the common property. If so, he is entitled to a lien against respondent's one-half interest in the property, for one-half the amount of such expenditures. It is meet, in equity, when declaring the interest and quieting the title of one co-tenant against another, to declare a lien against the interest so declared, for a due proportion of proper expenditures made by the other co-tenant in preserving and protecting the common property. *Ochoa v. McCush*, 213 Cal. 426, 431, 2 P.2d 357. The statute of limitations does not necessarily run against the right of lien in such a case. See *Olivero v. Rosano*, 42 Cal.App.2d 740, 743, 109 P.2d 976. In the instant case, it is possible that appellant herein has received rents, issues and profits of such a character that respondent is entitled to her one-half thereof. If so, she would be entitled to a reduction of the

amount of respondent's lien by the amount of her share of the rents, issues and profits, and, if the latter exceeds the former, a money judgment for the amount of the excess. That was approved in *Stewart v. Shearman*, 22 Cal.App.2d 198, 70 P.2d 702, a co-tenancy relationship which arose out of a contract of purchase executed by the predecessor of the defendant in his own name, with part of the purchase price paid out of his and the plaintiff's community funds and the remainder paid out of his separate funds after their divorce. The fact that such issues were specifically presented by the pleadings in the *Ochoa* and *Stewart* cases, but not in the instant case, is not a significantly differentiating feature. In respect to a lien for a due proportion of proper expenditures made by a co-tenant in possession for preservation and protection of the property, no pleading upon his part is required. The opposite party, invoking equitable relief, must do equity. *Dool v. First National Bank*, 207 Cal. 347, 354, 278 P. 233. In the instant case, it would seem proper also to embrace the issue of respondent's rights, if any, to share in the rents, issues and profits. Although such rights do not attach directly to either party's interest in the realty, they do have a significant bearing by way of potential reduction of the amount of appellant's lien upon respondent's interest in the property. It seems fair in the instant case to allow the parties to present all such issues even though they have made no specific request therefor. The amended complaint was filed after the taking of the evidence. No written answer thereto was filed. The parties focused all of their attention upon the question whether or not respondent became a co-tenant and apparently did not envision these other significant issues. The judgment must be reversed and findings of fact and conclusions of law revised. It is desirable to accord the parties a trial on these other issues, in this action, not to relegate them to a new action for a complete determination of this controversy.

Accordingly, the judgment should be reversed, with directions to the trial court to amend its findings of fact and conclusions of law appropriately to declare that

respondent owns an undivided one-half interest in the real property mentioned, and for further trial and determination of the amount of appellant's lien, if any, upon her interest in the property, based upon one-half of the proper expenditures made by him in perfecting title and preserving and protecting the common property, less the amount, if any, of her share of the rents, issues and profits, and if her share thereof exceed the amount of the lien to which he would otherwise be entitled, the amount of such excess. The trial court should permit the parties to file appropriate amended and supplemental pleadings upon such issues, as they may be advised.

There remain for discussion two points urged by appellant that do not bear directly upon fundamental issues in the case. He assigns as error the implied finding of the trial court that respondent is not estopped by judgment from asserting her interest in the property, and the denial of his motion for nonsuit.

[9, 10] The former judgment was rendered by a justice's court. The only evidence concerning that judgment and the action in which it was rendered is a document certified by the justice of the peace as a transcript of the pleadings and proceedings as appeared from his docket. This document contains none of the pleadings. It indicates that appellant herein was the plaintiff and respondent herein the defendant; that a complaint for forcible detainer was filed and summons issued August 5, 1947; that the action came on for trial on October 1, 1947; and recites, "it is ordered, adjudged and decreed that the Plaintiff do have and recover of and from the said defendant the sum of \$55 debt and \$5.50 costs, and that plaintiff have restitution of the premises." It does not identify the premises, nor does it demonstrate that title to real property was or could have been involved or adjudicated in the former action. A justice's court may try title to real property when "properly involved" in a forcible entry or forcible or unlawful detainer action as provided in subdivisions 1(b) and 2(b) of section 112 of the Code of Civil Procedure. The issue

of title is "properly involved" in such an action in the narrowly limited situations described in *Cheney v. Trauzettel*, 9 Cal.2d 158, 69 P.2d 832, and *Higgins v. Coyne*, 75 Cal.App.2d 69, 170 P.2d 25. The meager recitals in the justice's court judgment which appellant invokes are insufficient to show that respondent's right, title, and interest in the property (even if it were the property mentioned in the complaint herein) was or could have been "properly involved" and adjudicated in that action. The necessary elements of estoppel by judgment are lacking.

A motion for nonsuit was made prior to the taking of testimony. Counsel for respondent, in the course of his opening statement, said he would prove an oral agreement that all of the property acquired would be the property of both parties. Thereupon appellant moved for a nonsuit upon the ground that there was nothing in the complaint to show any such agreement or understanding. The court suggested that it take the motion under submission, to rule on it after hearing all of the testimony, and appellant agreed thereto. Respondent then requested and the court granted permission to amend the complaint to plead the agreement. In granting this request the court tendered appellant a continuance in order to meet the proof, but appellant preferred to proceed without a continuance. Accordingly, the court ordered that the trial proceed on the pleadings as they were, plus a cause of action alleging that the parties had an oral agreement that whatever property they accumulated would be their joint property, respondent to file during the course of the trial an amendment in writing alleging such a cause, and that such allegations would be deemed denied by the appellant. Later, respondent served and filed an amendment which added a paragraph to the complaint alleging such an agreement but not stating it separately from the cause of action originally pleaded. Defendant

demurred specially for failure to state the new cause separately. The demurrer was argued upon the conclusion of respondent's case in chief. The court sustained the demurrer with leave to amend the complaint by separately stating the two causes of action, both causes to be deemed denied. Appellant did not desire a continuance and the court directed that the parties proceed with the testimony. Thereupon appellant moved for a nonsuit on the ground that there had been no proof of an agreement that accumulations of property by either of these parties were to be enjoyed and owned jointly by both of them. The court denied the motion; properly so, for respondent had already given the testimony on that subject which we summarized earlier in this opinion.

The judgment is reversed with directions to the trial court, in accordance with this opinion and judgment, to amend its findings of fact and conclusions of law appropriately to declare that respondent owns an undivided one-half interest in the real property mentioned, and to accord the parties further trial on the issues of the amount of appellant's lien, if any, upon respondent's interest in the property, for one-half of the amount of the proper expenditures made by him in perfecting title and preserving and protecting the common property, less the amount, if any, of her share of the rents, issues and profits of the property, and, if the latter amount exceeds the amount due him by way of contribution, the amount of such excess. The trial court will allow the parties to file such appropriate amended and supplemental pleadings on the issues not hereby determined, as they may be advised, and, after trial of those issues, make its findings of fact and conclusions of law thereon, and render judgment on all issues. Each party will bear his own costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

STATE RUBBISH COLLECTORS ASSN.**v. SILIZNOFF.****Civ. 18230.**District Court of Appeal, Second District,
Division 3, California.

Aug. 31, 1951.

Rehearing Denied Sept. 18, 1951.

Hearing Granted Oct. 29, 1951.*

State Rubbish Collectors Association, a corporation, brought action against John W. Siliznoff upon promissory notes, and defendant filed cross complaint seeking cancellation of notes and compensatory and punitive damages for physical injuries allegedly resulting from emotional distress and fear caused by threats made by plaintiff and its representatives. The Superior Court of Los Angeles County, Wm. S. Baird, J., ordered notes cancelled and entered judgment awarding defendant compensatory and punitive damages, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence was insufficient to establish that physical injury resulted from wrongful acts of association or its representatives.

Judgment reversed as to award of damages, compensatory and exemplary, and otherwise affirmed.

1. Torts ⇐15

A party who intentionally and unreasonably subjects another to severe mental distress involving a risk of causing physical harm, is liable for substantial physical injuries actually incurred as a proximate result of the fright engendered by such conduct.

2. Threats ⇐10

Where member of mutual protective association of rubbish collectors which made practice of settling controversies took collection account from another member in violation of association rules and gave it to defendant who made financial settlement with wronged member after association inspector threatened physical violence if he failed to settle, association was not liable for defendant's alleged physical injuries resulting from emotional distress and fear in absence of showing that inspector had reason to believe that threats would result in illness or other bodily harm.

3. Threats ⇐10

In cross-action by defendant against mutual protective association of rubbish collectors for injuries allegedly resulting from emotional distress and fear caused by threats of association inspector made to force defendant into financial settlement for taking collection account from association member, evidence that defendant was frightened and worried, felt ill on several days during period of two months while settlement was under discussion, and that he had vomited four or five times, was insufficient to establish that he sustained physical injury resulting from any wrongful acts of association or its representatives.

4. Torts ⇐5

To recover for claimed physical injuries resulting from fright, there must be shown wrongful conduct which was reasonably calculated to produce injury and which was the proximate cause of injury, and recovery cannot be had for claimed physical injuries of such trivial nature as to require no medical attention, or without medical testimony as to cause of injury.

5. Threats ⇐10

In cross-action against mutual protective association of rubbish collectors for physical injuries allegedly resulting from emotional distress and fear caused by association inspector's threats to force defendant to make financial settlement with association member from whom defendant had taken collection account, fact that defendant's injuries were of such trivial nature as to require no medical attention, and that there was no medical testimony as to cause of injury, established that verdict of \$1,250 compensatory damages and \$7,500 exemplary damages was result of sympathy for the defendant and prejudice against association, especially in view of defendant's accusations and denunciations of association in argument to jury.

6. Damages ⇐18

The law does not recognize demands that cannot be established with reasonable certainty, but there must be a relationship between the wrong and the injury which

* Subsequent opinion 240 P.2d 282.

is susceptible of proof; and mere possibility of causal connection is insufficient.

7. Damages $\S$ 87(2)

Punitive damages are not allowable where there is no right to compensatory damages. Civ.Code, $\S$ 3294.

John C. Stevenson and Lionel Richman, Los Angeles, for appellants.

Borah & Borah and Peter T. Rice, all of Los Angeles, for respondent.

SHINN, Presiding Justice.

State Rubbish Collectors Association, a corporation, sued John W. Siliznoff upon 19 promissory notes aggregating \$1,875. In his answer the defendant admitted execution of the notes and pleaded want of consideration. Defendant also filed a cross complaint seeking cancellation of the notes for want of consideration and duress and seeking compensatory and punitive damages for "severe mental shock, distress, grief, worry, impairment and injury to his physical well being," alleged to have been occasioned by plaintiff's "misconduct, threats, terrorism and assault." The action was tried to a jury. The verdict was, (1) in favor of defendant and against plaintiff, (2) in favor of the cross complainant and against cross defendant for general and special damages of \$1,250, and for exemplary damages, \$7,500. The court made findings which incorporated the verdict, found that the notes were given without consideration and were executed as a result of acts of "oppression and duress committed upon defendant by the plaintiff, State Rubbish Collectors Association, its agents and board of directors;" also, that plaintiff "did commit acts of assault against cross complainant, John W. Siliznoff, as a result of which said cross complainant suffered nervous disorders and physical injuries," and that "plaintiff has been guilty of oppression, fraud, malice and duress in the commission of the acts aforementioned." The notes were ordered cancelled, and the judgment awarded Siliznoff damages in accordance with the verdict. Upon motion for a new trial the exemplary damages were reduced from \$7,500 to

\$4,000 by conditional order. Plaintiff appeals.

No claim is made that the judgment should be reversed with respect to the cancellation of the notes. The award of damages is challenged upon several grounds: (1) Insufficiency of the evidence to justify any compensatory damages; (2) insufficiency of the evidence to establish liability of plaintiff corporation; (3) prejudicial error in the admission of evidence and the exclusion of evidence; (4) incorrect instructions; (5) misconduct of counsel.

Before passing to the questions of law we shall give in some detail the background of the litigation. This is necessary for a clear understanding of the conditions which are alleged to have caused Siliznoff to become emotionally upset, and which, it is alleged, caused him physical distress. Plaintiff, as its name implies, is a mutual protective association of rubbish collectors, operating in Los Angeles and vicinity. Defendant Siliznoff is the son-in-law of Kobzeff, the elder, who was a member of the association. Mike Abramoff, also a member of the association, had for a customer the Acme Brewing Company. Shortly prior to January of 1948, Kobzeff contacted the Brewing Company a number of times with the result that the account which was said to be worth \$375 per month was taken from Abramoff and given to him. Although he signed the contract with the Brewery, Kobzeff turned the job over to Siliznoff, who undertook to perform it. In taking an account from another member of the association without his consent, Kobzeff ran afoul of the by-laws, principles and practices of the associated members. The controversy was reported to the corporation's board of directors and was thereafter acted upon in a manner that was customary in such matters. Kobzeff and Abramoff appeared before the board and stated their views with respect to the Acme account. The directors reviewed the circumstances of the case and recommended to Kobzeff and Abramoff, who were long time friends, that they settle their differences between themselves. It was determined by the board that Abramoff should be compensated for the loss of

the account; its value was placed at \$3,000, or eight times the monthly rate paid by Acme. Siliznoff accompanied Kobzeff to later meetings, and the two took the position that although Kobzeff had entered into the Acme contract, it in reality belonged to Siliznoff, and they contended that the latter should be required to pay nothing to Abramoff. Kobzeff offered Abramoff \$1,000 in settlement, which was declined, and eventually Siliznoff offered to pay the association for the benefit of Abramoff, \$500, which was refused. A settlement was reached for \$1,875, for which Siliznoff gave notes payable to the association. These are the notes in suit.

There was a great deal of evidence as to the purposes of plaintiff association and the manner in which the affairs of its members are conducted. It has some 300 members, seven of whom constitute its board of directors. It is provided in the by-laws that the members "shall not in any manner whatever encroach upon the territory of any member, and in case they discover that any member is encroaching upon their territory, or is about to, they shall immediately notify the secretary in writing and the association shall take steps to prevent any interference with their route." Members are given the first chance to buy a route which a member desires to sell. If a member desires to raise the price of a job he must report to the board full details and reasons for the raise and the board determines whether the change is reasonable. A member violating an applicable city ordinance may be fined from \$5 to \$25; the board shall investigate and conduct hearings on all claims of lost jobs or routes and shall render its decision thereon; it is the duty of the directors to appraise the value of routes and accounts that come into controversy. All controversies and claims arising between members, "shall be settled by arbitration under the laws of the State of California, and judgment may be rendered on the award in any court having jurisdiction. The arbitration shall be held in the County of Los Angeles, State of California, and in accordance with the laws of the State of California." It was the estab-

lished practice of the directors to pass judgment upon the controversies brought to the board for decision. The minutes of the association show proceedings involving arbitrations of more than 100 such controversies between December, 1947, and March, 1948. Many of them involved settlements between members where jobs belonging to one member were taken by another. Settlements were agreed to on the basis that the job taken was worth from five to ten times the monthly rate paid by the customer.

Accounts were freely bought and sold at these valuations. The minutes of numerous meetings show clearly that a major purpose of the association is to obviate differences among its members in all matters large or small that might otherwise cause trouble. The records show distinctly the disposition of the members to cooperate in accomplishing this purpose. The members of the Board sat in the capacity of arbitrators, listened to the disputing members, investigated their claims and passed judgment. The records kept furnished ample evidence that the hearings were conducted dispassionately, in good faith and with a purpose of accomplishing worthy aims of the association. Kobzeff, a member of the association for several years, was apparently well aware of the aims and practices of the association. He registered no objection to the proceedings other than to claim that the Acme account belonged to Siliznoff. He did not deny that he had taken it from Abramoff but claimed that the job was only worth five to one. Accordingly, the final settlement with Siliznoff was made on a valuation of five times the monthly rate. The foregoing is sufficient to give a general idea of the situation which Kobzeff brought about in procuring the Acme Brewing Company account and turning it over to his son-in-law. He was not ignorant of the fact that he would be called upon to justify his action or settle with Abramoff either by returning the account or paying what the account was determined to be worth.

We are thus brought to the only question which we need answer, namely, did Siliznoff make out a case for compensatory and

punitive damages. He claimed that he had been frightened, had suffered from nervousness and occasional nausea and had been "practically" confined at home for several days during a period of two months. According to his testimony he was present when John Andikian and Bob Stepanian, the former an inspector and the latter president of the association, called upon Kobzeff and told him that he and Siliznoff should make a settlement with Abramoff; that they should either give up the job or make a settlement for it. This was a friendly meeting and no threats were made. There was evidence that at the first board meeting Stepanian told Kobzeff he should settle; that some unnamed member of the board told Siliznoff that if a settlement was not made the job would be taken away from him even if they had to haul it for nothing; later, when a price of \$3,000 was mentioned and Siliznoff refused to pay it, he was told he had better drop the job and someone said he had better "pay up, or else make up your mind to pay up or drop it," otherwise they would stop the sale of his salvage. Siliznoff testified he was frightened. Abramoff was present but apparently said nothing. Later, John Andikian, an inspector of the association, talked to him and according to Siliznoff said: "We will give you up till tonight to get down to the board meeting and make some kind of arrangements or agreements about the Acme Brewery, or otherwise we are going to beat you up * * * either would hire somebody or do it himself * * * cut up the truck tires or burn the truck, or otherwise put me out of business completely." At the meetings there were present directors Aaron Perumean, Suren J. Lalaian, Michael Ambarkumian, Bob Stepanian, Tim Agajanian, also John Andikian and Theodore Smith. Lalaian said "What rights have you getting a job like that * * * you stole something from us." Andikian said that Siliznoff had better settle up with the boys. Siliznoff was again scared and promised to sign the notes. After they were signed Andikian invited him to have a cup of coffee and he accepted. Over a period of two months Siliznoff was sick and vomited four or five times. He did not

consult a physician or receive medical care and carried on his business with slight interruption. No one touched him or threatened any immediate violence.

[1] In *Emden v. Vitz*, 88 Cal.App.2d 313, 198 P.2d 696, we upheld a judgment for damages for personal injuries which resulted from fright and emotional upset due to the threatening words and conduct of the defendants. The plaintiff in that case was a young woman; she had been locked out of her apartment by her landlord, her clothing had been taken from her, she had been made a virtual prisoner in a room while two of the defendants yelled and screamed at her; she suffered an acute upset of her glandular condition which was described by medical testimony as a serious condition resulting from "some sort of upset or emotional experience." The case was brought clearly within the rules recognized in our state by the following summary, 88 Cal.App.2d at page 319, 198 P. 2d at page 700: "The evidence justified a conclusion that defendants intentionally and unreasonably subjected plaintiff to severe mental distress involving a risk of causing physical harm; and by clear and uncontradicted evidence, it was proven that substantial physical injuries were actually incurred by plaintiff as a proximate result of fright engendered by the said conduct of defendants. Liability under these circumstances is manifestly correct. (Rest., Torts, sec. 312.)" Plaintiff endeavors to bring his case within the holding in the *Emden* case. We think he failed in several respects.

[2] Section 312 of the Restatement, Torts, reads: "If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person." Comment C: "Where, however, the distress is likely to be physically harmful only to a person who has a peculiar sensibility to emotional strain

which is not characteristic of any substantial minority of women or men the actor is not subject to liability under the rule stated in this Section unless he knows or from facts known to him should realize that the other has or may have such a peculiarity." The threats uttered by Andikian were provisional and were so understood. If Siliznoff made a settlement with Abramoff he would have no trouble. That the threats were calculated to induce him to make a settlement cannot be denied. They were not made for any other purpose. Siliznoff was 23 years of age, in good health, and of sufficiently rugged physique and temperament to engage in the rubbish collection business. He was not shown to be a timid young man. His actions in resisting the demands made upon him for a period of two months indicated the contrary. Andikian, notwithstanding his strong language, was not shown to have been a man of violent disposition. The officers and directors of the association on the whole were considerate of the position of Siliznoff, and the very fact that his countrymen who composed the association made a practice of adjusting their business difficulties amicably should have indicated to him that they were peaceable by nature and not ruffians. One deficiency of the evidence is that it furnished no reasonable basis for an inference that Andikian should have recognized that his threats were likely to result in illness or other bodily harm to Siliznoff. There was no threat and no fear of immediate harm. The absence in the circumstances of any logical basis for an inference that Andikian had reason to believe that his threats would cause Siliznoff to become ill, appears more clearly from a consideration of the evidence, which failed completely to connect the claimed illness of Siliznoff with the threats that were uttered.

[3] There was in our opinion no tangible evidence of physical injury resulting from any wrongful acts of the association or its representatives. In a view of the evidence most favorable to Siliznoff he was frightened and worried; he felt ill on several days during a period of two

months while a settlement was under discussion, and in the same period he vomited four or five times. The nature of his alleged illness or illnesses was not disclosed. There was no evidence even as to any symptoms of illness. There was no evidence whatsoever to identify any illness with fright or other emotional disturbance. The same is true of the alleged attacks of nausea. The cause or causes were not identified. No doubt the young man got to worrying at different times spread over a period of two months. He had cause to worry over the fact that his father-in-law had involved him in a large financial controversy with Abramoff and the association and he expected him to settle it. If so, the association was not responsible; under its by-laws its demand that settlement be made with Abramoff was not wrongful. Once Siliznoff vomited after he left an extended meeting with the directors, but whether this was because of fright or the legitimate arguments that had taken place or the atmosphere of the meeting room was a matter of pure speculation. Incidentally, there was no corroboration, even by the wife of Siliznoff, of his testimony on the subject of illness. And we feel assured that responsible medical experts, if they had been called, would not have been able to determine from the meager facts in evidence the cause or causes of Siliznoff's occasional nausea.

[4-6] In the examination of a vast number of cases of claimed physical injury resulting from fright we have found none in which recovery was allowed upon such intangible evidence as we have related. In all those in which damages were recovered there was evidence of wrongful conduct that was reasonably calculated to produce injury, and also satisfactory evidence to establish such conduct as the proximate cause of injury. We may safely say that rarely, if ever, has there been recovery for claimed physical injuries of such trivial nature as to require no medical attention, or without medical testimony as to the cause of the injury. We are not disposed to inaugurate a type of litigation that has not heretofore plagued

the courts. And we may add that the present case illustrates the inadvisability of entertaining such tenuous claims. One cannot read the record without becoming convinced that the verdict for \$1,250 compensatory damages and \$7,500 exemplary damages was the result of sympathy for young Siliznoff and prejudice against the association. Punishment, rather than compensation was meted out. The argument to the jury by counsel for Siliznoff consisted of a bitter denunciation of the methods and motives of the directors of the association. They were accused of holding a "Kangaroo Court" with methods inconsistent with "good, decent, American business;" and with forcing their decision upon innocent people and who needed a "trouncing"; they were compared with people who poison horses, cut tires, smash windows, blackjack their victims and throw acid upon customers' clothes. It was suggested that something evil might happen to the "brave" witnesses who came to testify for Siliznoff. The arbitration procedure of the by-laws was ridiculed as illegal, arbitrary and unauthorized. Incidentally, the jury was instructed that there had been no legal arbitration of the Kobzeff-Abramoff controversy, although this was not in issue under the pleadings. To affirm the judgment in this case would be to encourage a new and frivolous type of litigation. The law does not recognize demands that cannot be established with reasonable certainty. There must be a relationship between the wrong and the injury which is susceptible of proof. Mere possibility of causal connection is not sufficient. One can readily imagine the consequences if every man who is roundly abused or threatened during a business argument should be given damages for nervousness, worry, or the everyday physical disturbances which he might attribute to emotional upset. We would not undertake to enumerate the common experiences of modern living which tend to destroy digestive tranquility.

[7] There being no right to compensatory damages, punitive damages are not allowable. Civ.Code, § 3294; Haydel v.

Morton, 8 Cal.App.2d 730, 736, 48 P.2d 709; Cf. Clark v. McClurg, 215 Cal. 279, 284, 9 P.2d 505, 81 A.L.R. 908; Wilkinson v. Singh, 93 Cal.App. 337, 345, 269 P. 705.

Evidence was introduced over the objection of appellant that its board of directors had used pressure upon other men engaged in rubbish collection to induce them to give up certain customers or to join the association. These incidents had occurred shortly prior to the trial and some two years after the Siliznoff transaction. The jury was instructed that evidence had been received that threats had been made against others "with the approval, ratification or acquiescence of the State Rubbish Collectors Association" and that it was received to prove "a system of procedure, tactics and methods of violence to gain their ends in the same manner as claimed by the cross complainant Siliznoff," and that the burden of proof was upon cross complainant "to prove that such other acts are tactics of violence as were alleged to have been committed against Siliznoff and for the same or similar unlawful purpose or purposes." Other instructions used such terms as "illegality" in the demands of the association, "unfounded claim" upon the part of the association, "wrongful extortion" as a condition to the exercise by Siliznoff of a "legal fight," and similar expressions which were calculated to incite prejudice against the association.

The principles of law first discussed were not given in any instructions. The jury was told that "a mental shock is deemed to be an assault."

These additional matters do not require discussion. We mention them only as explanatory of the verdict, which as we have said, represents punishment of appellant based upon wrongful conduct for which no recoverable damage was shown. If we were not reversing the judgment, in part, for insufficiency of evidence, it would have to be reversed for error. That would be inadvisable in view of our holding that upon the same evidence Siliznoff would not be entitled to recover damages.

The judgment is reversed as to the award of damages, compensatory and exemplary, to Siliznoff; otherwise it is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



106 Cal.App.2d 391

PARKER v. MENELEY et al.

Civ. 7936.

District Court of Appeal, Third District,
California.

Aug. 30, 1951.

Action by M. C. Parker, doing business under the firm name and style of Parker Pump Company for damages for breach of alleged oral contract against Leo Meneley, an individual, Mervin Owyang, also known as Mervyn Owyang, an individual, and Leo Meneley and Mervin Owyang, a copartnership, who filed a cross-complaint for damages for breach of written contract. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Van Dyke, J., held that evidence was insufficient to sustain finding that an oral agreement was entered into between the parties.

Judgment reversed.

1. Contracts ⇨33

Where written instruments contained seller's proposal to install three pumps, which were to be shipped from factory, not later than certain date for \$5,424, plus sales tax and to drill three wells to certain depth, and further contained customer's signature, following provision which stated that signature was an authorization to install described equipment, and signature of seller's admitted representative, and provided that terms were \$2,000 cash on pumps and wells and balance in one year, instruments even though captioned as estimates contained requisites of an en-

forceable contract. Code Civ.Proc. §§ 1856, 1860; Civ.Code, § 1625.

2. Contracts ⇨28(1)

Where parties orally negotiated for installation of pumps and drilling of wells, and oral negotiations culminated in written instruments which stated the contractual obligations and rights of parties, and instruments were complete, clear and adequate, presumption existed that parties intended to adopt instruments as the final and complete expression of their agreement. Code Civ.Proc. §§ 1856, 1860; Civ. Code, § 1625.

3. Evidence ⇨450(8)

Where written instruments contained seller's proposal to furnish three pumps which were to be shipped from factory and installed not later than certain date for \$5,424, plus sales tax and to drill three wells to certain depth, and further contained customer's signature following provision which stated that signature was an authorization to install described equipment, and signature of seller's admitted representative, and provided that terms were \$2,000 cash on pumps and wells and balance in one year, in absence of dispute as to validity of written instruments, or claim of mistake or imperfection, instruments were not ambiguous and parol evidence was not admissible to explain their terms. Code Civ.Proc. §§ 1856, 1860; Civ.Code, § 1625.

4. Contracts ⇨198(6), 214

Under written instruments which contained seller's proposal to furnish three pumps which were to be shipped from factory and installed not later than certain date for \$5,424, plus sales tax and to drill three wells to certain depth, and further contained customer's signature following provision which stated that signature was an authorization to install described equipment, and signature of seller's admitted representative, and provided that terms were \$2,000 cash on pumps and wells and balance in one year, seller was bound to drill wells and to furnish and install pumps and customer's obligation was to make down payment of \$2,000 and to pay balance of agreed price within one year

from date of instrument. Code Civ.Proc. §§ 1856, 1860; Civ.Code, § 1625.

5. Evidence ⇨428, 444(2)

Parol evidence is admissible to show that writing was sham or artifice or that its existence as a contract was dependent upon some condition not inconsistent with terms thereof and such evidence is not considered as varying terms of written instrument but as negating its very existence.

6. Evidence ⇨441(1)

Parol evidence is admissible to show a collateral oral agreement as to matters on which written agreement is silent if collateral agreement does not vary terms of written instrument.

7. Contracts ⇨28(3)

In seller's action for breach of alleged oral contract for installation of water pumps, for sinking of wells, and for goods and services, evidence was insufficient to sustain finding that oral agreement was entered into between parties. Code Civ. Proc. §§ 1856, 1860; Civ.Code, § 1625.

Babcock & Phillips, Sacramento, for appellants.

Arthur DeBeau Carr and Wray F. Sager, Sacramento, for respondent.

VAN DYKE, Justice.

This action was brought to recover damages for breach of contract. The first count alleges: "That on or about the 3rd day of April, 1948 defendants, Meneley and Owyang, entered into an oral contract with plaintiff herein wherein plaintiff was to install three water pumps at a cost of \$6,251.95; that as well plaintiff was to act as agent for the defendants herein in having three wells sunk for a total amount of \$3,565.61; that concomitant with the entering into of this oral agreement, defendants paid to plaintiff the sum of \$2,000. That under the terms of said oral contract defendants agreed to pay the full amount of the charges upon completion of the work by plaintiff herein in the amount of \$7,817.56. That after the work was started and the wells sunk and pumps installed, de-

fendants herein breached their contract by not paying the balance of \$7,817.56 all of which amount is now due, owing and unpaid." The second count was in form a common count for goods and services. The prayer was for the alleged unpaid balance due on completion of the contract.

Defendants answered, denying all allegations of each count. Defendants cross-complained. They alleged that on the same 3rd day of April plaintiff and defendants entered into a *written* contract, a copy of which was attached; that defendants had performed all of their obligations thereunder, but that plaintiff had failed to perform, to their damage. Plaintiff answered the cross-complaint, denying the allegations thereof and as a "further and separate defense" plaintiff repleaded all the foregoing quoted allegations from the first count in his complaint. Plaintiff had judgment in the trial court for \$2,667.54; and defendants appealed. We shall hereafter refer to the parties as appellants and respondent, respectively.

The trial court made findings, the essential parts of which follow: Following literally the allegations of the complaint which we have quoted the court found the matters so alleged to be true, with the exception that as to the alleged breach the court found that the appellants had breached their contract "by failing to pay the balance due of \$2,667.54." No findings were made upon the allegations of the cross-complaint. The court concluded as matter of law that respondent was entitled to judgment as above stated, saying that the amount so allowed was "represented by the cost of digging the wells \$3,467.61, less the down payment in the sum of \$2,000.00 plus the sum of \$580.00 which was spent by the plaintiff and cross-defendant in preparing two concrete bases for the pumps and for removing one pump and plus the sum of \$619.93 which plaintiff actually lost in returning these three pumps to the factory." Judgment was entered for the said sum of \$2,667.54.

Proceeding to prove his allegations of oral contract, respondent introduced evidence which may be said broadly to have

been in support thereof, including the allegations that he was to have been paid the balance of the contract price upon completion of his agreement. But as might have been anticipated a troublesome issue arose during presentation of respondent's case in chief for it was admitted that after certain preliminary negotiations which respondent claimed merely led to the making of the oral agreement, the parties executed two written instruments, the substance of which we will now state. On a form sheet entitled "Estimate on Parker Pump Co. Equipment" the following appeared:

"April 3, 1948

"We propose to furnish to Owyang and Meneley

* * * * *

"3 Western Turbines specifications listed below:"

There followed detailed descriptions and specifications of the turbines. Then appears the following: "Installed price is \$1,808.00 each", total "\$5,424.00." Then, omitting matters not material, there appeared this language: "All Three pumps to be shipped from the factory on April 26th, and installed not later than May 1, 1948. Cash deposit of 2,000.00. Balance due on pumps plus sales tax. \$3,424.00." Next and just above the space for "Customer's signature" appeared this: "The signature herein is an authorization to install such equipment as described in the above estimate. Terms 2000.00 Cash on Pumps & Wells bal. one year." Appellant Meneley signed for appellants. Above the space provided for signature by the Parker Pump Co. (the name under which respondent does business) appeared the following: "Parker Pump Co. is in no way responsible for well drillers' services." Bruce Bagwill, with admitted authority to act, signed for Parker Pump Co. At the same time and as a part of the same transaction, but upon a duplicate form a document was executed concerning the wells. Thereby Parker Pump Co. proposed to furnish to Owyang & Meneley three wells to be drilled to the necessary depth to produce 2500 gallons per minute. We quote the following: "Dia. of wells to be 14". Drilling cost to be

3.90 ft. as far as casing goes. Drilling below casing and up to 200' at 3.00 ft. Drilling below 200' at 3.50 ft. 14" Casing as needed at 3.25 per ft. Casing gage to be $\frac{3}{16}$ ". Estimated cost of wells 1400.00 to 1500.00 each." The rest of the document was identical with the one first discussed, including the statement over the customer's signature that the terms were "2000.00 Cash on Pumps & Wells bal. one year." In the printed forms over the customer's signature the word "Terms" was printed, followed by a blank space. The words "2000.00 Cash on Pumps & Wells bal. one year" were handwritten in that space.

A comparison of the oral agreement pleaded with the written documents points up the inconsistencies between them. According to the oral agreement as alleged and found the balance of the contract price was to be paid when respondent had performed. By the plain declaration of the written documents that balance was to be paid one year after the parties entered into their agreement. If the oral agreement prevailed there was a theory upon which respondent could proceed as for breach. If the written instruments controlled appellants had not breached their agreement because the action was begun within the year and before the appellants' obligation to pay further moneys matured.

When the wells had been drilled and the three pumps had been shipped from the factory to appellants and one of them was installed upon its base at a well, respondent ceased performance, claiming a right to do so because it had become apparent that appellants could not find the money with which to pay when performance should be complete. He introduced evidence tending to show that immediately after the contract, written or oral, was made appellants sought to obtain funds sufficient to complete the payment for the pumps and wells, applying to various banks for that purpose. They failed. When the one pump had been installed and before the other two had been placed at the wells, respondent told appellants that if the money would not be wholly forthcoming upon completion he would stop at that point. Within a few days he did stop, removed the pump that had been in-

stalled and shipped all three pumps back to the factory which received the same at a turn-back price \$619.93 less than respondent had paid the factory. Apparently, although this is not expressly stated, respondent ceased performance under a claim of anticipatory breach.

Mr. Bagwill, an accredited representative of respondent, conducted most of the negotiations leading up to the contract, whether it be oral or written. Early in his direct examination respondent caused to be introduced in evidence for all purposes plaintiff's Exhibit No. 1, the form sheet containing the provisions relative to the pumps from which we have quoted. Thereafter appellants objected to the introduction of testimony concerning the negotiations preceding the contract upon the ground that the same contradicted the written instrument. The objections were overruled. During the cross-examination of Mr. Bagwill there was introduced in evidence as defendants' Exhibit A the second document, and it may be said that there is no dispute but that both documents were executed at the same time and as a part of the same transaction and each refers to both wells and pumps. They are, therefore, to be treated as one contract. Respondent's evidence continued to be received over objection and continued to conflict with the writing. When it came time for appellants to present their case their testimony was as follows: They needed water to irrigate 360 acres of land they intended to plant to rice; they had been unable to get an assured supply of irrigation water from a public utility which ordinarily furnished water in that locality because of prior commitments of the utility; they therefore needed three wells and three turbine pumps which they proposed to operate by Diesel generators; they approached respondent and informed Bagwill of their needs, and told him they could pay \$2,000 down and would need a year to pay the balance; thereafter the written instruments were signed and respondent ordered pumps and placed drillers upon the land; after this had been done they paid the \$2,000 called for by the written instruments which respondent accepted. Respecting their ne-

gotiations with lending agencies after the writings had been executed, their testimony was generally to the effect that these things were done, not because they were in any way obligated to further finance their agreement with respondent, but for the accommodation of respondent in order that notwithstanding the contract he might obtain the balance through their having borrowed the needed sum from others. Their position was, and their testimony bore out that position, that in truth and in fact there was no obligation upon them after the payment of the \$2,000 to do anything further save to complete paying for the pumps and the wells on or before April 3, 1949, one year after the date of the written contract.

The trial court rendered a memorandum opinion in which it held that the contract had been oral and directed findings to be prepared by counsel for the respondent. This was done and these findings were made as we have stated them. When these findings were proposed counsel for the appellants objected thereto, and among other grounds of objection urged that there was no finding relative to the place in the picture of the written contract. These objections were unavailing and the court signed the findings proposed.

Appellants contend that the findings of fact are not supported by the evidence, that the conclusion they breached their contract is unsupported, that on the contrary they proved a written contract as alleged in their cross-complaint and proved the breach thereof and damages flowing therefrom and that the judgment should have been that plaintiff take nothing and that they recover of plaintiff their damages for his breach.

[1] We must first determine whether the writing contains the necessary requisites for a contract. The parties to the instrument are clearly set forth, as is the subject matter. The instruments contain a clear offer and an acceptance thereof. Each states in the body of the writing that "We propose to furnish to". "The word 'proposal', as applied to the law of contracts, is the equivalent of the word

'offer'". 34 Words & Phrases, 1951 Cum. Pocket Part, p. 153, citing *Daugherty v. Missouri-Kansas-Texas R. Co. of Tex.*, Tex.Civ.App., 221 S.W.2d 928, 931; Black's Law Dict. The acceptance of the offer is contained in these words above the signature of appellant Meneley: "The signature herein is an authorization to install such equipment as described in the above estimate." We are not unmindful of the fact that the heading or caption of the writings states that the writing is an estimate. The use of the word "estimate" under certain circumstances might indicate the remainder of the document was not intended to constitute an offer capable of acceptance, but this word cannot control the contractual requisites of the writing for at least two reasons: 1. The word as it first appears on the documents is not part of the operative clauses; 2. The printed portion in the lower right-hand corner proclaims that the signature of the offeree is an authorization to the offeror to install the equipment *as set forth in the estimate*. This clearly demonstrates that the parties were not merely stating an approximation of something to be done in the future. We conclude that the writing contained every requisite of an enforceable contract between the parties.

[2] The next step is to determine whether the trial court erred in permitting plaintiff to prove a different contract by parol. We are not at this moment concerned with the admissibility of parol evidence to show that the written contract never had any existence because the parties never intended it to constitute a contract. We will treat that subject later. But certainly, from the uncontradicted testimony of respondent and his agent and of the appellants, the written instrument and the oral agreement, if there was one, eventuated from the same previous negotiations and covered the same subject matter. And if these contracting parties, after these preliminary negotiations concerning the subject matter involved, came to an understanding and then adopted and executed these written instruments as the final and complete expression thereof, the result was

an integrated agreement to which the parol evidence rule concerning such documents would apply. Further, if after such negotiations concerning a definite subject matter of contract a written instrument is executed covering that subject matter and purporting to state the contractual obligations and rights of the parties, which instrument is upon its face complete, clear and adequate, it is to be presumed that it was executed by the parties with the intention to adopt it as the final and complete expression of their agreement.

The parol evidence rule, and the exceptions thereto, are contained in Section 1856 of the Code of Civil Procedure. That section provides:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

Sections 1625 of the Civil Code and 1860 of the Code of Civil Procedure are also to be considered. Section 1625 of the Civil Code provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Section 1860 of the Code of Civil Procedure provides: "For the proper construction of an instrument, the circum-

stances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

[3, 4] It is obvious that this case does not come within the two exceptions stated in Section 1856, for no mistake or imperfection of the writing is put in issue by the pleadings. Appellants take the position that the only contract they had with respondent concerning the matter of pumps and wells was the written instrument which the parties executed. The respondent made no claim in his pleading that if that contract was the contract between the parties there was any mistake or imperfection in the writing. Nor was the validity of the written agreement a fact in dispute save as such issue may be included in the claim that the same never had existence as a contract. It was claimed by respondent during the trial that the writing was ambiguous and for that reason parol evidence was admissible to explain its terms, but we fail to find any ambiguity in the writing. The terms are concise, but full, and they are susceptible of only one interpretation. In particular, the financial terms are perfectly clear. The statement "Terms 2000.00 cash on Pumps & Wells bal. one year" means exactly what it says and evidence was not admissible to show, as claimed by the respondent, that this statement meant anything else than what it so plainly says. Particularly was parol evidence inadmissible to show, as was attempted, that by that statement in the contract the parties intended not to state any term of the contract but merely to give information to a bank or other lending institution that if such lender "financed the deal" between appellants and respondent it would be required to do so in such a way as to extend to appellants one year's time within which to pay the balance. Such an interpretation would be utterly inconsistent with the plain language of the instrument. It was further claimed by respondent that the provision that the Parker Pump Company was in no way responsible "for Well

Drillers' services" furnished ground for permitting the introduction of evidence concerning the time of payment clause which we have discussed. Relative to this provision respondent pleaded that he was merely to act as agent to obtain the drilling of the wells for appellants. But the provision says nothing of agency and the other parts of the written instrument are completely at war with such a claim. To illustrate, we need do no more than refer again to the handwritten statement of terms which applied both to wells and to pumps and stated that the balance to be paid therefor—and of course to be paid to respondent—was to be paid within one year. There was no occasion for the introduction of parol testimony under any claim of ambiguity or conflict of terms within the writing itself. See *Harvey Machine Co. v. Western etc. Union*, 76 Cal.App.2d 421, 426, 173 P.2d 330. The admission of parol evidence in this case cannot be sustained under the provisions of Section 1860 of the Code of Civil Procedure. This section must be harmonized with Section 1625 of the Civil Code and Section 1856 of the Code of Civil Procedure. *Peterson v. Chaix*, 5 Cal.App. 525, 531, 90 P. 948. Section 1860 has no application where the instrument is clear and unambiguous. *Barnhart Aircraft, Inc., v. Preston*, 212 Cal. 19, 22, 297 P. 20; *Barham v. Barham*, 33 Cal.2d 416, 422, 202 P.2d 289; *Pagel v. Shipp*, 68 Cal.App.2d 12, 20, 155 P.2d 878. We conclude upon this subject that the agreement as written bound the respondent to drill the wells and to furnish and install the pumps, and that the obligation of the appellants was to make the down payment of \$2,000 and to pay the balance of the agreed price within one year from the date of the instrument.

[5] The judgment cannot be sustained upon the theory that parol evidence was admissible to show that the purported writing was not in fact the contract between the parties. Under this rule parol evidence is admissible to show that the writing was sham or artifice, or that its existence as a contract was dependent upon some condition not inconsistent with the

terms thereof. *P. A. Smith Co. v. Muller*, 201 Cal. 219, 256 P. 411; *Severance v. Knight-Counihan Co.*, 29 Cal.2d 561, 177 P.2d 4, 172 A.L.R. 1107; 32 C.J.S., Evidence, § 935, P. 857. Such evidence is not considered as varying the terms of a written instrument, but as negating its very existence. The parol evidence offered here simply contradicted the terms of the written instrument. It did not tend to show in any way that the parties executed the contract for some extrinsic purpose, such as sham or artifice, or that it was intended for some purpose other than to set forth their respective rights and obligations. Neither does the evidence show any extrinsic conditions upon which the effectiveness of the writing depended. In fact, the theory of respondent appears to be directly contrary to this rule. The conclusion from all his contentions is that the writing is not the contract because the parties entered into an oral contract.

[6] Parol evidence is also admissible to show a collateral oral agreement as to matters on which the agreement is silent if the collateral agreement does not vary the terms of the written instrument. *Kunz v. Anglo & London Paris Nat. Bank*, 214 Cal. 341, 5 P.2d 417; *O'Melia v. Adkins*, 73 Cal.App.2d 143, 166 P.2d 298. The oral agreement, as found by the court, plainly contradicted the written agreement, and the testimony relative thereto was not admissible as proving any collateral undertaking.

[7] We conclude that the findings of the trial court that an oral agreement was entered into between the parties as alleged in the complaint is unsupported by the evidence; that the only finding upon this issue which the court could make, which finding was required by the record here, was a finding that the oral contract pleaded was never made between the parties; that the written contract was duly executed and measured the respective obligations of the parties thereto; and that there was no breach of that contract. Upon the record, therefore, the court should have proceeded to find that the written contract pleaded

by the cross-complaint was the contract between the parties and that respondent breached the same when he refused to perform.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.



106 Cal.App.2d 458

FLANAGAN et al. v. SAN MARCOS SILK CO., Inc. et al.
Civ. 4240.

District Court of Appeal, Fourth District,
California.
Sept. 7, 1951.

Action by H. Clinton Flanagan and another against the San Marcos Silk Company, Inc. and others to quiet title to a parcel of land against a claim to an easement for the maintenance of a pipe line over a portion of the real property owned by plaintiffs. Defendants cross complained. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Griffin, J., held that the evidence sustained the finding that the easement in plaintiffs' property had been abandoned before the defendants purchased their interest in property.

Judgment affirmed.

1. Easements ⇐30(1)

While nonuser alone does not extinguish easement, long continued nonuser is some evidence of intent to abandon.

2. Easements ⇐37

Whether act is done with intent to abandon easement is question of fact to be determined by trial court from consideration of conduct of parties and surrounding circumstances.

3. Appeal and error ⇐1011(1)

Findings based on conflicting evidence are conclusive on appeal.

4. Easements ⚡36(2)

In action by real property owner to quiet his title against claim to easement, for maintenance of pipe line over portion of his property, evidence of actions by dominant tenant and successors in interest after date of alleged abandonment was relevant to question of intent.

5. Easements ⚡30(1)

Ordinarily, failure to repair does not constitute abandonment of easement, but abandonment may be predicated upon facts showing that means of enjoyment of easement have been in state of disrepair for long period of time.

6. Easements ⚡36(3)

In action by real property owner to quiet his title against claim to easement for maintenance of pipe line across part of his property, evidence sustained finding that common predecessor in interest of defendants had abandoned any interest in easement.

7. Appeal and error ⚡1057(1)

In action by real property owner to quiet his title against claim to easement for maintenance of pipe line across part of his property, after defendants introduced in evidence letter setting forth their claim to easement and disavowing knowledge of abandonment, any further evidence of their intention on purchasing property would have been cumulative, and no prejudicial error resulted from striking it from record.

8. Trial ⚡98

In action by real property owner to quiet his title against claim to easement for maintenance of pipe line across part of his property, since trial judgment was based on acts performed by predecessors in interest of defendants sufficient to show abandonment of easement, it was not improper for court to strike evidence as to intention of defendants on purchasing property.

9. Appeal and error ⚡169

Where trial court predicated findings on facts produced at trial, question as to evidence received on trial could not be raised for first time in argument on appeal.

Emil Steck, Jr., Los Angeles, for appellants.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents brought this action to quiet title to a parcel of land described as lots 2 and 5 of Rancho Los Valecitos de San Marcos, located near San Marcos, and it is directed to a claim by these appealing defendants to an easement for the maintenance of a pipe line over a portion of the real property owned by plaintiffs.

Certain of the named defendants in this action filed disclaimers and defaults were entered as to other defendants. These appealing defendants contested the action and will be hereinafter referred to as defendants.

Plaintiffs concede that defendants' predecessor in interest, American Silk Factors, Inc., a corporation (hereinafter referred to as the Silk Company) owned a large parcel of land south of lots 2 and 5, which lots were at that time owned by a Mr. and Mrs. Brambley; that by written grant deed, duly recorded in 1927, the Brambleys deeded to the Silk Company a "perpetual easement or right-of-way" for the construction of pipe lines over and across their property which is now owned by plaintiffs. A similar easement was obtained from the Akermans, who owned a parcel of land lying between that owned by the Silk Company and the parcel owned by the Brambleys. The Vista Irrigation District operated a water distributing ditch just north of plaintiffs' property. A pipe line was laid over and across plaintiffs' land, across the Akerman property, and across the Silk Company's property to the silk plant, and was the means by which the Silk Company was to obtain its water, operate its silk mills, and grow mulberry trees. The Silk Company's property was not in the irrigation district but in 1927 it obtained an agreement whereby the district would furnish water to it through their pipe line. During the operation of the plant, from 1927 to 1933, there was delivered to it each

year water in excess of 100 cubic feet. Shortly before 1933 the Silk Company became bankrupt. In February of that year the trustee in bankruptcy executed a trustee's deed and bill of sale to one Poulsen, conveying all property owned by the Silk Company, and specifically conveying the Brambley easement involved in this action. Received in evidence (Exhibit 10) is a commissioner's deed, dated November 19, 1933, being the result of a judgment of foreclosure dated October 18, 1932, on the Silk Company's property conveying to one Evans the property and all appurtenances thereunto belonging. By mesne conveyances thereafter a portion of the property originally owned by the Silk Company was transferred to and is now owned by defendant American Real Silk, Inc., subject to certain liens and trust deeds held by the other appealing defendants.

The court specifically found and concluded that "The common predecessor in interest of the defendants sometime during the year 1933 abandoned any interest which such predecessor in interest ever had in the easement in, over and upon a portion of plaintiffs' lands", and ordered plaintiffs' title quieted accordingly.

The main question on this appeal is the sufficiency of the evidence to support the finding of abandonment. In this connection the court found that in 1933 the pipe line in question was broken or blocked at its northerly end where it had previously been connected to the supply line of the irrigation district, and thereafter no water could or did run through it until 1944; that in 1933 the predecessor in interest of defendants drilled certain wells upon portions of the property now owned by defendants and irrigated their premises; that no water was ever carried through the pipe line here in dispute to any lands of defendants since 1933; that no water has been available for such delivery to defendants or their predecessors in interest since 1933; that this pipe line has been incapable of conducting water by reason of severance thereof; that after plaintiffs acquired their property, they caused the pipe line to be reconnected to the irrigation district system to supply

water to their lands; that prior thereto the line was cut off and blocked at the south end of the easement; that in 1946, it was broken at a point on the McCandless property, being a group of lots south of plaintiffs' property and that these owners connected, with defendants' consent, to water from a reservoir pumped from wells on defendants' property and were using that portion of the pipe line as a system wholly separate from the pipe line here involved. (Thereafter McCandless blocked off both ends of the pipe line on their property, dug their own well, and continued to use that portion of the pipe line on their property to carry water to it.) The evidence supports these particular findings and there is very little conflict in the evidence in this respect.

It is defendants' position that they acquired their interest and ownership in the property in 1943, in reliance upon the provisions in the several instruments conveying the easement across plaintiffs' land to them, and in reliance upon the statements of the seller that such easement was still in existence for the benefit of the property of defendants; that they had no knowledge of any purported abandonment at any time, and that they were innocent purchasers for value; that neither defendants nor their predecessors in interest ever ordered the pipe line disconnected or authorized its use by plaintiffs and that since no written notice of abandonment of the easement was ever recorded by defendants or their predecessors in interest, the easement is still in existence.

It is true that plaintiffs purchased their property in April, 1935, and soon thereafter learned about the pipe line and the easement of record across their property. They testified they had no consent of the Silk Company or its successors in interest to connect the pipe line to the irrigation district ditch but since their property was in the district they applied for and received consent from the district to establish a meter and receive water through those pipes. The evidence further shows that on September 28, 1948, defendant American Real Silk Company wrote plaintiffs that it had come to its attention that

plaintiffs were using the pipe line belonging to that company and located on the easement in question; that since the company had no present use for it, it would be satisfactory for them to continue using it until such time as the defendant company had a need for it. The source of defendants' claimed title thereto was set forth in the letter. On October 1, 1948, plaintiffs replied that they had made some investigation as to the record title and "presuming your company has the necessary credentials to establish ownership. * * * I would like to purchase" such interests and pipe line as are located on my property covering a lineal distance of 1180 feet. It was then stated that Mrs. Flanagan had a meter connected to the line in 1944, and that " * * * the line was apparently treated as abandoned property". In reply, the defendant company stated that it was negotiating a sale of the property and the contemplated purchaser "may or may not want to use the pipe line and the easement". Further negotiations were to be deferred until negotiations for the sale of the property were concluded. Flanagan testified that since the pipe had been in the ground for over 20 years it was beginning to spring leaks and "definitely will not last very much longer."

Defendants contend that although the pipe line in dispute was not being used by defendants to carry water, it was being held by the company as a "stand-by" source of supply to supplement the wells drilled on the property. It is its argument that the evidence shows nothing more than nonuse of the easement and pipe line in question since 1932, and that mere "nonuser", without more, is not sufficient evidence of abandonment or intent to abandon, citing such cases as *People v. Southern Pacific Co.*, 172 Cal. 692, 158 P. 177; *Smith v. Worn*, 93 Cal. 206, 28 P. 944; *Parker v. Swett*, 40 Cal.App. 68, 180 P. 351; and 9 Cal.Jur. p. 960, sec. 12. It cites the rule stated in *Smith v. Worn*, supra, 93 Cal. at page 213, 28 P. at page 945, that "The acts of the owner of the dominant tenement in case of non-user, or to prevent him from claiming an *easement acquired by*

grant, must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement."

As to this general proposition of law plaintiffs do not quarrel with defendants but strongly maintain that "nonuser", accompanied by an intention, either express or implied, to abandon the easement is sufficient, citing *Del Giorgio v. Powers*, 27 Cal.App.2d 668, 81 P.2d 1006; *Glatts v. Henson*, 31 Cal. 2d 368, 188 P.2d 745; 17 Am.Jur. p. 1026, sec. 141; and *Moon v. Rollins*, 36 Cal. 333, where it is said: " * * * lapse of time does not of itself constitute an abandonment, but that is only a circumstance for the jury to consider in determining the question whether there was an abandonment; * * * It is a question of *intention*, and has been so held over and over again, and *not* a question of *time*, * * *."

[1-3] In *Home Real Estate Co. v. Los Angeles Pacific Co.*, 163 Cal. 710, 126 P. 972, the rule is stated that while nonuser alone does not extinguish the easement, a long continued nonuser is some evidence of an intent to abandon, and that an intention with which an act is done is a question of fact to be determined by the trial court from a consideration of the conduct of the parties and the surrounding circumstances, and that where evidence is such that a finding either way might reasonably be made, the conclusion of the trial court must be upheld under the familiar rule protecting from review on appeal findings based on conflicting evidence.

[4,5] In the instant case there is no question about the discontinuance of the use of the pipe line in question in the year 1932 or 1933, when the Silk Company went bankrupt. It was not subsequently used by it or its successors in interest. The trial court apparently fixed the year 1933 as the one in which the abandonment occurred. Standing alone, this evidence of nonuse may not have been sufficient to support a finding of intent to abandon. *People v. Southern Pacific Co.*, 172 Cal. 692, 700, 158 P. 177. It is defendants' argument that any evidence of the conduct of the Silk Company and its successors in interest thereafter

was inadmissible and should not be considered for any purpose. The authorities cited by defendants do not support this argument. Since abandonment involves intent, evidence of actions after 1932 by the several successors in interest were relevant as bearing on the question. As pointed out by counsel for plaintiffs, suppose a husband left his wife in 1933 and went to another city and did not return. Evidence as to his subsequent actions would be relevant to determine whether he left her in 1933 with the intent to desert her. *Greer v. Greer*, 135 Cal. 121, 67 P. 20. Therefore, in connection with the fact of non-user, there is the additional evidence, as exemplified by pictures in evidence, that the pipe line easement had grown over with thick underbrush, the pipe became exposed, and gulches washed from under it. There is some evidence that it needed repair and that it would soon need replacing due to leaks and deterioration. The grant of easement contained a clause that the grantee and its successors were bound to maintain the pipe line upon plaintiffs' property "as free from leaks as possible". In 17 Am.Jur. 1027, sec. 142, the rule is stated to be that: "Ordinarily, failure to repair does not constitute an abandonment, but an abandonment may be predicated upon facts showing that the means of enjoyment of an easement have been in a state of disrepair for a long period of time." See, also, *Thompson on Real Property*, Vol. 2, pp. 371-372, sec. 694, where it is said (p. 372): "* * * One who is bound to keep his easement in repair but fails to do so for an unreasonable length of time may be deemed to have abandoned the easement. Any act on the part of the dominant owner that is inconsistent with his further enjoyment of the right is an abandonment of it."

[6] The facts here show: (1) Nonuser by defendants and their successors in interest for over 16 years; (2) Affirmative acts of these parties in obtaining a new and different source of supply of water by means of digging wells in the year 1934; (3) The sale and grant by defendants' predecessors in interest to a stranger in 1933 of a portion of the Silk Company's original

property over which the pipe line passed and lying between the plant and plaintiffs' property without a special reservation of an easement of right-of-way for this particular pipe line contained in the grant; (4) Permitting the blocking of a portion of the pipe line for the private use of the McCandless property; (5) The apparent adverse use of a blocked portion of the easement pipe line by plaintiffs since 1944; and (6) Failure to maintain the easement line in question free from leaks.

Had the trial court found that there had been no abandonment the finding might be supported by the evidence produced. Defendants bring this case before us upon a finding which is against them as to both the question of abandonment and intent. We cannot say that the finding of the trial court lacks evidentiary support.

It is next argued in defendants' reply brief, for the first time, that the court erred in striking certain evidence offered by defendants after the trial court granted a limited new trial. The record is confusing in this respect. The trial judge signed written findings in which he found that there was an abandonment of the easement, and entered judgment accordingly. Thereafter, on motion, the judgment against these appealing defendants was vacated and a new trial was granted on certain issues only, and a new trial was denied on the remaining issues. The issues to be considered on the new trial were designated as (1) "Was the easement referred to * * * at any time appurtenant to the lands which the said defendants * * * now own or in which they have an interest * * *"; and (2) "Were said defendants (appellants herein) * * * bona fide purchasers of the lands which they now own or in which they have interests * * *".

[7,8] Thereafter defendants produced several witnesses who, over objections, testified generally as to the location of the several pipe lines over the different properties and their past and present use as well as the past and present use of the properties. The attorney for the defendants was

examined. He testified that in 1943 he learned of the wells that were drilled on the plant property in 1934 and 1935; that the water therefrom was used for purposes of irrigating the mulberry trees and several acres of tomatoes; that he also learned, at that time, about the easement across the plaintiffs' land leading to the Vista Irrigation District flume; that he informed the appealing defendants, the prospective purchasers of the plant, at that time about what he had learned regarding the easement and the type of pipe installations on the property. He testified that he had no knowledge of any abandonment of the easement in question. He further testified that for the past two years he knew that plaintiffs were using the portion of the pipe crossing their property but both these defendants and their successors in interest followed the policy for some years of consenting to the use of these pipes by the adjoining property owners, subject to their ultimate right to use them when they needed them; that these defendants thought they had some right to purchase stock in the Escondido Mutual Water Company and that thereby they might obtain some water from the irrigation district, in the future, if possible. This testimony was admitted subject to a motion to strike. In ruling upon the motion the court stated that it found that the easement had been abandoned before these appealing defendants became interested in the land, and that they bought the land without the easement and accordingly made an oral order as follows: "* * * testimony as to the physical pipes on the ground prior to the defendants' purchase is admitted but the testimony as to what the defendants thought or believed at the time they purchased is excluded * * *. If this easement had been abandoned, and I have already found that it was abandoned before these defendants became interested in this land, the logical result is that they bought the land that they bought without the easement."

It is now claimed that if plaintiffs were allowed to show all the circumstances, up to the time of trial indicating the intent

of the several owners of the mill property as to abandonment, defendants should likewise have been afforded the opportunity to show what their intentions were when the property was purchased by these appealing defendants. It is difficult, from the order, to determine just what portion of the testimony was stricken. Under the state of the record we cannot say that the question as to whether defendants were "bona fide purchasers of the land" was not fully considered by the trial court at this hearing or in the former trial. The question as to what defendants "thought or believed" may have been subject to objection. The claimed fact that they had no knowledge of any abandonment is probably still in the record and would be weighed against the evidence produced by plaintiffs. In the letter dated September 28th, directed to plaintiffs, above referred to, the defendants specifically set forth their claim and apparently disavowed any knowledge of any abandonment of the easement. This letter was received in evidence on the first hearing. Any further evidence on this subject would have been but cumulative, and no prejudicial error resulted in striking it from the record. At any rate, the trial court's judgment was predicated upon acts which were performed by the predecessors in interest of these defendants which in and of themselves sufficiently show that there had been an abandonment prior to the time these appealing defendants acquired the property. After finding that in 1927 the easement then obtained was, at that time, intended to benefit the lands now owned by defendants as dominant tenants and that it was then appurtenant to the lands, it also found that it was extinguished by abandonment, as indicated. This finding has evidentiary support. No reversible error appears.

[9] In the argument of counsel for defendants before this court he raises some question as to whether the easement actually crossed some of the lands indicated on a map, received in evidence and used by the trial court in its findings. Since the trial court predicated its findings upon the facts produced at the trial this question

cannot be raised for the first time in argument on appeal. *Lotts v. Board of Park Commissioners*, 13 Cal.App.2d 625, 57 P.2d 215.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



106 Cal.App.2d 381

CONSTANS et al. v. ROSS et al.

Civ. 18263.

District Court of Appeal, Second District,
Division 1, California.

Aug. 30, 1951.

Hearing Denied Oct. 25, 1951.

Action by Robert Q. Constans and Edith M. Constans, partners under the firm name and style of Live Oak Lumber Co., against Ivan K. Ross, and others, partners, for the value of building materials furnished to defendant building contractor. The Superior Court of Los Angeles County, Kurtz Kauffman, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain finding that brokers entered into partnership agreement with building contractor and were engaged in business of erecting homes upon properties owned by prospective home builders.

Judgment affirmed.

1. Partnership ¶17

Question whether partnership exists depends primarily upon intention of parties ascertained from terms of agreement and from surrounding circumstances.

2. Partnership ¶5, 14

Ordinarily, existence of partnership is evidenced by right of respective parties to participate in profits and losses and in management of business.

3. Partnership ¶17

Whether parties to written agreement intended thereby to create partnership

should be determined chiefly from terms of writing.

4. Partnership ¶20

Whether partnership exists is a question to be determined from nature of relation agreed upon rather than name which parties have given to it, but some weight must be given to language of parties themselves.

5. Partnership ¶17

In determining whether partnership exists, it is intention of parties as evidenced by terms of agreement, and not subjective or undisclosed intention of parties, that controls.

6. Partnership ¶17

Where contract by its terms establishes a partnership between parties, even the expressed intent of parties that it should not be so classed would be of no avail.

7. Partnership ¶20

Apportionment of duties does not preclude existence of a partnership since one partner may be given the right of management.

8. Partnership ¶5

Generally, a partnership contemplates an equal sharing of profits and losses in prosecution of common purpose, but division may be left to agreement of parties.

9. Partnership ¶46, 218(3)

In ascertaining whether partnership exists it is necessary to consider all of attending facts and circumstances, and if evidence is sufficient it is for jury's consideration.

10. Partnership ¶5

A partnership agreement for division of profits implies an agreement also to bear the losses.

11. Partnership ¶32, 141

Under agreement entered into between brokers and contractor providing that parties are mutually interested in construction of residences for sale, that brokers agree to secure suitable locations, arrange financing, arrange and pay for plans and specifications, and provide Venetian blinds, nails and hardware, that contractor agrees to

enter into written contract with each purchaser and to build each residence in accordance with plans and specifications, a partnership existed and brokers were liable for value of building materials furnished to contractor. Corporations Code, §§ 15001 et seq., 15006, 15007(3), (4)(a-c, e); Business and Professions Code, §§ 7028, 7031.

12. Partnership ⇨55

In action by lumber dealer against brokers for value of building materials furnished to building contractor, evidence was sufficient to sustain finding that brokers entered into partnership agreement with building contractor and were engaged in business of erecting homes upon properties owned by prospective home builders. Corporations Code, §§ 15001 et seq., 15006, 15007(3), (4) (a-c, e); Business and Professions Code, §§ 7028, 7031.

13. Appeal and error ⇨1170(9)

Partnership ⇨218(2)

In action by lumber dealer against brokers for value of building materials furnished to building contractor, instruction submitting issue of existence of partnership, was not confusing or misleading, but even if erroneous judgment would not be reversed since different verdict would probably not have been rendered had instruction not been given. Corporations Code, §§ 15001 et seq., 15006, 15007(3), (4) (a-c, e); Business and Professions Code, §§ 7028, 7031; Const. art. 6, § 4½; Code Civ.Proc. § 475.

Burke Mathes, Los Angeles, for appellants.

Shatford & Shatford, by Henry W. Shatford, Temple City, for respondents.

WHITE, Presiding Justice.

Plaintiffs recovered judgment upon the verdict of a jury in an action for the value of building materials furnished to defendant William A. Davidson, a building contractor. The verdict and judgment against defendants and appellants Paul S. Burkholder and Ivan K. Ross were based upon the theory that said appellants were partners with Davidson in the business of

building homes. A reversal is sought upon the grounds that there is no substantial evidence to support the verdict, by which the jury impliedly found that appellants were partners with Davidson and therefore liable for the debts incurred by the partnership in the operation of its building business, and that the trial court erred in one of its instructions to the jury.

On February 10, 1947, Burkholder, Ross and Davidson entered into a written agreement, reading as follows:

"This agreement, made and entered into this 10th day of February, 1947, by and between Paul R. Burkholder and Ivan K. Ross, hereinafter called the First Party, and William A. Davidson, hereinafter called the Second Party, Witnesseth:

"Whereas, the parties hereto are mutually interested in the construction of residences for sale and

"Whereas, the parties have agreed to cooperate and work together in the obtaining of suitable sites for such residences, the financing of the purchases of such residences and the construction of such residences, upon the terms and conditions hereinafter enumerated:

"Now, Therefore, the parties hereto in consideration of the mutual covenants and agreements herein contained, agree as follows:

"1. The First Party shall secure suitable locations for residences to be erected by the Second Party;

"2. The First Party shall make all necessary arrangements for the financing of all residential projects undertaken in accordance with the terms hereof;

"3. The First Party will arrange for, obtain and pay for all plans and specifications necessary for the construction of all residences constructed under the terms of this agreement;

"4. The First Party will provide for and pay for all Venetian blinds furnished or used in all such residences;

"5. The Second Party will enter into a written contract with such purchaser of a residence hereunder and will build each such residence in accordance with the said plans and specifications;

"6. Upon completion of a residence including sewage disposal facilities, driveway and garage the Second Party shall be paid the sum of Nine Thousand Dollars; upon completion of a residence without sewage facilities, driveway and garage the second party shall be paid Seven Thousand Nine Hundred Ninety Dollars. The Parties of the First Part agree to furnish nails and hardware out of their part, or pay for them. * * *."

Burkholder and Ross caused advertisements to be placed in Pasadena newspapers. Interested persons who called at the real estate offices of either Burkholder or Ross and entered into an agreement, signed a memorandum of agreement substantially in the following form:

"Received from _____

"Address _____ Telephone _____

"The sum of \$_____, being a part payment on a _____ room house _____ as per prints and specifications of Model #_____. To be constructed on Lot #_____, Tract #_____, Book #_____, Page #_____, Street _____ City _____. Total Price to be _____ Dollars \$_____. Balance payable as follows: G. I. Loan _____ Construction Loan _____ Cash _____

"If this Contract is subject to G. I. financing, it is understood and agreed that a charge of \$22.00 will be made for appraisal and credit report and this amount is not refundable. This Deposit accepted with the understanding of all parties that the above mentioned lot is clear and level and that no additional grading, filling, retaining walls, etc., will be required.

"The Agent reserves the right to refund this deposit if inspection of the lot indicates additional costs will be necessary.

"I (we) have read and approve of the foregoing agreement.

"_____ Purchaser _____ Purchaser
"_____ Agent, per _____."

After a purchaser had entered into such a memorandum agreement, he would be introduced by Ross or Burkholder to the con-

tractor, Davidson, and would enter into a contract, as owner, with Davidson as contractor, for the building of a residence. Burkholder and Ross retained \$1,000 of the moneys paid under the building contract and the balance went to Davidson. Ross and Burkholder, from their \$1,000, furnished plans and specifications, nails, hardware, and Venetian blinds. They also assisted the purchaser in obtaining financing.

In February, 1947, plaintiffs commenced selling lumber to Davidson, and extended credit to him until January of 1948. In April, 1948, plaintiffs filed suit against Davidson and recovered judgment for \$19,913.08, representing the balance due for lumber sold and delivered. Plaintiffs for the first time learned of the existence of the agreement between Davidson and Ross and Burkholder in December, 1948, when Davidson was examined as a judgment debtor. Subsequently Davidson was adjudicated a bankrupt, and shortly thereafter the present action was commenced.

Appellants contend, first, that the written instrument hereinbefore set forth is not a partnership agreement; that, paraphrasing the language used in *Kloke v. Pongratz*, 38 Cal.App.2d 395, 401, 101 P.2d 522, the agreement "contains no express intention that Davidson would share the conduct of his contracting business with Burkholder and Ross. No common liability was contemplated. No provision was made for the sharing of the profits or the losses. It was nothing more than an agreement on the part of Burkholder and Ross to act as agents for Davidson in the obtaining of building contracts for him and furnishing certain materials and services." Secondly, it is urged that the acts and conduct of Davidson do not indicate a partnership agreement; that Davidson testified that he could have rejected a proffered contract had he seen fit to do so; that other contractors were working under the same arrangement with Burkholder and Ross; that he signed individual contracts with each owner, and any money left after he had finished the job and paid the bills belonged to him; that neither Burkholder nor Ross had the right to come on the job and fire

any of his men or instruct them in the manner in which they were to perform their duties, and had never attempted to do so. Further, it is pointed out, the lumber bills were charged to Davidson and his brother-in-law, Manwell, described by Davidson as "a profit-sharing investor." As additional circumstances indicating the absence of a partnership relation, it is pointed out that Burkholder and Ross contributed no part of the capital of Davidson's contracting business and had no right to participate in the profits of such business or in its management.

The Uniform Partnership Act, in effect in this state, and now embodied in Chapter 1 of Title 2 of the Corporations Code, defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." Corp. Code, sec. 15006. Section 15007 of the Corporations Code, in setting forth the rules for determining whether a partnership exists, provides, in part as follows:

"* * * (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

"(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

"(a) As a debt by installments or otherwise.

"(b) As wages of an employee or rent to a landlord.

"(c) As an annuity to a widow or representative of a deceased partner.

* * * * *

"(e) As the consideration for the sale of a good will of a business or other property by installments or otherwise."

[1-6] The question of the existence of a partnership depends primarily upon the intention of the parties ascertained from the terms of the agreement and from the surrounding circumstances. *Denning v. Taber*, 70 Cal.App.2d 253, 256, 160 P.2d

900; *De Rigne v. Hart*, 94 Cal.App. 209, 270 P. 1013; *Kersch v. Taber*, 67 Cal.App. 2d 499, 154 P.2d 934; 20 Cal.Jur. sec. 7, p. 686. Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business. *Denning v. Taber*, supra; *Black v. Brundige*, 125 Cal.App. 641, 13 P.2d 999; *Smith v. Grove*, 47 Cal.App.2d 456, 118 P.2d 324; *Martin v. Sharp & Fellows Cont. Co.*, 34 Cal.App. 584, 168 P. 373; *Kersch v. Taber*, supra; 20 Cal.Jur., sec. 9, p. 689. In ascertaining the intention of the parties, where they have entered into a written agreement, such intention should be determined chiefly from the terms of the writing. *Kersch v. Taber*, supra, 67 Cal.App.2d at page 504, 154 P.2d 934. While the question of whether a partnership exists is to be determined from the nature of the relation agreed upon rather than the name which the parties have given to it, some weight must be given to the language of the parties themselves. *Title Ins. & Trust Co. v. Grider*, 152 Cal. 746, 94 P. 601; *Donleavey v. Johnston*, 24 Cal.App. 319, 141 P. 229. It is the intention as evidenced by the terms of the agreement, and not the subjective or undisclosed intention of the parties, that controls. As was said by this court in *Associated Piping, etc., Co., Ltd., v. Jones*, 17 Cal.App.2d 107, 110, 61 P.2d 536, 538. "The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partnership. However, their intention in this respect is immaterial (*San Joaquin L. & P. Corp. v. Costaloupes*, 96 Cal.App. 322, 332, 274 P. 84); and if the contract by its terms establishes a partnership between the parties, even the expressed intent that it should not be so classed would be of no avail. It is the intent to do the things which constitute a partnership that usually determines whether or not that relation exists between the parties. *Chapman v. Hughes*, 104 Cal. 302, 37 P. 1048, 38 P. 109."

Turning now to the agreement here in question, we find that the parties "are mutually interested in the construction of

residences for sale"; that they agree "to cooperate and work together" in obtaining suitable sites, financing, and construction. They then proceed to an apportionment of duties. The two brokers agree to secure suitable locations, arrange financing, arrange and pay for plans and specifications, and provide Venetian blinds, nails and hardware. The contractor agrees that he "will enter into a written contract with each purchaser" and "will build each such residence in accordance with the said plans and specifications." With respect to appellant's contention that the agreement merely created an agency, it can here be observed that while an agency contract could have been made had the parties desired, the agreement actually entered into was not cast in that form. The instrument contains no agreement by the contractor, Davidson, to pay the first parties, the brokers, a commission for securing customers, materials or building sites. To the contrary, it provides for a division of profits. Davidson was to receive as profit \$9,000 or \$7,990, less the cost to him of constructing the residence. While the contract contains no provision as to the amount of money to be received by Ross and Burkholder, the practice of the parties, operating under the agreement, was that Ross and Burkholder received \$1,000 of the purchaser's payments, out of which amount they paid for the materials and services required of them under the agreement.

With respect to the conduct of the parties in conducting the business pursuant to the agreement, it appears that Ross and Burkholder caused advertisements to be placed in newspapers substantially in the following form:

"Homes To Be Built
Immediately

"A custom built (not prefab.) 3-bedroom home, 2 fireplaces, 1¾ baths (2 stall showers), chrome plumbing, hardwood floors, plastered walls, tile features, choice of colors, shades or venetian blinds optional. Approximately 1280 sq. ft. floor space. Choice of architecture in this house you will be proud to call home.

"Price Built on Your Lot
"Only \$8990
"Come in or phone for appointment
"Paul S. Burkholder
"Realtor
* * * * *
"or
"Ivan K. Ross
* * * * *

The testimony of Mr. Perry, one of the purchasers of the homes constructed under the agreement, was to the effect that he was assured that Mr. Ross "had a source of material" so that there would be no delay in the progress of the building. When subsequently he complained to Ross of the lack of progress, Mr. Ross "would usually try to help me locate Mr. Davidson who was very hard to find." When the parties embarked on their venture Mr. Ross approached Mr. Constans, one of the plaintiffs, to secure lumber and materials for Davidson.

[7] The argument that Ross and Burkholder had no control over Davidson's building activities presents a minor consideration. Under the agreement Davidson agreed to enter into a building contract with a customer. In response to the question: "Did Ross and Burkholder have a right to tell you to change the manner in which you were doing the work?", Davidson testified, "If I wouldn't have been doing it right I felt they did." The instrument under consideration is silent on the subject, and the question apparently never arose. In any event, apportionment of duties does not preclude the existence of a partnership. One partner may be given the right of management. *Thompson v. O. W. Childs Estate Co.*, 90 Cal.App. 552, 266 P. 293; *Associated Piping, etc., Co., Ltd. v. Jones*, supra, 17 Cal.App.2d at page 111, 61 P.2d 536; *Westcott v. Gilman*, 170 Cal. 562, 567, 150 P. 777.

[8] The fact that the profits and losses were not equally shared does not necessarily compel a conclusion that no partnership existed. Although a partnership generally contemplates an equal sharing of the profits and losses in the prosecution of the common purpose, the division may be

left to the agreement of the parties. *Campagna v. Market St. Ry. Co.*, 24 Cal.2d 304, 308, 309, 149 P.2d 281.

[9-11] "In ascertaining whether a partnership exists it is necessary to consider all of the attending facts and circumstances, and if the evidence is sufficient, it is for the jury's consideration." *Northampton Brewery Corp. v. Lande*, 138 Pa. Super. 233, 10 A.2d 583. Considering the terms of the agreement here involved and the conduct and activities of the parties thereto in carrying on the business, the conclusion is impelled that a partnership existed. The agreement discloses an association for the purpose of carrying on a business and dividing the profits. And the agreement for division of profits implies an agreement also to bear the losses. *San Joaquin L. & P. Corp. v. Costaloupes*, 96 Cal.App. 322, 334, 274 P. 84, 89. As was said in the last-cited case, "The courts will not countenance contrivances for giving persons the whole of the advantage of a partnership, without subjecting them to the liabilities, and an agreement which attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership." In *Westcott v. Gilman*, 170 Cal. 562, 568, 150 P. 777, 779, Ann.Cas.1916E, 437, it is said: "In truth, the existence or non-existence of a partnership in any case cannot be determined by * * * dissecting the whole relationship into broken parts and members, and studying each disjointed fragment as though it were the complete whole." So in the instant cause, looking to the contract and the parties' conduct as a whole, rather than concentrating on one or more inconsistent details, the conclusion is inescapable that a partnership existed.

It might also here be noted that during the operations of appellants and Davidson, the former would personally benefit from the delivery by respondent of building materials used by Davidson in the construction of the residences in question.

[12] From the evidence presented herein the jury was justified in concluding

that appellants were desirous of engaging in the business of erecting homes upon properties owned by prospective home builders; that not being licensed contractors, they could not act in the capacity of contractors, Bus. & Prof. Code, secs. 7028, 7031; that Davidson, being a licensed contractor, was taken into the joint venture to the end that in his capacity as a licensed contractor he could enter into a valid and enforceable agreement for the construction of the homes in question. That there was a mutual interest between appellants and Davidson, as well as a purpose to jointly carry on the business, is evidenced by the agreement itself, wherein it is stated, "The parties hereto are mutually interested in the construction of residences for sale," and "the parties have agreed to cooperate and work together * * *."

[13] Finally, appellants urge that the trial court erred in giving the following instruction to the jury: "The court further instructs you that there does not have to be an even division of the profits to establish a partnership, but that the parties may agree on what their profits shall be. Hence, if you are reasonably satisfied from the evidence that Davidson was to furnish the contractor's license, and the responsibility of getting the houses built, and Ross and Burkholder were to furnish the buyers, part of the material and the capital, and that Burkholder's and Ross' profit was to be what they could make on their \$1,000.00 and Davidson's profit to be what he could make on his price for each house, this would constitute a partnership."

Concededly, as pointed out by appellants, Burkholder and Ross did not furnish capital, in the sense of funds to be put into the business. But they did furnish their efforts, their real estate office facilities, and their own funds to initiate the project by advertising for buyers; while Davidson furnished his efforts as a builder, his contractor's license, and his building equipment.

We cannot agree with appellants that the instruction amounted virtually to a direction to the jury to find that a partnership existed. It clearly and plainly set

forth issues framed by the pleadings and raised by the evidence. It then advised the jury that if they found evidence that established the truth of certain facts, a partnership must be found to exist. The challenged instruction did not invade the province of the triers of fact, nor was it in conflict with any other instruction given so as to confuse or mislead the jury to the prejudice of appellants. And, we might add, that under the facts of this case, as revealed by the evidence, even though it be conceded that the giving of the instruction was erroneous, nevertheless, section 4½ of Article VI of the Constitution of California, and section 475 of the Code of Civil Procedure, restrain us from reversing the judgment, because we would not be warranted in saying that a different verdict would probably have been rendered had the instruction complained of not been given.

The judgment should be affirmed, and it is so ordered.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



106 Cal.App.2d 415

DICK v. WOOLSON et al.
Civ. 18191.

District Court of Appeal, Second District,
Division 3, California.

Aug. 31, 1951.

Rehearing Denied Sept. 18, 1951.

Hearing Denied Oct. 29, 1951.

Action by John Dick against Leigh Woolson, Builders Supply Corporation, Corporation Management, Inc., and others, to recover the balance due on a contract for the sale of a business to defendant Woolson. Plaintiff, as third-party beneficiary of assignments by which corporations assumed Woolson's obligation, sued the corporate defendants. The Superior Court, Los Angeles County, J. A. Smith, Judge assigned, gave judgment for the plaintiff, and the corporate defendants appealed. The District Court of Appeal, Shinn, P. J., held that where corporation expressly assigned liability and obligations

under sales contract to second corporation the assignment did not operate as a rescission of the agreement between the defendant buyer and first corporation.

Judgment affirmed.

1. Sales ◊220

Where buyer of business agreed to form corporation which would give note to seller for balance due on sales contract and make monthly payments thereon, and buyer assigned sales contract to such corporation which in turn assigned it to second corporation in order for promissory note given by second corporation to operate as payment of sales contract it was necessary to show that it was so accepted by seller.

2. Sales ◊225(4), 359(3)

In action by seller of business against buyer and successive corporate assignees of buyer to recover balance due on sales contract, evidence was insufficient to establish that seller treated promissory note given by second corporate assignee as payment of sales contract.

3. Judgment ◊583

Where on June 4, 1947, corporate assignee of buyer of business assumed obligations of sales contract dated May 1, 1947, gave seller promissory note due in November, 1948, and had judgment rendered against it based upon its assumption of the sales contract obligations, liability under the contract was established, and it was immaterial whether seller's action on note in March, 1948, was premature.

4. Sales ◊86, 220

Where buyer of business agreed to form corporation which would give note to seller for balance due on sales contract and make monthly payments thereon, seller's acceptance of promissory note from assignee of corporation did not discharge buyer or original assignee on sales contract.

5. Contracts ◊187(1)

A person not a party to a contract may nevertheless sue for its enforcement where it is made especially for his benefit and has not been rescinded. Civ.Code, § 1559.

6. Contracts ⇨187(4), 330(4)

Where obligations of contract are assumed, creditor under original contract may sue assuming party on theory that creditor is an express beneficiary of the assumption contract, and creditor may join both assuming party and original debtor. Civ.Code, § 1559.

7. Contracts ⇨187(4)

Where obligations of contract are assumed, until creditor-beneficiary under original contract has accepted benefits or has detrimentally acted in reliance thereon, assuming party may rescind, but as long as assuming promisor continues to retain consideration from original promisee, contract for benefit of third party cannot be rescinded or revoked. Civ.Code, § 1559.

8. Sales ⇨220

Where buyer of business agreed to form corporation which would give note to seller for balance due on contract and make monthly payments thereon, and buyer assigned sales contract to such corporation which in turn expressly assigned sales contract to second corporation, which assumed contractual obligations, latter assignment did not operate as rescission of agreement between buyer and first corporation.

9. Sales ⇨225(4)

Where corporate assignee of sales contract from buyer of business claimed as defense to action against it by seller for balance due on purchase price that it was induced to accept assignment by fraud of buyer, but it retained the property purchased, evidence of fraud was inadmissible.

Nathan Newby, Jr. and Nathan Newby,
Los Angeles, for appellants.

W. C. Schaper and Glenn Simpson, Los
Angeles, for respondent.

SHINN, Presiding Justice.

From a money judgment for plaintiff rendered after trial to the court, defendants Builders Supply Corporation and Cor-

poration Management, Inc., appeal. The judgment was for the balance due on a contract for sale of a business by plaintiff to defendant Woolson. The corporate defendants are successive assignees of Woolson of the sales contract and plaintiff sues as third party beneficiary of the assignments by which the corporations assumed Woolson's obligation.

The business transactions to be reviewed were involved, and the evidence wandered far from the issues to be tried. The principal facts are that plaintiff Dick and defendant Woolson entered into an agreement whereby, for a consideration of \$25,000, Dick sold to Woolson a going business, The Home Improvement Company. The payment terms were \$5,000 on the signing of the agreement, an additional \$5,000 within ninety days, and the remaining \$15,000 in equal monthly installments of \$1,000 or more beginning September 1, 1947. Woolson agreed to form a corporation which would give a note to Dick for the balance due on the contract and would be jointly liable with Woolson on the contract. On May 31, 1947, Woolson assigned the sales contract to defendant Corporation Management, Inc., which assumed all the liabilities and obligations under the contract. On June 4, 1947, Corporation Management assigned the sales contract to defendant Builders Supply Corporation, which assumed the contractual liabilities and obligations. (The corporate defendants will be referred to as Management and Builders.) Both corporations were formed just prior to taking the assignments and after the two assignments Builders' major asset was the Home Improvement Company and Management's major asset was the common stock of Builders. At this point in the transaction, if the sales contract was still operative and there had been no rescission of the assignment contracts, plaintiff was a creditor under the contract with Woolson, was creditor-beneficiary under a contract between Woolson and Management, and a creditor-beneficiary under the contract between Management and Builders. In August, 1947, plaintiff received from Builders the second \$5,000

payment together with a promissory note for \$15,297.22, the balance due on the contract, plus interest from May 1st. As provided in the contract, Builders made additional payments on September 1 and October 1, 1947. These payments were made even though the note was not due until November, 1948. Plaintiff received no other payments and brought this action against Woolson and Builders on March 18, 1948, claiming the accrued payments due under the contract plus interest. On November 23, 1948, the complaint was amended to include Management as a defendant and to add a cause of action on the note against Builders, and further to change the amount claimed to the full contract price which was by that time past due.

Judgment was granted against all three defendants for the balance due plus interest at five per cent and defendants' motion for a new trial was denied. Defendant Woolson did not appear at the trial and is not here appealing. Defendant Builders no longer owns the assets forming the subject matter of the sales contract, having reassigned them to Management in December, 1947. Builders was shown to be insolvent.

Defendants' contentions on appeal are: (1) Builders' note given to plaintiff discharged its liability under the sales contract; (2) Builders can be sued on the note only after maturity and as this action was brought before maturity it should be dismissed; (3) even if the note did not discharge the sales contract, Management rescinded its assignment from Woolson and plaintiff cannot sue as beneficiary of a non-existent contract; (4) Management was induced to accept the assignment by Woolson's fraud. These contentions will be considered in order.

[1,2] In order for the note to operate as payment of the sales contract it was necessary to show that it was so accepted by plaintiff. There was no evidence that plaintiff so treated the note. This conclusion is fortified by the terms of the sales contract under which the note was to be given as "collateral to and coinci-

dent with liability on the contract." The further fact that Builders proceeded to make payments under the contract even after the note was given is inconsistent with the contention that the note discharged the sales contract. The sales contract was outstanding and if Builders had not rescinded the assignment to it before plaintiff accepted the benefit of the assignment, Builders was clearly liable to plaintiff on a creditor-beneficiary theory.

[3] The judgment against Builders was, as appellants state, "based exclusively upon its assumption on June 4, 1947, of the obligations of the contract dated May 1, 1947." If, therefore, liability under the contract was established, it is immaterial whether the action on the note was premature.

[4] As regards Management, the contention is that the note discharged its liability on its acceptance of the assignment. The contract provided that a corporation was to be formed, that it would issue a note to plaintiff for the balance due, and that the "note [would] be collateral to and coincident with the obligations of [Woolson]." Management's argument is that the sales contract clearly shows the only obligation of the corporation would be on the note since it would be "collateral" to Woolson's obligation on the sales contract. This might have been true had there been no independent assumption by the corporation of the contract obligations. The basis of the action against Management is that it assumed Woolson's obligation and is thus liable to plaintiff, the creditor-beneficiary of the assumption contract. As indicated above, Woolson was not discharged on the contract by plaintiff's acceptance of the note; neither was his assignee of the contract discharged.

[5-7] The principal question on the appeal is that raised by contentions three and four—as to the nature of the liability to a third party beneficiary. A person not a party to a contract may still sue for its enforcement where it is made expressly for his benefit and has not been rescinded. Civ.Code, § 1559. Where the obligations

of a contract are assumed, the creditor under the original contract may sue the assuming party on the theory that he is an express beneficiary of the assumption contract. The creditor may join both the assuming party and the original debtor. *Anderson v. Calaveras Cent. Mining Corp.*, 13 Cal.App.2d 338, 343-344, 57 P.2d 560. However, until the creditor-beneficiary has accepted the benefit or has detrimentally acted in reliance thereon, the assuming party may rescind. But as long as the assuming promisor continues to retain the consideration from the original promisee, the contract for the benefit of the third party cannot be rescinded or revoked. *Pitzer v. Wedel*, 73 Cal.App.2d 86, 165 P.2d 971; *Pearsall v. Townsend*, 7 Cal.App.2d 162, 45 P.2d 824.

[8] Management concedes that when it assumed the obligations of the sales contract from Woolson on May 31, 1947, plaintiff became a third party beneficiary, but contends that this assumption contract was rescinded by it. If true, this would relieve Management of liability to plaintiff. At the trial, Management advanced the claim that the assignment of June 4, 1947, from Management to Builders, operated as a rescission by Management and a new assignment from Woolson to Builders. This contention was substantially disproved by the terms of the contract of assignment dated June 4, 1947, which was an express assignment by Man-

agement to Builders in clear and unambiguous terms. The contract may not be construed as a rescission of the Woolson-Management agreement. It is completely inconsistent with any theory of rescission. There is no basis for the contention that it did not embody the agreement of the parties. There was no other evidence in the record as to rescission. Nothing was ever restored to Woolson.

[9] Management's remaining theory is that it was induced to accept the assignment by the fraud of Woolson. The transcript references given do not bear out the claim that evidence of fraud was offered and excluded. But if such evidence was offered it should have been excluded. Neither Management nor Builders ever restored the subject property, or any part of it to Woolson. There was no rescission. Such of the property as Builders acquired and had not disposed of was transferred to and retained by Management, leaving Builders insolvent. It was not claimed that plaintiff was a party to Woolson's alleged fraud. Manifestly, Management or Builders, as assignees of Woolson, would have no right to retain the property purchased without paying plaintiff the agreed price. Validity of the Dick-Woolson contract was never questioned.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

TURKOVICH v. ROWLAND et al.

Civ. 18259.

District Court of Appeal, Second District,
Division 1, California.

Sept. 4, 1951.

Rehearing Denied Sept. 24, 1951.

Hearing Denied Nov. 1, 1951.

Action by Anna Turkovich against William James Rowland and others for personal injuries received in an automobile accident. From a judgment for defendant in the Superior Court, Los Angeles County, Ragain, J., plaintiff appealed. The District Court of Appeal held that evidence sustained the judgment and that there was no error in the instructions.

Affirmed.

1. Automobiles ⇨245(60)

In personal injury action by passenger in automobile struck in rear by second automobile against driver of second automobile, the proximate cause of the accident was a question of fact to be determined by the jury.

2. Automobiles ⇨245(15)

Where automobile following another runs into the automobile in front, the issue of negligence is a question of fact and not one of law.

3. Automobiles ⇨244(12)

In action by passenger for injuries received when automobile she was riding in stopped suddenly and was struck in rear by another automobile, against driver of second automobile, evidence sustained verdict for defendant.

4. Appeal and error ⇨1064(1)

In personal injury action by passenger in automobile struck in rear by another vehicle against driver of second automobile, instructions to the jury on unavoidable accident was not prejudicial error.

5. Automobiles ⇨242(7)

Where passenger in automobile struck in rear by second automobile sues driver of second automobile, passenger has the burden of proof to show that the accident was caused by the negligence of the defendant.

6. Automobiles ⇨246(57)

In action for personal injuries by passenger in automobile struck in rear by second automobile, when first automobile stopped suddenly, against driver of second automobile, the question of whether the driver of the first vehicle gave an arm signal was relevant to the issue of proximate cause and instruction to jury based on statute relative to giving signals by arm was proper. Vehicle Code, § 544(c).

7. Trial ⇨260(8)

In personal injury action by passenger in automobile struck in rear by another automobile against driver of second automobile, refusing to give instruction based on Highway Code provision regarding stopping at intersections was not error where the jury was fully and fairly instructed upon all the issues in the case. Vehicle Code, § 577(a).

Nicholas Ferrara, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee and R. S. Harrington, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff, Anna Turkovich, was riding with two other persons in the single seat of a coupe. She was in the middle of the seat between a lady driver, Olga Petrovich, and a gentleman on her right. The coupe was going easterly along Culver Boulevard to its intersection with Main Street in Culver City, in Los Angeles County. It was about 7:30 p. m., and dark at the time.

About 25 to 30 feet west of the pedestrian crossing at the intersection, the driver of the coupe made a sudden stop, and defendant's car following ran into it.

The driver of that car, one of defendants, testified that he had been driving about 18 to 20 feet behind the coupe for a city block; that he was going 20 to 25 miles an hour; that he saw no arm signal given; that he applied his brakes when he saw the stoplight on the coupe light up; but that the coupe stopped so quickly that

he was unable to check the momentum of his vehicle in time to avoid the collision.

After the accident this witness went forward opposite the driver's window of the coupe, and found the door locked and the glass window rolled up. Plaintiff makes no contention that an arm signal was given.

Plaintiff was thrown forward to the front of the coupe and then backward against the cushion on the back of the seat. She was taken to the Santa Monica hospital in an ambulance, examined there by an intern, and discharged as "ambulatory". She went home and went to bed and next morning called her doctor. He pronounced her injury a mild form of concussion, gave her sedative medicine, and told her to stay in bed.

About a week later plaintiff caught her hand in the wringer of a washing machine. The injuries thus suffered were painful and severe, and required treatment for several weeks, and a number of calls to her doctor's office.

Plaintiff testified that she lost consciousness just before she caught her hand in the wringer, and her doctor testified that such loss of consciousness could have been from the injuries received in the accident.

The case was tried by a jury, whose verdict was for defendants. From the judgment which followed plaintiff appeals.

Plaintiff argues that the negligence of the driver of the following car was in some degree at least the proximate cause of the accident; that the negligence of the driver of the coupe was not imputable to plaintiff; also that it was error for the trial court to give and to refuse certain jury instructions.

[1,2] It was the province of the jury to determine the proximate cause of the accident. See cases collected in 19 Cal. Jur. 832. When an automobile following another one runs into the car in front negligence is a question of fact and not of law. *Wohlenberg v. Malcewicz*, 56 Cal. App.2d 508, 133 P.2d 12.

[3] By its verdict the jury found that the proximate cause of the accident was the negligence of the driver of the coupe, and that defendant driver was not negligent. The evidence supports the verdict.

[4,5] Plaintiff complains of the giving of the usual instruction relative to unavoidable accident. Since plaintiff had the burden of proof to show that the accident was caused by negligence of the defendant driver, this instruction cannot be said to have been harmful to plaintiff's case. *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823.

[6] Plaintiff complains of an instruction based upon Section 544(c) Vehicle Code, relative to giving of signals, and contends that it was not applicable to plaintiff as a passenger in the coupe. The instruction was proper, however, because whether an arm signal was or was not given was relevant to the issue of proximate cause.

Plaintiff also complains of the giving of an instruction (Baji 149-a) relative to the application by the jury of a failure of any party to an accident to comply with the law. This instruction was likewise proper in view of the issues involved.

[7] Plaintiff further complains of the giving of an instruction following Vehicle Code Section 577(a) relative to the code requirement that all vehicles must stop at through highways; and of the failure to give an instruction proposed by plaintiff, (Baji 149-b.). Plaintiff contends that the jury was not properly instructed, "since defendants would in any event be liable, unless Olga Petrovich's negligence was the 'sole' proximate cause of the accident." However, the essential fact for plaintiff to prove was negligence of the defendant driver.

The jury was fully and fairly instructed upon all of the issues in the case. There was no error in giving or refusing any particular instruction.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

106 Cal.App.2d 373

**BETHLEHEM PAC. COAST STEEL CORP.
v. INDUSTRIAL ACC. COMMISSION
et al.
Civ. 14788.**

District Court of Appeal, First District,
Division 2, California.
Aug. 30, 1951.

Proceeding by the Bethlehem Pacific Coast Steel Co. to review order of Industrial Accident Commission awarding compensation to James A. Chipman. The District Court of Appeal, Goodell, J., held that there was sufficient evidence to support the award of the Industrial Accident Commission.

Affirmed.

**1. Administrative law and procedure — 784,
789**

Workmen's compensation — 1724, 1939

The determination of percentage of disability of employee is a question of fact and is left to the discretion of the Industrial Accident Commission, and its determination is not subject to review unless palpably contrary to undisputed fact. Labor Code, § 4660.

2. Workmen's compensation — 1671

In proceeding to determine permanent disability, where employee receives nine broken ribs, punctured lung, and injuries to chest, back and left shoulder and when recovered suffered a wage loss of \$2 per day, evidence sustained award of 27% permanent disability.

3. Workmen's compensation — 1857

Questions not raised in petition for rehearing to Industrial Accident Commission cannot be raised for the first time on review by the courts. Labor Code, §§ 5900, 5902, 5904.

GOODELL, Justice.

Respondent Chipman was injured while employed by petitioner as a structural iron worker at Stockton. He was then 25. In proceedings several years later he was given an award based on a rating of 10¼% permanent disability. He was dissatisfied therewith and asked for and obtained a rehearing. The second hearing was before a different referee and the rating was made by a different rating specialist. The second award was based on a rating of 27% permanent disability. The employer, a self-insurer, then asked for a rehearing, which was denied, and the present proceeding followed.

Chipman was injured while he and a fellow employee were unloading from a gondola car steel girders and trusses, and some miscellaneous iron. A girder, weighing about 1,875 pounds, which was being handled by a crane, caught on the edge of the car. Chipman testified that he "had reached out to free the girder. As a result I didn't quite make it and as the girder came down it hit the side of the car and pinned me between the girder and the vertical trusses." The truss struck him diagonally across the chest and the girder struck him "at the lower part of the shoulder blades horizontally right across the back." His chest, upper back, and left shoulder were injured and five ribs on his right side and four on his left side were fractured. His right lung was punctured. He returned to work about July 20, 1945, but could do only light work and not such as he had done theretofore.

Chipman testified with respect to the consequences of his injuries and how they had affected him and his ability to work. He testified that he could no longer continue as a structural iron worker, which requires hand-over-hand climbing which he could no longer do, but had had to confine his activities to reinforced iron work which pays 25 cents an hour less, and wherein there is very little climbing; "very little overhead work at all" and which is mostly ground work, or on staging or scaffolding. He testified, also, that after his injury he had to quit two different

Lillick, Geary, Olson, Adams & Charles, Harold S. Dobbs and John F. Porter, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger and Alvin L. Dove, San Francisco, for respondents Industrial Acc. Commission.

jobs because, physically, he could not handle them.

In connection with the first hearing a doctor who was agreed upon by both Bethlehem and Chipman examined the applicant and turned in a detailed report of his findings. Chipman was also examined by a doctor appointed by the Commission, who filed a report. At the second hearing Chipman again testified, and the reports of both doctors theretofore rendered went into the record. No other medical reports are in the case. Each of the two rating reports enumerate the physical and medical factors on which they are based.

The burden of petitioner's attack herein is that because (a) the findings in both hearings were based on the same medical reports, and (b) there was nothing developed at the second hearing which had not been brought out at the first, and (c) the factors shown in both rating reports are essentially the same, there is no evidence to sustain a rating of 27% as against the earlier one of 10¼%. More than that, petitioner points out that the second rating report contains a factor (respecting Chipman's gripping or grasping power) which was not contained in the first rating report, and which indicates that even the 10¼% rating was too high.

On receiving a copy of the second report of permanent disability rating, which was made by Edw. T. Dougherty, fixing it at 27%, or the equivalent of 108 weeks of disability, petitioner's counsel wrote the Commission stating that they desired to exercise the right to cross-examine the rating bureau regarding the report, and requesting that a hearing be scheduled. The commission fixed the time and place for the hearing "to cross examine E. T. Dougherty" and notices were sent to all concerned. Petitioner failed to subpoena Mr. Dougherty as the rules require and at the time and place set for his cross-examination no witness was present.

The net result is that petitioner is now in the position of urging on this court that there is no evidence to sustain the 27% rating without having cross-examined the expert who made it. Such examination

might have convinced counsel that the rating was not improper. If it did not do so, it at least would have supplied the petitioner with a record which could have been brought here and which might have formed some kind of a basis for the attack now made.

Section 4660, Labor Code provides: "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.

"The commission may prepare, adopt, and from time to time amend, a schedule for the determination of the percentages of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."

There is not even before this court a copy of the schedule provided for in sec. 4660, which might or might not have thrown some light on the case.

All that the petitioner has done is to draw a comparison between the two rating reports, factor by factor, and to suggest its own idea of what percentage certain factors should properly rate. Counsel then concludes that, at the very outside, the percentage of permanent disability should not be higher than 17.

Petitioner concedes "that the determination of the percentage of an employee's disability is left *in large measure* to the discretion of the * * * Commission". (Emphasis added.) The authorities go much further than that.

[1] In *Frankfort General Ins. Co. v. Pillsbury*, 173 Cal. 56, 59, 159 P. 150, 152, the court said: "The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the Commission in the exercise

of its sound discretion, based upon a fair view of all of the circumstances. *Its conclusion on this matter is the determination of a question of fact, and is not subject to review by the courts unless palpably contrary to the undisputed evidence.*" (Emphasis added.) And in *Ford Motor Co. v. Industrial Acc. Comm.*, 202 Cal. 459, 464, 261 P. 466, 468: "This was a matter within the exclusive jurisdiction of the commission, and this court has no power to disturb such action provided there was any evidence before the commission to justify such a finding."

In *Hines v. Industrial Acc. Comm.*, 215 Cal. 177, 188, 8 P.2d 1021, 1026, the court said: "The determination of the percentage of this disability is, of course, left to the sound discretion of the commission to be exercised in view of all the circumstances. (Citations.)"

In *Tanenbaum v. Industrial Acc. Comm.*, 4 Cal.2d 615, 618, 52 P.2d 215, 216, it is said: "* * * it is settled that the determination of the percentage of disability is a matter left to the sound discretion of the commission." (Citations.)

In *County of Los Angeles v. Industrial Acc. Comm.*, 14 Cal.App.2d 134, 138, 57 P.2d 1341, 1343, this was said: "The officials of the commission with their great experience in handling matters involving injuries to workmen are of necessity better qualified than the average layman to pass upon such questions."

For all that appears in this record the rating bureau might have found that the 10¼% had been erroneously arrived at or that it "was unjust as first made", *Great Western Power Co. v. Industrial Acc.*

Comm., 191 Cal. 724, 729, 218 P. 1009, 1011; *Pacific Employers Ins. Co. v. Industrial Acc. Comm.*, 58 Cal.App.2d 262, 267, 136 P.2d 633.

[2] From the brief statement of facts appearing earlier it is perfectly clear that Chipman's injuries were very serious; that after his accident his ability to labor as a structural iron worker ended, and that this "diminished ability" sec. 4660, reduced his daily earnings by about \$2 (25 cents an hour).

We are satisfied that there is sufficient evidence to sustain the 27% rating, the findings and the award. At the very least we are unable to say on this record that the Commission's conclusion is "palpably contrary to the undisputed evidence". *Frankfort General Ins. Co. v. Pillsbury*, 173 Cal. 56, 59, 159 P. 150, 152.

[3] In its closing brief "petitioner contends that it was an abuse of discretion for the referee to refuse petitioner's offer to request that the specialist, who was then available, take the stand, and to further refuse to grant a continuance so that a subpoena might be procured." If this is intended as presenting a separate point in this proceeding, the answer is that that particular point cannot now be raised, since it was not raised before the Commission on petitioner's application for a rehearing. Secs. 5900, 5902, 5904, Labor Code; *Alford v. Industrial Acc. Comm.*, 28 Cal.2d 198, 206, 169 P.2d 641 and *Pullman Company v. Industrial Acc. Comm.*, 28 Cal.2d 379, 386, 170 P.2d 10 and their citations.

The award is affirmed.

NOURSE, P. J., concurs.

37 Cal.2d 727

WHITE v. TOWERS.

L. A. 21804.

Supreme Court of California, in Bank.

Sept. 4, 1951.

Action by Claude White against Charles Towers, also known as C. L. Towers, for malicious prosecution. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained defendant's demurrer to complaint without leave to amend and entered judgment in favor of defendant and plaintiff appealed. The Supreme Court, Spence, J., held that investigator for State Fish and Game Commission was immune from civil liability for malicious prosecution for instituting criminal proceedings in municipal and federal courts for violation of State Fish and Game Code and for pollution of navigable waters within concurrent jurisdiction of state and federal governments.

Judgment affirmed.

Carter, Schauer, and Edmonds, JJ., dissented.

For prior opinion see, 222 P.2d 920.

1. Malicious prosecution ⇨42

Sound reasons of public policy require that a peace officer or other comparable official should be immune from civil liability for alleged malicious prosecution.

2. Malicious prosecution ⇨42

The public policy of protecting individual citizens from oppressive official action and the apparently conflicting policy of promoting the administration of the law for the whole people by protecting public officers from retaliatory damage suits may both be subserved by refusing to permit civil actions against officer for alleged malicious prosecution and remanding the offended individual to his remedy under the penal statutes. Pen.Code, § 170.

3. Officers ⇨110

Where duty to investigate crime and institute criminal proceedings is lodged with any public officer, it is for best interests of community as a whole that he be protected from harassment in the performance of such duty.

235 P.2d—14

Cal.Rep. 235-236 P.2d—9

4. Malicious prosecution ⇨38

It is the policy of the law to discourage actions for malicious prosecution because of their tendency to obstruct the administration of justice.

5. Malicious prosecution ⇨42

Investigator for state fish and game commission was a law enforcement officer charged with the duty of enforcing laws for the protection of fish and game and as such officer he was immune from civil liability for malicious prosecution for instituting, allegedly without probable cause, criminal proceedings in municipal court for violation of Fish and Game Code. Fish and Game Code, § 481.

6. Officers ⇨66, 121

A peace officer may be called to account criminally for official misconduct or he may be ousted from office on account of such misconduct. Pen.Code, § 170.

7. Malicious prosecution ⇨42

Executive heads of administrative departments and their deputies, who act in their stead, are immune from civil liability for malicious prosecution.

8. Malicious prosecution ⇨42

Public prosecutors and grand jurors are immune from civil liability for alleged malicious prosecution.

9. Malicious prosecution ⇨42

Penal provision making it a misdemeanor to procure a search warrant or warrant of arrest to be issued and executed maliciously and without probable cause provides some measure of protection for the individual citizen from the specified malicious acts of any person, including law enforcement officers, and resort to such penal provision subserves the public interest far better than civil litigation against public officer. Pen.Code, § 170.

10. Officers ⇨116

A public officer is liable for injuries caused by acts done outside the scope of his authority.

11. Malicious prosecution ⇨42

Investigator for state fish and game commission acted within the scope of his

authority in instituting criminal proceedings in federal court for pollution of navigable waters in violation of federal statute, where alleged offense occurred in the littoral waters of the state under the concurrent jurisdiction of state and federal governments, and hence investigator was not subject to civil liability for malicious prosecution for instituting such proceeding. 33 U.S.C.A. § 407.

12. Officers ☞110

Duties of a public office include those lying squarely within its scope, those essential to the accomplishment of the main purpose for which office was created, and those which, though only incidental and collateral, serve to promote the accomplishment of the principal purpose.

13. Officers ☞103

In determining the scope of official action regard must be had to the authority conferred which embraces every act which may properly constitute an aid in the enforcement of the law.

14. Fish ☞11

Game ☞6

An investigator for state fish and game commission is assumed, in absence of any allegation to the contrary, to have authority to enforce laws for the protection of fish and game.

Joseph K. Coady, Bellflower, for appellant.

Fred N. Howser, Atty. Gen., Bayard Rhone and Norman Sokolow, Deputy Attys. Gen., for respondent.

SPENCE, Justice.

In this action for damages for alleged malicious prosecution, plaintiff has appealed from the judgment entered in favor of defendant following an order sustaining defendant's demurrer without leave to amend.

According to the allegations of the complaint, defendant maliciously and without probable cause procured the institution of two criminal proceedings against plaintiff. In both proceedings the charges were based upon events which allegedly occur-

red on October 3, 1948. The first proceeding, filed in the Municipal Court of the City of Long Beach on October 5, 1948, charged plaintiff with having violated section 481 of the Fish and Game Code, in that he had deposited certain petroleum matter, deleterious to fish and plant life, in the waters of the state of California. On October 28, 1948, that proceeding was dismissed. On April 29, 1949, defendant, by sworn affidavit, caused a second proceeding to be instituted in the United States District Court for the Southern District of California, charging plaintiff with violation of section 407 of 33 U.S.C., 33 U.S.C.A. § 407 (pollution of navigable waters). On July 19, 1949, plaintiff was acquitted in the second proceeding.

In the present action, it appears that the trial court sustained defendant's demurrer without leave to amend because it affirmatively appeared in an affidavit, attached to and incorporated by reference in the complaint, that defendant was an investigator for the State Fish and Game Commission. It was not alleged that defendant had acted without the scope of his authority; and the trial court concluded that as such investigator acting within the scope of his authority, defendant was immune from civil liability for alleged malicious prosecution. Thus, the main issue presented is whether defendant Towers, as an investigator for the State Fish and Game Commission, is immune from civil liability for the alleged malicious prosecution of said criminal proceedings.

Plaintiff contends first, that the doctrine of immunity from civil liability is not available to defendant with respect to either prosecution because defendant is at best a peace officer; and second, that in any event said doctrine has no application to the proceeding in the federal court as defendant was acting without the scope of his authority in instituting a proceeding in that court. We have concluded, however, that plaintiff's contentions cannot be sustained.

[1,2] In support of his first contention, plaintiff cites and relies upon certain language found in *Prentice v. Bert-*

ken, 50 Cal.App.2d 344, 349, 123 P.2d 96, but, as hereinafter indicated, we believe that sound reasons of public policy require that a peace officer, or other comparable official, be shielded by the cloak of immunity from civil liability for alleged malicious prosecution. At the outset, we are faced with an apparent conflict between the public policy of protecting individual citizens from oppressive official action and the equally well established policy of promoting the fearless and effective administration of the law for the whole people by protecting public officers from vindictive and retaliatory damage suits. However, we feel that both policies may at once be subserved by refusing to permit civil actions against the officer for alleged malicious prosecution and remanding the offended individual to his remedy under the penal statutes. E. g. Pen.Code, § 170.

[3-5] When the duty to investigate crime and to institute criminal proceedings is lodged with any public officer, it is for the best interests of the community as a whole that he be protected from harassment in the performance of that duty. The efficient functioning of our system of law enforcement is dependent largely upon the investigation of crime and the accusation of offenders by properly trained officers. A breakdown of this system at the investigative or accusatory level would wreak untold harm. "Criminal law does not enforce itself. It demands the assistance of valid evidence and fearless officials to put it in execution. Because of their tendency to obstruct the administration of justice, it is the policy of the law to discourage actions for malicious prosecution." *Watts v. Gerking*, 111 Or. 641, 669, 222 P. 318, 228 P. 135, 141, 34 A.L.R. 1489. It is patent that defendant Towers is a law enforcement officer, charged with the duty of enforcing laws for the protection of fish and game. As such officer he is entitled to the immunity from civil liability with which the law surrounds officials directly connected with the judicial processes. To rule otherwise would place every honest law enforcement officer under an unbear-

able handicap and would redound to the detriment of the body politic. "The public welfare requires that this choice (whether or not to institute proceedings) shall be free of all fear of personal liability. To assure this freedom of action it is deemed best to make that assurance positive and definite by securing him against even actions based upon a malicious abuse of his official power." *Phelps v. Dawson*, 8 Cir., 97 F.2d 339, 340, 116 A.L.R. 1343.

[6] We are not impressed with the argument that to extend such immunity to peace officers is a major step toward "statism." Such argument erroneously assumes that our law enforcement agencies are rife with persons who will abuse their powers, and that the imposition upon law enforcement officers of civil liability for alleged malicious prosecution is necessary to curb such abuse. But as has been said with respect to public prosecutors: "There is no great danger that abuse of power will be fostered by this exemption from civil liability, for the [peace officer] is at all times under the wholesome restraint imposed by the risk of being called to account criminally for official misconduct, or of being ousted from office on that account." *Smith v. Parman*, 101 Kan. 115, 117, 165 P. 663, L.R.A.1917F, 698.

[7] We are aware of the fact that in thus surrounding peace officers with immunity in cases of this sort, hardship may result to some individuals. However, experience has shown that the common good is best served by permitting law enforcement officers to perform their assigned tasks without fear of being called to account in a civil action for alleged malicious prosecution. The doctrine of immunity from liability for allegedly malicious acts has long been established with respect to numerous public officers. In the early case of *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646, the doctrine was applied to judges of courts of record. "This rule finds its genesis in the necessary protection of courts in the impartial, uninfluenced discharge of judicial duties." *Phelps v. Dawson*, supra, 8 Cir., 97 F.2d 339, 340, 116

A.L.R. 1343. Since that time it has been recognized that the orderly administration of the affairs of government necessitates the inclusion of many officials within the cloak of immunity. Executive heads of administrative departments have been included, *Spalding v. Vilas*, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780; *Gibson v. Reynolds*, 8 Cir., 172 F.2d 95; *Adams v. Home Owners Loan Corp.*, 8 Cir., 107 F.2d 139; *Lang v. Wood*, 67 App.D.C. 287, 92 F.2d 211; *Brown v. Rudolph*, 58 App.D.C., 116, 25 F.2d 540, certiorari denied 277 U.S. 605, 48 S.Ct. 601, 72 L.Ed. 1011; *Mellon v. Brewer*, 57 App.D.C. 126, 18 F.2d 168, 53 A.L.R. 1519, certiorari denied 275 U.S. 530, 48 S.Ct. 28, 72 L.Ed. 409; *U. S. to the Use of Parravicino v. Brunswick*, 63 App.D.C. 65, 68, 69 F.2d 383; *Farr v. Valentine*, 38 App.D.C. 413; *Thibodaux v. Town of Thibodaux*, 46 La. Ann. 1528, 16 So. 450, as well as their deputies, who act in their stead. *Standard Nut Margarine Co. v. Mellon*, 63 App.D.C. 339, 72 F.2d 557, certiorari denied 293 U.S. 605, 55 S.Ct. 124, 79 L.Ed. 696; *De Arnaud v. Ainsworth*, 24 App.D.C. 167, 5 L.R.A., N.S., 163; *U.S. to the Use of Parravicino v. Brunswick*, supra, 63 App.D.C. 65, 68, 69 F.2d 383.

[8] The last cited cases, however indicative of the trend of judicial decision, do not furnish the persuasive reason for holding that the doctrine extends to peace officers. Rather, it is the line of cases which directly concerns the application of the doctrine to those connected with the judicial processes which is determinative herein. Thus, it has been held almost universally that public prosecutors are entitled to immunity. *Norton v. Hoffmann*, 34 Cal.App.2d 189, 93 P.2d 250; *White v. Brinkman*, 23 Cal.App.2d 307, 313, 73 P.2d 254; *Pearson v. Reed*, 6 Cal.App.2d 277, 44 P.2d 592; *Laughlin v. Rosenman*, 82 U.S.App.D.C. 164, 163 F.2d 838; *Laughlin v. Garnett*, 78 U.S.App.D.C. 194, 138 F.2d 931; *Cooper v. O'Connor*, 69 App.D.C. 100, 99 F.2d 135, 118 A.L.R. 1440; *Yaselli v. Goff*, 2 Cir., 12 F.2d 396, 56 A.L.R. 1239; *Anderson v. Rohrer*, D.C., 3 F.Supp. 367; *Smith v. Parman*, supra,

101 Kan. 115, 165 P. 663; *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001. But see *Leong Yau v. Carden*, 23 Hawaii 362. Similarly, grand jurors were early held to be protected against civil actions for alleged malicious prosecution. *Turpen v. Booth*, 56 Cal. 65. A review of the cases which have concerned the application of the doctrine to law enforcement officers shows that the great majority of the courts have ruled in favor of the officers. Thus, in *White v. Brinkman*, supra, 23 Cal.App. 2d 307, 73 P.2d 254, it was said that a building inspector, charged with the investigation of purported violations of building ordinances, was immune from civil liability for alleged malicious prosecution. Similarly, in *Phelps v. Dawson*, supra, 8 Cir., 97 F.2d 339, it was held that a deputy fire marshal, charged with investigating fires, was immune; and in *Springfield v. Carter*, 8 Cir., 175 F.2d 914, an assistant city engineer, a deputy building inspector, and a fire inspector were held to be immune because their official duties encompassed the investigation of particular crimes and the institution of criminal proceedings. Finally, in *Cooper v. O'Connor*, supra, 69 App.D.C. 100, 99 F.2d 135, 118 A.L.R. 1440, a special agent of the Federal Bureau of Investigation was held to be included within the cloak of immunity. The court there stated: "The administration of criminal justice would be impossible without the active participation of public officials representing the departments concerned with the enforcement of particular laws. * * * It is the duty of all citizens to reveal such evidence, of which they may have knowledge, at the risk of being guilty of misprision of felony for failing to do so. In the case of an official, his failure to act under such circumstances would, in addition, constitute serious malfeasance in office." 99 F.2d 135, 140.

While there is language in *Prentice v. Bertken*, supra, 50 Cal.App.2d 344, 123 P.2d 96, which lends support to plaintiff's position, such language is out of harmony with the majority view which establishes the sounder rule, and therefore that language must be disapproved.

[9] "The doctrine of immunity is not for the benefit of the few who might otherwise be compelled to respond in damages. It is for the benefit of all to whom it applies, that they may be free to act in the exercise of honest judgment, uninfluenced by fear of consequences personal to themselves. This again is not for their personal advantage or benefit. It is only that they may be enabled to render a better public service." *Pearson v. Reed*, supra, 6 Cal. App.2d 277, 288, 44 P.2d 592, 597. Although public policy demands that the peace officer be free from liability in civil actions for alleged malicious prosecution, such policy does not go so far as to free the offending officer from all liability, for it has long been the law in this state that, "[e]very person who maliciously and without probable cause procures a search-warrant or warrant of arrest to be issued and executed, is guilty of a misdemeanor." Pen.Code, § 170. Such penal provision manifestly could have been invoked here if plaintiff could have sustained his charges. That section provides some measure of protection for the individual citizen from the specified malicious acts of any person, including law enforcement officers; and a resort to such penal action would subserve the public interest far better than would a resort to civil litigation against the public officer. *Smith v. Parman*, supra, 101 Kan. 115, 165 P. 663. This penal provision is also the direct answer to the claim that the adoption of the doctrine of civil immunity constitutes a step toward the creation of a "police state."

[10-12] It is also well established that a public officer is liable for injuries caused by acts done outside the scope of his authority. 67 C.J.S., Officers, § 126, p. 419; *Laughlin v. Garnett*, supra, 138 F.2d 931; *Cooper v. O'Connor*, supra, 99 F.2d 135, 137-138. However, plaintiff's second contention that defendant Towers was acting outside the scope of his authority in instituting proceedings in the federal court is without merit. The alleged penal offense occurred in the littoral waters of the state of California which were under the concurrent jurisdiction of the state and federal governments. *C. J. Hendry Co. v. Moore*,

318 U.S. 133, 63 S.Ct. 499, 87 L.Ed. 663; *U. S. v. Carrillo*, D.C., 13 F.Supp. 121; *People v. Stralla*, 14 Cal.2d 617, 96 P.2d 941. Defendant Towers was no less discharging his duty to enforce the laws for the protection of fish and game by instituting the proceeding in the federal court than he would have been if all proceedings had been instituted in the state courts. "Duties of a public office include those lying squarely within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes." *Nesbitt Fruit Products v. Wallace*, D.C., 17 F. Supp. 141, 143. It would be an anomalous doctrine which would deny a public officer access to any properly constituted tribunal with jurisdiction over the alleged offense on the ground that said officer was a state officer attempting to discharge his duty by a proceeding in the federal courts, or was a federal officer attempting to discharge his duty by a proceeding in the state courts.

[13,14] A somewhat similar argument was raised and rejected in *Norton v. Hoffmann*, supra, 34 Cal.App.2d 189, 93 P.2d 250, wherein a deputy city attorney of the city of Los Angeles, with the authorization of the city attorney, had instituted criminal proceedings charging plaintiff with having appeared in the capacity of an attorney in a municipal court proceeding when he was not an active member of the State Bar. Plaintiff in that case argued that the city officials were acting without the scope of their authority in instituting criminal proceedings instead of proceeding before the State Bar. The court, however, held that a proceeding in either tribunal was proper, and that the city attorney and his deputy could properly resort to either. Further, as was stated in *United States v. Birdsall*, 233 U.S. 223, 235, 34 S.Ct. 512, 516, 58 L.Ed. 930, "in determining the scope of official action regard must be had to the authority conferred; and this * * * embraces every action which may properly constitute an aid in the enforcement of the law." Here the complaint affirmatively showed that de-

fendant Towers was an investigator for the Fish and Game Commission; and in the absence of and allegation to the contrary, it is to be assumed that he had authority to enforce laws for the protection of fish and game. Whether, upon the charge of pollution of the waters in question, he chose to proceed in the state courts or in the equally available federal courts is immaterial in determining whether he was acting outside the scope of his authority. See, also, *Spalding v. Vilas*, supra, 161 U.S. 483, 498, 16 S.Ct. 631, 40 L.Ed. 780; *Standard Nut Margarine Co. v. Mellon*, supra, 72 F.2d 557, 559.

It is therefore apparent that the demurrer was properly sustained without leave to amend.

The judgment is affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent.

The majority holding in the present case affirming a judgment of dismissal following an order sustaining defendant's demurrer to plaintiff's complaint without leave to amend, adds another case to the growing list of those recently decided by this court which have arbitrarily deprived a plaintiff of his right to a trial on the merits.

Plaintiff's complaint stated a cause of action for malicious prosecution and defendant's demurrer thereto should have been overruled. Defendant Towers' affidavit (made part of the complaint) stated that he was an "investigator" for the California Division of Fish and Game. The trial court, in sustaining the demurrer to the complaint without leave to amend, repeated that averment and then held, in his memorandum opinion, that "it would seem that an *Inspector* of the Fish and Game Commission" should be immune from civil liability for malicious prosecution. (Emphasis added.)

The Fish and Game Code provides in section 20 that: "The commission shall, from time to time, employ such deputies, with, or without pay, clerks, assistants and

other employees as they may need to discharge in proper manner the duties imposed upon them by law." Section 21 provides, in part, that: "*All deputies* appointed to enforce the provisions of this code are public officers and have all the powers and authorities of peace officers to make arrests for violations of this code, and may serve all processes and notices throughout the State. * * *" (Emphasis added.) The trial judge and a majority of this court have assumed too much. *Only* deputies, by provision of the code, have authority to make arrests and serve processes and notices. In what category is an "Investigator" or an "Inspector"? It has been assumed throughout that one in Towers' position is a deputy. If he is actually a deputy who was appointed to enforce the provisions of the code, then, and then only, is this court privileged to decide whether the immunity from civil suit for malicious prosecution should be extended to him. But before that may be legally done, there are questions of fact presented for determination—his capacity and the scope of his authority. Under the pleadings there is absolutely no way for anyone to know what an investigator of the Fish and Game Commission is, or what his duties, power and authority are. The majority of this court maintain that because plaintiff did not affirmatively allege anything to the contrary, it was to be "assumed" that Towers was a law enforcement officer who had authority to enforce laws for the protection of fish and game. With this I can not agree. If Towers was a deputy at the time the prosecution was commenced and empowered to institute actions on behalf of the commission, that was a matter of defense and *a plaintiff is not required to anticipate defenses*. *Jaffe v. Stone*, 18 Cal.2d 146, 159, 114 P.2d 335, 135 A.L.R. 775; *Pulvermacher v. Los Angeles Co-ordinating Com.*, 61 Cal.App.2d 704, 708, 143 P. 974. Defendant Towers' affidavit, which led to the prosecution of plaintiff in the federal court, was filed on April 29, 1949. The events which led to the prosecution of the plaintiff were alleged to have occurred on October 3, 1948; the first proceeding against him was filed on

October 5, 1948. The affidavit of defendant, filed in April, 1949, is the only basis for holding that he, as an investigator, should be extended immunity from civil suit. It has also been assumed that because he was an investigator on that date he was so employed on October 3rd and 5th, 1948. In my opinion, to assume such facts for the purpose of sustaining a demurrer to the complaint is an unwarranted and arbitrary exercise of judicial power.

Plaintiff has alleged the successful termination of the prosecutions against him—he has alleged malice and want of probable cause—he has alleged the injury suffered by him as a result thereof to his damage in a certain sum. He certainly should not be required to allege, in addition, that the defendant had the right to arrest him while acting within the scope of his authority. What if the plaintiff had alleged that defendant was an "employee" (§ 20) of the Fish and Game commission and had incorporated defendant's affidavit in which it was averred that he was employed as a janitor in the offices of the commission? Would this court then assume that he was a deputy, on the day the prosecution was commenced, and acting within the scope of his authority so that immunity from civil liability could be extended to him? Probably.

It has been specifically held in this state that deputy fish and game commissioners are liable in damages for unlawfully confiscating fish, and for torts committed in connection with such confiscation, even though they acted under a mistaken belief that the confiscation was proper. *Noack v. Zellerbach*, 11 Cal.App.2d 186, 188, 53 P.2d 986, hearing denied; *Silva v. MacAuley*, 135 Cal.App. 249, 26 P.2d 887, 27 P.2d 791, hearing denied. Assuming for the moment that an investigator is a deputy, if deputies are liable in damages when they are acting in good faith, albeit mistakenly, why should they not be held liable if the action is taken with malice? The Restatement of Torts (§ 656[d]) states that only *public prosecutors* are immune from such liability and that the immunity does not apply to *all* persons whose function it is to aid in the enforcement of the

criminal law. While it may be admitted that malicious prosecution is a disfavored action, the policy should not be pressed further to the extreme of practical nullification of the tort, and the consequent defeat of the other important policy which underlies it, of protecting the individual from the injury caused by unjustifiable criminal prosecution. *Jaffe v. Stone*, 18 Cal.2d 146, 159, 114 P.2d 335; *Schubkegel v. Gordini*, 56 Cal.App.2d 667, 672, 133 P.2d 475; *Pulvermacher v. Los Angeles Coordinating Com.*, *supra*. The plaintiff here should have been permitted to prove, if he could, that defendant was not acting within the scope of his authority and therefore not entitled to the privilege of immunity. This court, in affirming the action taken by the trial court, has decided that defendant investigator or inspector was acting within the scope of his authority without even being sure that he was so employed at the time of the first prosecution. Having made these assumptions, it is then arbitrarily held, that whatever his official duties were, immunity from civil liability should be extended to him. Plaintiff has, in effect, been denied his day in court as the result of this holding.

As is usual in these cases, this court settled a conflict in policy by deciding that the police should be favored in the "fearless and effective administration of the law." I agree that the police should not be unduly hampered but surely the individual citizen is entitled to some protection and should be reimbursed or compensated for injury done to him without right and with malice. Are the police, or any employees of any governmental body, to be given carte blanche to arrest, or bring unwarranted criminal actions, without probable cause, and with malice, and go scot free? Again, in this case, the one injured by the malicious prosecution is said to have a remedy under the penal statutes. *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A. L.R. 1383; *People v. Rochin*, 101 Cal.App. 2d 140, 225 P.2d 1 [certiorari granted]. I should like to have brought to my attention any such case where a plaintiff has been successful, or even where a prosecution has been instituted. It is absurd to suggest

that any district attorney, or superior officer, is going to take criminal action against one of his subordinates at the request of one injured by an unwarranted prosecution, especially where the prosecutor has relied upon the testimony of the subordinate as a basis for the prosecution. Furthermore, even if a plaintiff did succeed in a criminal action against an officer, would the conviction be of any aid to him financially? A plaintiff who has been subjected to malicious prosecution has been injured not only in his reputation, but in a monetary sense in that he has been put to the expense of defending himself against such unfounded charges. The majority opinion states that public officers should be protected from "*vindictive and retaliatory damage suits*." The reverse situation is presented here: Any employee, clerk, assistant, investigator, inspector or deputy is, by this holding, protected when he has instigated the commencement and prosecution of a vindictive and malicious suit. This is true because the allegations of plaintiff's complaint must be taken as true, and he has alleged that the action was brought with malice and without probable cause. Any officer of the law is in a better position to defend himself against a malicious prosecution action than is a defendant in a criminal case. The Fish and Game Code, for example, specifically provides, § 21.5, that the attorney for the Division of Fish and Game shall act as counsel in defense of any officer or deputy in any suit for damages brought against such officer or deputy alleged to have occurred as the result of the negligence or misconduct of the officer or deputy while engaged in the performance of his official duties. But a private individual who has been subjected to malicious and unwarranted criminal prosecution has no such free defense available to him. He must, at his own expense, hire his own lawyer and pay his own costs. I am at a loss to understand how the problematical "resort to such penal action", Pen.Code, § 170, provides "some

measure of protection for the individual citizen" and how it "would subserve the public interest far better than would a resort to civil litigation against the public officer." (Majority opinion.)

The plaintiff contends, and I agree, that the holding in this case is a major step toward statism. This case extends the doctrine of immunity to one who labels himself an "investigator" on the assumption that such an employee is a deputy commissioner acting within the scope of his authority in bringing such an action. One has only to read the cases cited by the majority to see how the doctrine has been unnecessarily stretched and expanded to cover almost any type of employee. For this court to reach out and extend immunity from civil liability under the pleadings in this case, is to lay a foundation for an extension of the privilege that is, to my mind, unthinkable. The protection of individual rights should be zealously guarded from unwarranted police action, and the privilege of police immunity should be available only to those whose clear-cut duty it is to apprehend violators of the laws of this state. The privilege of immunity should not be extended to those whose duties, power and authority are undefined.

Under the pleadings in the case at hand, plaintiff was entitled to proceed to trial for a determination of the questions of fact presented, and I would therefore reverse the judgment and direct the trial court to overrule the demurrer.

SCHAUER, Justice.

I concur in the conclusion reached by Justice CARTER.

EDMONDS, Justice.

I concur in the conclusion that the allegations of the complaint in regard to the position held by Towers do not show him to be a person who, by virtue of official position, is exempt from civil liability for malicious prosecution.

WOLD v. LUIGI CONSENTINO &**SONS et al.****Civ. 8063.**District Court of Appeal, Third District,
California.

Sept. 12, 1951.

Action by Louis Wold against Luigi Consentino & Sons, a partnership, Luigi Consentino, James Consentino, and John Consentino. From an adverse judgment in the Superior Court of the County of Shasta, the defendants appealed. On motion for incorporation into record of certified copies of proposed findings and proposed judgment of trial court, the District Court of Appeal, Per Curiam, held that in view of fact that matters sought to be incorporated into record might be germane to matters involved on appeal, order directing incorporation of certified copies of proposed findings of fact, notice of presentation of findings, and proposed judgment would be entered.

Order entered.

Appeal and error Ⓒ559

Where it appeared that matters contained in certified copies of proposed findings of fact, notice of presentation of finding, and proposed judgment, all on file in trial court, were germane to matters involved on appeal, order would be granted directing incorporation in record on appeal of such certified copies.

Goldstein, Barceloux & Goldstein, Chico (Jordan N. Peckham, Chico, of counsel), for appellant.

Carlton & Shadwell, Redding, for respondent.

PER CURIAM.

Appellants above named having filed in this court a "Notice of Motion for Diminution of Record," and an amendment thereto, together with an affidavit of appellants' attorney in support of said notices of motion, which said motion is for an order of this court incorporating in the record on appeal on file herein a certified copy of Proposed Findings of Fact, Notice of Presentation of Findings, and proposed

Judgment, all of which are on file in the trial court; and said motion having come on for hearing on September 6, 1951, and it appearing that the records which appellants seek to have incorporated in the record on appeal may be germane to the matters involved in said appeal, it is ordered that certified copies of said Proposed Findings of Fact, Notice of Presentation of Findings, and proposed Judgment be transmitted to this court by the clerk of the Superior Court of the County of Shasta, but solely at the cost of said appellants.



106 Cal.App.2d 467

PATTEN v. SAN DIEGO COUNTY et al.**Civ. 4248.**District Court of Appeal, Fourth District,
California.

Sept. 7, 1951.

Hearing Denied Nov. 5, 1951.

Mandate proceedings by Mason B. Patten against the County of San Diego and others to compel named defendant to restore plaintiff to indigent relief. The Superior Court of San Diego County, Robert B. Burch, J., entered an order denying plaintiff's motion to vacate and amend judgment ordering issuance of writ requiring that plaintiff be restored to indigent relief subject to conditions imposed by law and plaintiff appealed. The District Court of Appeal, Griffin, J., held that court had no jurisdiction in mandate proceeding to order retroactive payment of county general relief in absence of evidence that discontinuance of relief payments on account of recipient's failure to report contributions from sister was not reasonable and proper and that mandamus would not lie to recover a specific sum on account of money advanced to former recipient of relief by third parties on theory that such sum constituted allowable costs.

Order affirmed.

1. Paupers Ⓒ43(2)

Refusal to order retroactive payment of general county relief on ground that dis-

continuance of relief payments for failure of recipient to report contributions from sister was arbitrary and capricious was not error in absence of evidence or finding that such discontinuance of relief was arbitrary or capricious. Welfare and Institutions Code, § 2500; Code Civ.Proc. § 1963, subd. 15.

2. Mandamus ⇨187(9)

Denial of motion to amend judgment ordering issuance of writ of mandate was not erroneous on ground that trial court erroneously believed it had no jurisdiction to act since original judgment had become final, in absence of evidence that denial was based on such ground.

3. Paupers ⇨42

The administration of county general relief given pursuant to Welfare and Institutions Code is vested in county board of supervisors and courts have no authority to determine the amount of relief payments or the date at which they should be made. Welfare and Institutions Code, § 2500.

4. Administrative law and procedure ⇨763 Paupers ⇨42

The specific type of relief to be granted indigents, the amount of relief payments to indigents and the time at which such payments are to be made are matters within the discretion of county board of supervisors and court has no authority to interfere with administrative determination of such board with respect to the granting of county general relief in absence of a clear showing of fraud or arbitrary or capricious conduct. Welfare and Institutions Code, § 2500.

5. Mandamus ⇨168(2)

Court had no jurisdiction in mandate proceedings to order county to pay former recipient of county general relief the amount he would have received as relief payments if such payments had not been discontinued because of his failure to report contributions from sister, in absence of evidence that such discontinuance of relief payments was not reasonable and proper. Welfare and Institutions Code, § 2500; Code Civ.Proc. § 1963, subd. 15.

6. Evidence ⇨83(1, 2)

Public officials are presumed to perform their duty and no presumption of irregularity or failure to perform official duty may be indulged against municipal or public officers. Code Civ.Proc. § 1963, subd. 15.

7. Mandamus ⇨81

Mandamus will not lie to compel county board of supervisors to exercise in any particular manner its discretion with respect to the type of relief to be granted indigents, the amount of relief payments to be made or the time at which such payments are to be made. Welfare and Institutions Code, § 2500.

8. Mandamus ⇨72

In mandamus proceeding to compel public officer to exercise his discretion, court may only direct such officer to act leaving to his determination what action he will take.

9. Mandamus ⇨105

Mandamus would not lie to compel county to pay former recipient of county general relief a specific sum on account of money advanced to him by third parties during period of his removal from relief rolls on theory that such amount constituted allowable costs. Welfare and Institutions Code, § 2500.

Mason B. Patten, in pro. per.

James Don Keller, Dist. Atty., Robert G. Berrey, Deputy Dist. Atty., San Diego, for respondent

GRIFFIN, Justice.

The appellant was a recipient of county general relief under section 2500 of the Welfare and Institutions Code, and failed to report the fact that he had received certain sums of money from his sister. For such failure the payment of general relief was discontinued. On July 10, 1950, appellant instituted mandate proceedings against the respondent County of San Diego to compel it to restore appellant to indigent relief "in such amount as he is entitled", and "subject to certain conditions".

At the trial appellant offered no evidence. Respondent stipulated appellant was an indigent and was then entitled to relief as a recipient under the aforementioned section. Judgment was entered on July 12, ordering the issuance of the writ, i. e., that plaintiff be restored subject to conditions imposed by law notwithstanding his past failure to disclose receipt of contributions. Thereafter, on August 9, appellant moved to vacate the judgment and moved to have the original judgment amended so as to order the respondent to pay appellant a specific sum of \$157 on account of money advanced to appellant by third parties in "maintaining his illness, during this dispute", plus the amount of relief money he would have received had he not been removed from the relief roll. The motion was denied and appellant appeals from that order.

The contention is that the trial court erred in the original judgment by not ordering the county to pay to appellant retroactive payments of relief because the actions of respondents County of San Diego and Department of Public Welfare, in disallowing his relief was "arbitrary and capricious".

[1] No evidence was introduced on this subject and the trial court made no such finding. There is nothing in the record and plaintiff has pointed to no evidence or finding that might imply the order was based upon such grounds. This contention therefore must fail.

[2] Plaintiff's argument that the trial court denied the motion on the ground that it believed it had no jurisdiction to act since the original judgment became final is subject to the same disposition for the same reason that there was no evidence that the finding was based on that ground.

[3-6] The next point is that the court was bound to order restoration of back payment since the provisions of section 2500 of the Welfare and Institutions Code were mandatory under the decision of City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912. There is no merit to this contention. In *Bila v. Young*, 20 Cal.2d 865, 129 P.2d 364, it was held that a trial court has no authority to determine

the amount of the payments or the date at which they should be made. See, also, *Worcester v. Board of Supervisors of San Diego County*, 55 Cal.App.2d 883, 132 P.2d 276. The administration of county general relief given pursuant to section 2500 of the Welfare and Institutions Code is vested in the county boards of supervisors. The Welfare and Institutions Code does not require that the county grant indigents any specific type of relief nor does it require the payment of any specific amount of money to indigents nor prescribe the time at which payments are to be made. These are matters within the discretion of the boards of supervisors and the court has no authority to interfere with the administrative determinations of a board of supervisors with respect to the granting of county general relief in the absence of a clear showing of fraud or arbitrary or capricious conduct. 70 C.J.S., Paupers, § 11, page 23; 41 Am.Jur. p. 707, sec. 35; *In re Snyder*, 93 Wash. 59, 160 P. 12, 3 A.L.R. 1230. There is nothing in the record in this case which shows that the action of the Department of Public Welfare in discontinuing payment of relief to appellant for failure to report income from his sister was not reasonable and proper. Public officials are presumed to have performed their duty. Sec. 1963(15), Code Civ.Proc. No presumption of irregularity or failure to perform official duty may be indulged against municipal or public officers. *Stuart Arms Co. v. City and County of San Francisco*, 203 Cal. 150, 152, 263 P. 218.

[7,8] Mandamus may not compel the exercise of such discretion in any particular manner. It may only direct that the officer act, and must leave the matter as to what action he will take to his determination. *Bank of Italy v. Johnson*, 200 Cal. 1, 31, 251 P. 784.

[9] Mandamus will not lie to recover the claimed item of \$157, under the theory it was allowable costs. *Hunt v. State Board of Chiropractic Examiners*, 87 Cal.App.2d 98, 101, 196 P.2d 77.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

**PARCHER et al. v. CITY OF LOS
ANGELES.**
Civ. 18211.

District Court of Appeal, Second District,
Division 3, California.

Aug. 31, 1951.

Rehearing Denied Sept. 18, 1951.

Hearing Denied Oct. 29, 1951.

Action by Emma Parcher, and others, against the City of Los Angeles, a municipal corporation, for wrongful death which occurred when deceased was swept from a bridge and drowned by storm waters. The Superior Court of Los Angeles County, John G. Gabbert, J., rendered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to sustain jury's finding that storm drain under highway bridge was inadequate and created a known dangerous condition which was the proximate cause of the accident.

Judgment affirmed.

1. Municipal corporations $\S$ 821(20)

In action against city for wrongful death which occurred when deceased was swept from bridge and drowned by storm waters, whether deceased was contributorily negligent and voluntarily assumed risk were questions for jury. Government Code, $\S$ 53051.

2. Municipal corporations $\S$ 819(1, 4)

In action against city for wrongful death which occurred when deceased was swept from bridge and drowned by storm waters, evidence was sufficient to sustain jury's finding that storm drain under highway bridge was inadequate and created a known dangerous condition which was the proximate cause of the accident. Government Code, $\S$ 53051.

3. Appeal and error $\S$ 1064(1)
Death $\S$ 104(1)

In action against city for wrongful death which occurred when deceased was swept from bridge and drowned by storm waters, where two phases of deceased's conduct were involved, and there was evidence on one phase, instruction that deceased is presumed to have exercised ordinary care for his safety at time of accident

was too broad and should have been restricted to that phase of deceased's conduct as to which there was no evidence or only fragmentary evidence but giving of instruction was not reversible error. Government Code, $\S$ 53051.

4. Death $\S$ 58(1)

In action against city for wrongful death which occurred when deceased was swept from bridge and drowned by storm waters, where two phases of deceased's conduct were involved, and evidence of one phase indicated that deceased left automobile to go onto bridge to make investigation and there was no evidence or only fragmentary evidence as to phase having to do with manner in which deceased proceeded through water and exercised his faculties of observation and care to maintain footing to avoid accident, presumption that deceased exercised ordinary care was not applicable to former phase but was applicable to latter. Government Code, $\S$ 53051.

5. Appeal and error $\S$ 1067
Death $\S$ 104(1)

In action against city for wrongful death which occurred when deceased was swept from bridge and drowned by storm waters, instruction relative to presumption that deceased exercised ordinary care during phase of deceased's conduct as to which there was no evidence or only fragmentary evidence should have been given but failure to do so was not reversible error in view of instruction given. Government Code, $\S$ 53051.

6. Trial $\S$ 235(6)

In action against city for wrongful death which occurred when deceased was swept from bridge and drowned by storm waters, instruction that oral admissions of party should be viewed with caution, was not error. Government Code, $\S$ 53051.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, Deputy City Atty., W. L. Weber, Deputy City Atty., Los Angeles, for appellant.

Hector P. Baida and J. Leroy Irwin, Santa Monica, for respondents.

SHINN, Presiding Justice.

From a judgment on verdict of \$10,000 for plaintiffs in a wrongful death action, defendant city appeals. Plaintiffs are the heirs at law of Ray L. Parcher who was swept from a bridge and drowned by storm waters. The suit is founded on Government Code, § 53051 on the theory that a storm drain under a highway was inadequate and created a known dangerous and defective condition.

The bridge is part of Sawtelle Boulevard in the City of Los Angeles, about one-half mile north of its intersection with Venice Boulevard. The storm drain runs south, along the east side of Sawtelle Boulevard, and then turns directly west to pass under the boulevard. In times of heavy rain the water overflows the drain and runs across Sawtelle Boulevard. At times this overflow covers the bridge and the roadway for some distance north of the bridge, and to a depth of 12 or 14 inches. At the drain crossing there is no sidewalk and little pedestrian traffic.

About 9:30 p. m. on the night of December 26, 1946, Ray Parcher and his son Wayne, who was driving, were traveling north on Sawtelle Boulevard. It was raining and storm water was overflowing across the bridge and the roadway north of the bridge. Two friends of the Parcher's, Mr. Byers and Mr. Wier, were following in their own car. The Parcher car was having mechanical difficulties and was pushed from time to time by the other car. As they approached the drain the roar of the waters could be heard. Ray Parcher, who was not familiar with the conditions, stopped his car, got out, and walked over to the bridge barefooted. He walked near the center of the roadway several feet from the guard rails and apparently was washed off the bridge by the force of the overflow water. While his father was walking out on the bridge Wayne Parcher went back to explain the delay to their friends. After his father disappeared, Wayne walked out onto the bridge. He felt the force of the current around his feet; he was barefooted, the surface of the bridge was slippery, and he held onto the guard rail.

Over a period of years other accidents of a similar nature had occurred at the bridge due to the rush of storm waters. Without denying that the inadequacy of the drain created a dangerous condition, the city contends that deceased was contributorily negligent as a matter of law in walking onto the bridge and he voluntarily assumed the risk which inspection of the conditions involved. Defendant urged these grounds upon motions for nonsuit, directed verdict and judgment notwithstanding the verdict. On appeal, defendant makes the same contentions, and in addition complains of an instruction given as to the presumption of due care on the part of the decedent, and one as to oral admissions.

The only testimony as to Ray Parcher's conduct was given by his son Wayne and a Mr. Coe who lived 75 feet south of the bridge and witnessed the accident. Coe's testimony was only that he saw Parcher walk out on the bridge about four feet from the westerly guard rail, slip or fall and go over the side into the storm drain. At the trial Wayne testified his father did not say anything to him about what he was going to do; that he, Wayne, got out of the car and walked back and knew nothing of what was happening to his father until he heard a scream, looked at the bridge and saw his father washed off of it. In a deposition Wayne said he did discuss with his father whether or not it was safe to cross, and that his father said he was going to see how bad it was, and that he then saw his father walk onto the bridge and also saw him washed off the bridge.

[1,2] The city argues that the dangerous condition of the highway at the bridge was not a proximate cause of the accident; that the act of the deceased in going onto the bridge was "an unrelated and efficient" cause, and the dangerous condition but a remote cause. The contention is untenable. It is then argued that deceased, with knowledge of the dangerous condition, walked onto the bridge and assumed the risk involved, and, if there was not a voluntary assumption of risk there was, at least, in his actions, no semblance of the exercise of ordinary care. The argument would have had more force if Ray Parcher

had directed his son to drive across the bridge without having attempted to ascertain the depth and force of the water that was passing over it. But the very reason for the inspection was that he did not know whether it would be safe to attempt a crossing. Prudence dictated that he should either turn back or endeavor to learn whether it was safe to go ahead. The fact that he chose the latter course is not decisive of the question of assumption of risk or of contributory negligence. He proceeded on foot because that was the logical method for making an inspection. There was obvious danger, of course, but the night was dark, the conditions were new to him and the depth of the water was unknown. The jury could have so concluded, and having done so would have come to the question whether the deceased exercised ordinary care in view of the danger that was, or should have been, known to him. The fact that he lost his footing did not prove negligence in the manner in which he was proceeding. The surface was slippery, debris was being washed across the bridge and the current was swift, but the immediate cause of Mr. Parcher's fall was unknown. These conditions are not of such common occurrence as to require a court or jury to conclude either that the extent of the danger they presented to Mr. Parcher should have been known to him or that his attempted inspection, if conducted with caution, was of itself a failure to exercise ordinary care. In these respects the facts differ materially from those of the cases upon which appellant relies. Without further discussion we hold the evidence to be sufficient to support the factual findings as to liability that are implicit in the verdict. See *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826.

[3] The court did not commit reversible error in giving an instruction, reading as follows: "Ray L. Parcher, now deceased, under our law, is presumed to have exercised ordinary care for his own safety at the time of and immediately preceding the accident wherein he lost his life. This presumption is a form of *prima facie* evidence and will support findings in accordance therewith in the absence of a prepon-

derance of the evidence to the contrary. It is your duty to weigh any evidence that conflicts with such presumption against the presumption itself and any evidence that may support the presumption, to determine which, if either preponderates."

[4, 5] The giving of this instruction illustrates the error of using abstract instructions without shaping them to the facts of the case when required in the interest of accuracy and clarity. There were two phases of Mr. Parcher's conduct. The first was his leaving the car and undertaking to go onto the bridge to make an investigation. The evidence as to this action was explicit. Nothing was left to inference. No presumption existed that this phase of his conduct evidenced the exercise of ordinary care. Conceivably, the jury could have determined that it did not. As stated in *Ford v. Chesley Transportation Co.*, 101 Cal.App.2d 548, 553, 225 P.2d 997, 1001: "The presumption has no place in the determination of the question, whether certain acts or omissions, believed by the jury to constitute the conduct of a party, were or were not negligent." The instruction was susceptible of too broad an application. It should have been restricted to that phase of the conduct of the deceased as to which there was no evidence, or at least, only fragmentary evidence. This had to do with the manner in which Mr. Parcher proceeded through the water, the manner in which he exercised his faculties of observation and the care he took to maintain his footing and to avoid an accident. That was the crucial question of fact as to which there was and scarcely could have been definite or satisfactory evidence. In vital particulars the precise precautions taken by Mr. Parcher were beyond the scope of the evidence. As to these the presumption had application. *Westberg v. Willde*, 14 Cal.2d 360, 367, 94 P.2d 590. An instruction on the presumption should have been given, not in the form in which it was given, but in such form as to clearly specify the conduct of the deceased to which it applied and that to which it did not apply. The failure to do this was not, in our opinion, reversible error. From a consideration of the entire evidence we

have little doubt that the result would have been the same had the instruction been in proper form. Moreover, defendant had an opportunity to offer a better instruction on the presumption of due care and did not do so.

[6] There was, in our opinion, no error in giving an instruction that oral admissions of a party should be viewed with caution. There was some evidence to which it may have been applied.

The judgment is affirmed.

WOOD, and VALLÉE, JJ., concur.

Hearing denied; SHENK, EDMONDS and TRAYNOR, JJ., dissenting.



106 Cal.App.2d 500

In re RAWNSLEY'S ESTATE.

RAWNSLEY v. DEMPSTER.

Civ. 18294.

District Court of Appeal, Second District,
Division 1, California.
Sept. 12, 1951.

Proceeding in the matter of the estate of Ann Seddon Rawnsley, also known as Ann Seddon Wilkinson, deceased, wherein James Rawnsley filed a petition, contested by Ann Seddon Dempster, for a determination that certain items listed in inventory constituted community property to which petitioner as surviving husband was entitled. From an adverse judgment of the Superior Court of Los Angeles County, John Gee Clark, J., petitioner appealed. The District Court of Appeal, Hanson, J., pro tem., held that former adjudication in special proceeding instituted by daughter that estate left by testatrix was her separate property was res judicata of question of character of estate as separate or community property.

Judgment affirmed.

1. Husband and wife ⚡274(1)

Daughter of testatrix who was survived by husband would not be entitled as pretermitted heir to any part of estate consisting of community property. Probate Code, § 201.

2. Descent and distribution ⚡71(5)

Where surviving husband in answer to petition filed by daughter of testatrix for an adjudication that she was entitled to one-third of estate as pretermitted heir averred that estate was the separate property of testatrix, evidence that estate consisted of separate property of testatrix was unnecessary and receipt of such evidence would have been improper. Probate Code, § 201.

3. Judgment ⚡743(1)

Where surviving husband on appeal from decree in special proceeding adjudging that estate left by testatrix was her separate property and that daughter as pretermitted heir was entitled to one-third of estate did not challenge the findings and judgment on ground that court was not entitled in such proceeding to determine the character of the property of estate, adjudication was res judicata precluding surviving husband from relitigating the matter in subsequent proceeding for a determination that specified property listed in inventory of estate constituted community property to which he was entitled. Probate Code, §§ 201, 1080.

4. Descent and distribution ⚡71(1)

Daughter of testatrix was entitled to obtain by special proceeding before final distribution a determination as to whether she was entitled as pretermitted heir to a portion of deceased mother's estate and adjudication in such proceeding to which surviving husband was a party that estate left by testatrix was her separate property was binding on husband, though he had not made an election whether to take under will or to rely on his statutory community rights. Probate Code, §§ 201, 1080.

Samuel H. Sherman, Hollywood, for appellant.

L. L. James, Carl E. Day, San Francisco, for respondent.

HANSON, Justice pro tem.

The only question to be determined on this appeal is whether a decree, in a special proceeding in which appellant and respondent were parties, which adjudged

that respondent was (1) an heir (i. e., daughter) of decedent; (2) that the estate left by decedent was her separate property; and (3) that respondent was entitled to one third of decedent's estate, bars a subsequent action by decedent's spouse from relitigating the question whether the property was in fact her separate property in whole or in part.

The decedent Ann Rawnsley died testate leaving surviving her the appellant, her husband, a daughter of that marriage named Ena Rawnsley, and a daughter by a prior marriage, with one Wilkinson, of the name of Ann Dempster. By her will the testatrix bequeathed and devised all her property to her surviving husband for life with remainder over to her daughter Ena Rawnsley. The will made no provision for or mention of decedent's daughter Ann Dempster. The surviving husband having been appointed administrator with will annexed filed an inventory listing decedent's property wherein he averred, under oath, that all of decedent's property was her separate property. Thereafter, respondent Ann Dempster filed a petition in the probate proceeding wherein she averred she was the daughter of the decedent and entitled to have distributed to her one third of decedent's estate and prayed that the court determine the rights of all persons entitled to the estate and determine who "are entitled to distribution" thereof.

Appellant as surviving husband along with his own daughter Ena filed a verified statement, in the nature of an answer, admitting that the petitioner was a daughter of decedent and one of her heirs at law and averring affirmatively that the estate was the separate property of decedent but that nevertheless they were entitled to the estate in accordance with the terms of the will to the exclusion of petitioner owing to certain advancements which had been made to petitioner by decedent during her lifetime.

At the trial counsel for the husband and his daughter stated that the only issue between the parties was whether petitioner could be charged with the alleged advancements. The trial court found and ad-

judged, among other things, that petitioner was the daughter of decedent and that the entire estate of decedent was her separate property; that petitioner "1. * * * is entitled to receive and have distributed to her, and there is vested in her, one-third of the estate of decedent, free of any life interest, or other interest, of James Rawnsley therein.

"2. That, under the last will of decedent, James Rawnsley, husband of decedent, is entitled to a life interest in the remaining two-thirds of the estate of decedent, and Ena * * *, daughter of decedent, is entitled to the remainder of said remaining two-thirds interest of the estate of decedent upon the death of said James Rawnsley.

"3. That each of said persons is entitled to distribution of his or her share or interest therein, as herein set forth, when said estate shall be in a condition to be distributed."

Appellant appealed from the decree assigning as the only error the refusal of the trial court to receive parol evidence as to the alleged advancements. He conceded on appeal that the petitioner was a daughter of decedent and a pretermitted heir and that she was entitled to a one-third part of the estate, but contended that all the advancements he had sought to prove by parol evidence should have been received and ordered deducted by the trial court from petitioner's one-third of the estate. He did not contend that findings went beyond the issues or that they were not sustained by the evidence.

After the decision on appeal, appellant elected to and filed a petition of his own in the probate action wherein he averred that certain items listed in the inventory were community property and prayed a determination to that effect and that it be decreed that petitioner alone was entitled thereto. The respondent herein answered denying that any portion of the estate was community property and in addition thereto averred appellant was barred from contending to the contrary by reason of the prior judgment rendered upon respondent's petition. The trial court so ruled.

Upon the facts narrated appellant contends that the prior judgment is only conclusive as to such issues as were essential to or shown to have been involved in the judgment and that the question whether or not the estate consisted only of separate property was not in issue and that the determination thereof by the court was not necessary or essential. We fail to see any merit whatsoever in the contention.

[1-3] Respondent in her original petition averred that she was entitled to one-third of the estate. Under the provisions of Probate Code, § 1080, she was entitled to raise that issue and have it determined, as well as the issue whether she was in fact a pretermitted heir. When by his answer thereto appellant averred the estate consisted of only separate property he in effect conceded the allegation made by respondent as she was not entitled to one-third of all the property inventoried unless all of it was separate property. If all the property had been community property the respondent would not have been entitled to any part of it. Likewise, if only a part was community property she would not have been entitled to any portion of such community property. Probate Code, § 201. In view of the averment made by appellant in his answer there was no need, and indeed it would have been improper, to receive any evidence on the subject. *Fuentes v. Tucker*, 31 Cal.2d 1, 187 P.2d 752. If appellant was of the view that the trial court was not entitled to determine the character of the property of the estate because it was not in issue at all or not conceded by him to be separate property it was incumbent upon him to have raised the point on the first appeal by a challenge to the findings and the judgment. Cf. *In re Estate of Roberts*, 27 Cal.2d 70, 162 P.2d 461; *In re Baxter's Estate*, 101 Mont. 504, 54 P.2d 869. Not having done so he is barred from relitigating the issue. *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502, 258 P. 387; see also, *Sutphin v. Speik*, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; *Estate of Roberts*, 27 Cal.2d 70, 162 P.2d 461.

[4] A further contention made by appellant, if we understand him correctly, is

that he may not be required to elect until final distribution whether he will take under the will or rely on his statutory community rights. Hence, the argument appears to be that the petition by a third party to have the court determine the character of a decedent's property is not maintainable, or at all events any decree made thereon, is not binding upon the surviving spouse unless and until such spouse has made an election. Merely to state the contention is to answer it. *Estate of Roberts*, 27 Cal.2d 70, 162 P.2d 461.

The judgment below being in all respects correct is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



106 Cal.App.2d 378

In re LUCAS' ESTATE.

Civ. 18225.

District Court of Appeal, Second District,
Division 1, California.

Aug. 30, 1951.

Proceeding in the matter of the estate of Mrs. S. Ella Lucas, deceased, wherein Isabel Kittrell sought the probate of an instrument contested by Jane Reese. The Security First National Bank of Los Angeles was appointed special administrator. The Superior Court, Los Angeles County, John Gee Clark, J., denied contest of will and the contestant appealed. The District Court of Appeals, Drapeau, J., held that the finding that the will admitted to probate was decedent's last will and testament was supported by the evidence.

Affirmed.

1. Wills ⇐302(1)

Evidence supported finding that will admitted to probate was duly executed and published.

2. Appeal and error ⇐981

New trial ⇐99

Granting of new trial because of newly discovered evidence is largely discretionary.

ary and on review the action of the trial court will not be disturbed except on a clear showing of abuse of discretion by the trial court.

David B. Sallee, Scales & Broderick and Wallace B. Scales, Los Angeles, for contestant and appellant.

Cannady & Freeman and George E. Cannady, Los Angeles, for petitioner and respondent.

Jacob W. Silverman, Los Angeles, for special administrator and respondent.

DRAPEAU, Justice.

During her last illness S. Ella Lucas made her will. After her death the will was offered for probate, and contest filed. The contest was heard by the court without a jury. Proof of due execution of the will was ample and sufficient.

Decedent was a widow, with no living issue; and, so far as the record shows, no heirs. Her only son served as an officer in the first world war and died in Sawtelle Veterans' Hospital in 1935.

Contestant's case may be summed up as follows: Decedent stated to several witnesses that she had a godchild, Jane Reese (who was no relative of the blood) to whom she wanted to will all her property. Decedent asked a real estate broker to prepare a will for her, leaving her property to her godchild. The broker prepared an extraordinary document, which, after it was signed by decedent, her godchild, two friends, and a notary public—who appended his jurat and seal—reads as follows:

"Los Angeles, Calif.

July 2, 1946

To Whom it May Concern;

I will place everything I Possess into Jane Reese's hands, (my GOD child.) I trust GOD and agree that she'll be beneficiary in case anything should happen to me before 1953. My property, jewels, finance & everything goes to her. The property's address is 630 E. 52nd street, & 832 Upland Ave. San Pedro, California. The bank is located at Vernon Ave. & Avalon Blvd.

I vow that she pay all bills, if anyone else should step in, I want her to take property with all legal power and respect. I leave everything to my GOD child, Jane Reese, 741 E. 51st street, Los Angeles, Calif.

Sincerely Yours,

Ella Lucas

Jane Reese 741 E. 51st

Edd N. Taylor 5030 McKinley Ave

Mae Murray 207 W Vernon Ave

Subscribed and sworn to before me
this 2 day of July 1946.

Wynyard H. Ammons Notary
in and for the County of Los Angeles,
State of California".

(Seal)

Proponent's case may be summed up as follows: A little over three years after the real estate broker's "will" was made, and while Mrs. Lucas was in the hospital suffering from her last illness, she asked her doctor to get a lawyer for her. This was done.

Mrs. Lucas told her lawyer she wanted him to prepare a will for her, leaving all of her property to a long-time friend, Isabel Kittrell. The will was prepared and taken to the hospital, and, without reciting details, there duly executed according to the requirements of the statute.

Witnesses for proponent testified that at the time decedent subscribed her will she was of sound and disposing mind and memory; also that she had told them she wanted all of her property to go to Isabel Kittrell.

The Probate Court held that the will should be admitted to probate, and that the broker's document should be denied probate. From the judgment which followed contestant appeals.

[1] No argument appears in the briefs as to the effect as a will of the document prepared by the real estate broker. Assuming it to have been testamentary in character, In re Estate of Pagel, 52 Cal. App.2d 38, 125 P.2d 853; In re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874, the Probate Court's finding that the will admitted to probate was duly and properly executed, signed and published as dece-

dent's last will and testament is supported by the evidence.

[2] Contestant's argument that the judgment should be reversed because of newly discovered evidence is not tenable. Due consideration was given by the Probate Court to the affidavits presented on contestant's motion for a new trial on this ground. The motion was denied, and no abuse of discretion appears. The granting of a new trial upon the ground of newly discovered evidence is largely a matter of discretion. *Lundy v. Lakin*, 96 Cal.App. 2d 221, 215 P.2d 61. The action of the trial court in such cases will not be disturbed except upon a clear showing of abuse of discretion. *Rockwell v. Italian-Swiss Colony*, 10 Cal.App. 633, 103 P. 162; and see cases digested in 17 McKinney 936.

The judgment is affirmed.

DORAN, Acting P. J., and HANSON, J. pro tem, concur.



106 Cal.App.2d 514

PEOPLE v. THORNTON et al.

Cr. 759.

District Court of Appeal, Fourth District,
California.

Sept. 13, 1951.

Thomas Thornton was jointly charged with others in Superior Court, Imperial County, L. J. Monser, J., of robbery and other crimes and Thomas Thornton appealed from judgment convicting him of robbery of first degree and sentencing him as an habitual criminal. The District Court of Appeal, Griffin, Acting P. J., held that evidence was sufficient to support conviction and sentence.

Affirmed.

I. Witnesses ¶63

In prosecution for robbery, and other crimes, evidence justified finding that there

was no legal marriage of witness and defendant and witness was competent to testify. Pen.Code, §§ 211a, 644(a), 1322; Gen.Laws, Act 1970.

2. Criminal law ¶1169(2)

In prosecution for robbery, evidence was sufficient to show that defendant was armed with deadly weapon at time of commission of offense, disregarding testimony of alleged wife, and no prejudicial error resulted from admission of such testimony. Pen.Code, §§ 211a, 644(a), 1322; Gen.Laws, Act 1970.

3. Criminal law ¶1202(3)

In prosecution for robbery and other crimes wherein defendant admitted previous convictions of robbery and other felonies, no further proof was necessary to establish that defendant was an habitual criminal. Pen.Code, §§ 211a, 644(a), 1322; Gen.Laws, Act 1970.

4. Criminal law ¶1202(1)

Penal code section relating to habitual criminals does not create a substantive offense, such as habitual criminality, but provides for more severe punishment of habitual offenders. Pen.Code, § 644(a).

Thomas Thornton, in pro. per.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant and appellant Thomas Thornton was jointly charged with Eleanor Thornton and one Harreld in count one of an information with the crime of robbery; in count two with kidnaping; and in counts three and four with the crime of forgery. In count five appellant was charged with burglary and in count six with possession of a dangerous weapon, in violation of the Dangerous Weapons' Control Act, as amended, Stats.1947, chap. 1281, p. 2792, Deering's Gen.Laws Act 1970. In count seven he was charged with a prior conviction of a felony, to wit, robbery in Iowa; and in count eight with a prior

conviction of a felony in Wyoming; and that he served time in states' prisons for such crimes.

Appellant, while represented by counsel, pleaded guilty to counts one, three, four, five, and six, and admitted the two prior convictions of robbery as charged in counts seven and eight. Thereafter, the court ordered that appellant be sentenced to state's prison and found that appellant was one coming under the provisions of sec. 644(a) of the Penal Code and adjudged him an habitual criminal to be punished by imprisonment for life.

Appellant, in propria persona, appealed from this judgment. The only questions attempted to be presented on this appeal are the actions of the trial court in its reception of evidence fixing the degree of the crime of robbery as charged and pertaining to the question whether the defendant was at the time armed with a deadly weapon, to wit, a 25-caliber automatic pistol. It was stipulated that the court might consider the testimony of Mr. Samuels, the victim, concerning the degree of robbery, as appeared from his testimony taken at the preliminary examination. Quotations from this record appear in the reporter's transcript and show that the appellant knocked at the door of the complaining witness's home about 3 o'clock in the morning and came in; that appellant "had a gun in his hand" and he "pushed it in my ribs", took the complaining witness' money from the pocket of his near-by pants while the other defendant twisted his arm around his neck, and choked him; that appellant hit the complaining witness over the head with his gun and told him to dress and take the defendants in his automobile. It was after considering this evidence that Eleanor Thornton was called as a witness for the prosecution. She stated her true name was Eleanor Kelly; that she rode to Samuel's house trailer with appellant in a cab, and that appellant had a 25-caliber automatic pistol in his possession at the time. This answer, pertaining to the gun, was stricken for the purpose of objection, which counsel stated was made "under sec. 1322 of the Penal Code" on the ground

that "this testimony is inadmissible" as against appellant by "reason of the fact that the marriage of this witness to the defendant Thornton * * *". The court then allowed evidence on the question of the claimed marriage. The witness testified that she married one Kelly on December 15, 1949, in Nevada and the recorded marriage certificate was received in evidence. She then testified she had never secured an annulment of that marriage nor a divorce from Kelly and had never received any notice that Kelly had secured one; that they separated in July or August, 1950, and at that time Kelly was in jail in Sacramento and was still there.

Appellant testified that the witness was his wife but no further details as to the method by which she became his wife were related. However, reference is made to some affidavit previously presented, on some motion which appellant claims supported his contention that he was married to the witness. This affidavit is not before us. From the evidence produced the court found that the witness was not appellant's legal wife and allowed her to testify that appellant had such a loaded gun, as described, at the time, and used it in the perpetration of the robbery. Thereafter, appellant testified that he did ride out with the witness in a cab but did not have such a gun with him on that occasion, although he did own such a gun and did have a box of shells with him in the cab. The court fixed the degree as robbery of the first degree.

[1,2] Under the evidence before us the trial court was justified in finding that there was no legal marriage of the witness and appellant at that time. *People v. Glab*, 13 Cal.App.2d 528, 57 P.2d 588; *Estate of Smith*, 33 Cal.2d 279, 201 P.2d 539; *People v. Langtree*, 64 Cal. 256, 259, 30 P. 813; *People v. Rulia Singh*, 182 Cal. 457, 483-484, 188 P. 987. However, disregarding her testimony, there was sufficient showing made that defendant was armed with a deadly weapon at the time of the commission of the offense, and no prejudicial error resulted. Sec. 211a, Penal Code; *People v. Carmody*, 95 Cal.App.2d 368, 371, 212 P.2d 627.

The last argument is that the court erred in declaring appellant to be an habitual criminal under sec. 644(a) of the Penal Code. This contention is set forth in the general assignment that the prior convictions and the fact that appellant was an habitual criminal were neither correctly pleaded nor sufficiently proved.

[3] Appellant admitted the previous convictions of robbery, felonies enumerated in sec. 644(a) of the Penal Code, and admitted that he served separate sentences in state penitentiaries for such crimes as charged. No further proof was necessary. *People v. Birdsell*, 21 Cal.App.2d 682, 688, 70 P.2d 231; *In re McVickers*, 29 Cal.2d 264, 176 P.2d 40; *People v. Houston*, 88 Cal.App.2d 11, 15, 198 P.2d 53.

[4] Sec. 644(a), Penal Code does not create a substantive offense, such as habitual criminality. It provides for a more severe punishment and merely involves a determination of certain facts which operate to prolong the prisoner's confinement and limit his right to parole. *In re McVickers*, supra.

Judgment affirmed.

MUSSELL, J., concurs.



106 Cal.App.2d 449

PEASE v. JOHNSON et al.

Civ. 4225.

District Court of Appeal, Fourth District,
California.
Sept. 5, 1951.

Rehearing Denied Sept. 25, 1951.

Hearing Denied Nov. 1, 1951.

Carl Erikson brought action to quiet title to mining claims against Ben. F. Johnson, and others. The Superior Court, San Diego County, William A. Glen, J., quieted title in defendants and plaintiff appealed, and C. C. Pease, as successor in interest, was substituted as appellant. The Court of Appeal, Mussell, J., held, inter alia, that plaintiff had

not acted in good faith when he located his claim.

Affirmed.

1. Mines and minerals ⇨38(15)

In action to quiet title to mining claim, evidence supported finding that claim was not open for entry at time plaintiff's predecessor in interest attempted location.

2. Mines and minerals ⇨60

A tenant may not contest title of his landlord to a mining claim but tenant is not estopped to deny landlord's title as against a stranger.

3. Quieting title ⇨10(1)

One who seeks to quiet title must recover on the strength of his own title.

4. Mines and minerals ⇨27(1)

Where subsequent locator of mining claim knew of senior locator's possession and location, subsequent location was not made in good faith and was of no effect.

5. Mines and minerals ⇨27(1)

Any subsequent locator who enters upon actual possession of senior locator's land for purpose of initiating claim must act in good faith, although senior location be invalid, and when entry is in bad faith, it constitutes a naked trespass.

6. Mines and minerals ⇨27(1)

Where mining claim had not expired, location and filing of subsequent claim was premature and of no effect, and subsequent claim could not prevail over later claim filed after expiration of mining claim.

7. Mines and minerals ⇨38(15)

In action to quiet title to mining claims wherein it was alleged that defendant's discovery shaft was not near point of discovery and proper location notice had not been posted at point of discovery, evidence was sufficient to support finding that claim was properly located, necessary work done, and that notices were properly posted.

8. Mines and minerals ⇨27(1)

Where claimant to mining lands had actual knowledge of another's prior location claimant could not avail himself of alleged

technical defects in the making of the prior location.

9. Mines and minerals Ⓒ38(20)

In action to quiet title to mining claim, finding that proper amount of work had been completed by defendant was supported by evidence.

10. Mines and minerals Ⓒ38(14)

In action to quiet title to mining claim, burden of proving superior title was upon plaintiff, who had to recover upon strength of his own title and not upon weakness of defendants' title.

C. C. Pease, San Diego, for appellant.

Geo. A. Westover, San Diego, for respondents.

MUSSELL, Justice.

Plaintiff Carl Erikson brought this action to quiet title to mining claims situated in the Julian-Banner mining district of San Diego county. Since this appeal was filed, C. C. Pease has been substituted as appellant, as the successor in interest of Erikson. The controversy herein concerns the validity of locations by the parties and their predecessors in interest of two mining claims, generally described in the record as the East and West Claims. These claims, particularly described in the findings, are parallel and are separated by what is known as the Golden Chariot Mine Patent Lot. No. 39. Plaintiff claims title to the West Claim by virtue of location thereof alleged to have been made by Charles W. Carey on June 29, 1940, and a subsequent deed by Carey to Erikson. Defendants claim title by deed from one William Crosby and also by location thereof on July 1, 1940.

[1] The trial court found that the attempted location by Carey was void as the said claim was not then open for entry and found that the plaintiff's claimed predecessor in interest obtained no rights thereto. It was further found that after Twelve o'clock Noon, July 1, 1940, one William Crosby, defendants' predecessor in interest, filed a valid location notice upon this claim and subsequently, by deed, made a valid

transfer thereof to defendants Ben Johnson and Ed Farris; that there was no abandonment or forfeiture of this claim by the defendants and that they have been in possession and present upon the property at all times since Twelve o'clock Noon, July 1, 1940, and have done the required discovery and assessment work since said date. These findings are supported by substantial evidence.

There was testimony that Crosby located the West Claim in 1936 as the "Armistice" mining claim; that defendant Ben Johnson went on the property on June 30, 1940, and on the following day, with Crosby, re-located this claim, placed monuments around it, found mineral in place, mailed the location notice to the recorder's office in San Diego and thereafter did the necessary work upon the property. There is also substantial evidence that when Carey made his attempted location on June 29th, he knew of the prior location by Crosby and saw the defendants on the property prior to his own location thereof. He admitted that the reason he hurried to the recorder's office on July 1, 1940, was that he had noticed the defendants filling out location notices.

[2-6] It is claimed by the appellant that Crosby was not in a position to locate this claim because of a lease which was executed on December 22, 1933, between Golden Chariot Mining Corporation, as lessor, and Crosby, as lessee, which lease covered the West Claim and other mining property. Plaintiff is not in a position to raise the question of the effect of the lease on Crosby's title. While it is true that a tenant may not contest the title of his landlord to a mining claim, *Storrs v. Belmont Gold Min. & Mill Co.*, 24 Cal.App.2d 551, 556, 76 P.2d 197, it is also true that a tenant is not estopped to deny his landlord's title as against a stranger. 51 C.J.S., *Landlord and Tenant*, § 273, p. 919. Evidence was introduced showing that the Golden Chariot Mining Company claimed no interest in the premises and there was no showing by plaintiff that he claimed title through the said mining company. Moreover, plaintiff is bound by the rule that one

who seeks to quiet title against another must recover, if at all, on the strength of his own title. *Del Giorgio v. Powers*, 27 Cal.App.2d 668, 685, 81 P.2d 1006. Since plaintiff's predecessor in interest knew that Crosby was in possession of the property and that it had been located by him, the claimed location by Carey was not made in good faith. As this court said in *Brown v. Murphy*, 36 Cal.App.2d 171, 181, 97 P.2d 281, 286: "Good faith confronts any subsequent locator who enters upon the actual possession of a senior locator's land for the purpose of initiating a claim to the same ground, although the senior location be invalid, and when such entry is in bad faith, such intrusion constitutes a naked trespass. *Little Sespe Consolidated Oil Co. v. Bacigalupi*, 167 Cal. 381, 139 P. 802; *Talmadge v. St. John*, 129 Cal. 430, 436, 62 P. 79; *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 249 U.S. 12, 39 S.Ct. 231, 63 L.Ed. 447, 458." The evidence is that the assessment work was done on this claim by defendants for the mining year ending at Noon, July 1, 1940, and that the claim belonged either to the Golden Chariot Mining Corporation or to Crosby, who claimed by a prior location in 1936. Hence, the claim by Carey to the West Claim by reason of an alleged location on June 29, 1940, and recorded at or about Nine o'clock A.M., July 1, 1940, was premature and of no effect.

[7,8] The record shows that Erikson filed location notices as to the East Claim in October of 1940 and at that time it was not subject to location, it having been located by the defendants after Noon on July 1, 1940. The appellant claims that the defendants' locations on the East Claim are improper in that the discovery shaft was not near the point of discovery and no proper location notice was posted at the point of discovery. In this connection, Johnson testified that he and one Herman Wolf rebuilt the old monuments on this claim and placed notices in each of the monuments; that there was a vein of quartz there from which they took samples showing "gold colors"; that "We went to work there and did our assessment work

on that claim right there. We dug a hole in there about 18 or 20 feet deep at that time, back in the hill, and at the face it was possibly 10 feet high and we dug it about 10 or 12 feet wide"; that they "erected the old monument and placed the location notice on it." Erikson admitted that when he located this claim in October, 1940, he found the monument erected "along side the cut" and there found a notice that the claim had been located by Crosby, and that Johnson and Wolf had signed as witnesses on the notice of location. This evidence was sufficient to support the trial court's finding that the claim was properly located, the necessary work done and the notices properly posted. Furthermore, as was said in *Ehrhart v. Bowling*, 36 Cal. App.2d 503, 508, 97 P.2d 1010, 1012: "It is well settled that one who has actual knowledge of the claims of another to mineral land cannot, in good faith, relocate the land because of technical defects in the making of the location. *Stock v. Plunkett*, 181 Cal. 193, 183 P. 657; *Kramer v. Sanguinetti*, 33 Cal.App.2d 303, 91 P.2d 604; *Dennis v. Barnett*, 30 Cal.App.2d 147, 85 P.2d 916; *Kern Oil Co. v. Crawford*, 143 Cal. 298, 76 P. 1111, 3 L.R.A.,N.S., 993." Erikson, having had actual knowledge of the location of the East Claim by the defendants, plaintiff cannot avail himself of technical defects, if any, in the making of the location of either of the two claims here involved.

[9] There was a conflict in the evidence as to whether the necessary work was or was not done upon the claims by the parties. Erikson claimed that he could not find evidence of work. However, the defendants offered exhibits and testimony showing that the proper amount of work had been completed. This conflict was resolved in favor of the defendants and cannot here be disturbed.

[10] The burden of proof rested upon the plaintiff to show that his title was superior to that of the defendants and he must recover upon the strength of his own title and not upon the weakness of the defendants' title. *Casaletti v. McGuire*,

89 Cal.App.2d 777, 781, 201 P.2d 889. The trial court's conclusion that the plaintiff did not establish his title by a preponderance of the evidence is sustained by the record.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



106 Cal.App.2d 426

JACKSON v. LOVAS.

Civ. 18235.

District Court of Appeal, Second District,
Division 3, California.

Aug. 31, 1951.

Walter S. Jackson sued George J. Lovas for personal injuries received when Lovas backed his automobile over a sidewalk and struck Jackson. The Superior Court, Los Angeles County, Swain, J., gave judgment for the defendant and plaintiff appealed. The District Court of Appeal, Vallee, J., held that there was no prejudicial error in refusing to admit evidence of plaintiff.

Affirmed.

1. Appeal and error ⇨108

An appeal does not lie from a verdict.

2. Appeal and error ⇨108

Where party purported to appeal from the verdict but the notice of appeal and the notice to prepare transcript on appeal stated it was for appeal from judgment, the court on review would treat the appeal as one from a judgment.

3. Automobiles ⇨244(2, 41)

In action for personal injuries received by pedestrian when struck by automobile backing across sidewalk from private driveway, the evidence was sufficient to justify implied finding of fact that driver exercised due care or that pedestrian was contributorily negligent.

4. Appeal and error ⇨1056(1); 1067

In action by pedestrian for injuries received when struck by automobile backing across sidewalk against driver, where motor vehicle code required motorist crossing sidewalk to yield right of way to pedestrian and local ordinance required motorist to stop prior to driving onto sidewalk and jury was instructed on the basis of the statute, there was no prejudicial error in excluding the ordinance from evidence and not instructing the jury thereon. Vehicle Code, §§ 458, 560.1.

Louis F. Labarere and John A. Cronin,
Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, Los
Angeles, for respondent.

VALLÉE, Justice.

[1, 2] Plaintiff appeals from "the verdict of the jury in the above-entitled action in favor of defendant and against plaintiff." An appeal does not lie from a verdict. See authorities cited in 5 West's California Digest, Appeal and Error, ⇨108, page 133. However, taking the notice of appeal, together with the "Notice To Prepare Reporter's Transcript On Appeal," which requests a transcript of the oral proceedings and the instructions given "for use by the appellant on the appeal from the judgment herein," we will treat the appeal as one from the judgment. The action is for damages for personal injuries sustained by plaintiff when struck by defendant's automobile.

The accident occurred about 7:30 p. m. on March 14, 1949, in the center of a public sidewalk. Defendant was backing his automobile out of the driveway of his home on the east side of Naples Avenue, when he struck plaintiff, who was walking in a general northerly direction on the sidewalk. It was a "very dark" night.

Appellant's contention that the evidence is insufficient to sustain the verdict finds no support in the record.

Defendant testified he got into his automobile, which he had parked in the drive-

way of his home earlier that evening, turned on the headlights, started the motor, looked back over his shoulder through the rear window a couple of times to one side and then to the other, put the car in gear, released the emergency brake, opened the left-hand door in order to look back, and started backwards. He did not see plaintiff. In backing his car he moved at a speed of about two or three miles an hour until he felt the impact, when he immediately stopped and pulled forward to where he had started.

Plaintiff testified that he had been walking up and down the block and had seen defendant's car as he "walked by there five or six times." The car was just standing there; no one was in it; no lights were on. The last time he saw the car was when he was about six or eight feet of the driveway—"just before I was hit I glanced at it again, and I would say I was six feet or eight feet from it." He was struck by the right rear of defendant's car, when he was "on the south portion" of the driveway about the center of the sidewalk. Plaintiff also testified that his hearing and eyesight were "good," but he neither heard the engine of the automobile or its gears, nor did he see the car in motion at any time.

[3] The foregoing resumé of the evidence amply supports an implied finding that defendant exercised due care or that plaintiff was contributively negligent.

Appellant also contends that the court erred 1) in sustaining an objection to the admission in evidence of section 80.23 of the Municipal Code of the city of Los Angeles (Ord. 77,000 as amended), and 2) in refusing to give an instruction based thereon.

The ordinance reads: "80.23. Emerging from Alley or Private Driveway. The driver of a vehicle emerging from an alley, driveway or building, shall stop such vehicle immediately prior to driving onto a sidewalk or into the sidewalk area extending across any alley-way."

Objection to the introduction of the ordinance was based on the ground that the subject matter of the ordinance had been regulated by the Vehicle Code, sec-

tions 458 and 560.1, was not a proper subject for municipal regulation, and was, therefore, invalid.

Section 458 of the Vehicle Code, Div. 9, ch. 2, provides: "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein."

Division 9, chapter 10, secs. 560-566, is entitled "Pedestrians' Rights and Duties". Section 560.1, enacted in 1947, provides: "The driver of any motor vehicle, prior to driving over or upon any sidewalk, shall yield the right of way to any pedestrian approaching thereon."

[4] Assuming, without deciding, that the ordinance is valid and that it should have been received in evidence and an instruction based thereon given, the rejection of the ordinance and the failure to give the instruction was not prejudicial error. The ordinance says that the driver of a vehicle emerging from a private driveway shall stop the vehicle immediately prior to driving onto a sidewalk. Section 560.1 says that the driver prior to driving over and upon any sidewalk shall yield the right of way to any pedestrian approaching thereon. While the statute does not impose a specific duty upon the driver to stop his vehicle, as does the ordinance, the duty imposed upon him by the statute is far broader in its scope, for the duty of yielding the right of way to a pedestrian necessarily includes the lesser duty of stopping the vehicle.

The court at the request of plaintiff-appellant read section 560.1 of the Vehicle Code to the jury. In addition, the court, at the request of plaintiff-appellant, instructed the jury at length with respect to what is meant when the law says that the driver of a motor vehicle "shall yield the right of way to any pedestrian", and among other things told the jury that failure to yield to one to whom the law has given the right of way is negligence unless it can be said that the conduct of the driver of the vehicle was such as to excuse or

justify him. There was, therefore, no prejudicial error in sustaining defendant's objection to the introduction of the evidence and in not giving an instruction based thereon.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



106 Cal.App.2d 454

**THOMSEN et al. v. YANKEE MARINER
CORP. et al.
Civ. 4244.**

District Court of Appeal, Fourth District,
California.

Sept. 6, 1951.

Rehearing Denied Sept. 25, 1951.

John H. Thomsen brought action against Yankee Mariner Corporation, and others, to determine validity of election of directors of that corporation, and defendants filed cross-complaint against plaintiff and San Diego Packing Company, and others, in which specific performance was asked of corporation article which required that before stock was sold, stockholders should have right to buy it. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment on complaint and cross-complaint for plaintiff and cross-defendants, and defendants appealed. The District Court of Appeal, Barnard, P. J., held that powers of proxy holder, not coupled with interest, were suspended when stockholders of record appeared and elected to vote stock, and shares were lawfully voted, but that the corporation article created a right which could not be destroyed by less than two-thirds vote, and that it had been unlawfully stricken.

Modified and affirmed.

1. Corporations ⇨197

Where agreement to sell stock, contrary to corporation articles, was conditional and not consummated, sellers lawfully voted the stock as stockholders of record. Corporations Code, § 2215.

2. Corporations ⇨198

Where proxies were not coupled with an interest, powers of proxy holder were suspended when stockholders appeared and elected to vote stock in person. Corporations Code, § 2228.

3. Corporations ⇨198

In action to determine validity of election of corporation directors, evidence supported finding that agreement to sell stock, contrary to corporation articles, was not consummated, and that there was no fraud or inequitable conduct in the giving of proxies. Corporations Code, §§ 2215, 2228, 2236.

4. Corporations ⇨40

Where corporation article provided that before there could be valid sale of stock, other stockholders had right to buy such shares, stockholders had "right to purchase," within meaning of Corporations Code and amendment approved by less than two-thirds majority, which struck said article, was without legal effect. Corporations Code, § 3634(h).

See publication Words and Phrases, for other judicial constructions and definitions of "Right to Purchase".

John G. Robertson, Long Beach, for appellants.

J. A. Donnelly, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action under section 2236 of the Corporations Code to determine the validity of an election of directors.

The Yankee Mariner Corp. was organized in 1948 for the purpose of purchasing and operating a tuna fishing vessel known as the "Yankee Mariner". One section of the articles of incorporation, known as Article 6-c, provided that before a valid sale of any share could be made the holder must give written notice; that for forty days the other shareholders would have the right to buy such shares; and that any sale would be void if this condition was not complied with.

This vessel was lost at sea on October 19, 1949. For some months thereafter a claim was pending under an insurance policy covering the loss of the vessel. During this period a difference of opinion arose as to what should be done with the insurance money when collected. The then board of directors announced an intention of using this money to go into the deep freeze business. Some of the stockholders desired to dissolve the corporation and distribute its assets among the stockholders.

On March 8, 1950, the San Diego Packing Co., the largest stockholder, entered into an agreement with a Mr. and Mrs. Lang, by which it agreed to buy 67.5 shares owned by them, subject to the approval of the sale by the corporation commissioner. The agreement further provided that upon the dissolution of the corporation the Langs were to receive, in addition to the named purchase price, their full share of any remaining assets. On the same day, San Diego Packing Co. entered into a similar agreement with Genevieve Napier for the purchase of 67.5 shares held by her. On the same day, the Langs and Napier gave their proxies to J. A. Donnelley, irrevocable for 90 days, granting him the right to vote this stock for the purpose of removing the then directors of the corporation and electing new directors.

On March 22, 1950, a regularly called meeting of the stockholders was held at the office of the corporation in Long Beach. By votes representing more than a majority of the issued stock, with the use of the Lang and Napier stock, the then board of directors was removed from office and a new board of directors was elected. Mr. and Mrs. Lang and Genevieve Napier were personally present, voting their stock to this end, and the proxies given to Donnelley were not used or produced at the meeting. On March 23, 1950, with the written consent of stockholders thus holding more than a majority but less than two-thirds of the stock, the new board of directors adopted resolutions moving the office of the corporation to San Diego, and amending the articles of incorporation by striking out the whole of article 6-c.

This action was filed on April 3, 1950. The defendant answered, denying the right of the Langs and Napier to vote their stock, and filed a cross-complaint asking specific performance of article 6-c. Shortly before the trial the underwriters paid \$272,250 for the loss of the vessel.

The court found that all of the allegations of the complaint were true; that this was a valid election and the new board of directors was validly elected; that by the action of the board of directors, with the consent of a majority of the shareholders, the articles of incorporation have been duly and legally amended; that article 6-c has been legally stricken from the articles and is no longer of any effect whatsoever; that the San Diego Packing Co. entered into an agreement with the Langs and Napier to buy their stock, but this sale was never consummated; and that there is no evidence of fraud or any inequitable conduct in connection with the agreements to sell stock or with the giving of these proxies to Donnelley. Judgment was entered accordingly and the defendants have appealed.

It is first contended that article 6-c was a valid option contract giving the appellants the right to purchase the Lang-Napier stock; that the agreements entered into between the Langs and Napier and the San Diego Packing Co. breached this option contract; and that it follows that this stock should be deemed to be held in trust for the appellants. While not directly stated, the contention seems to be that the Langs and Napier had no right to vote this stock because it had been improperly sold and because the former owners had given their proxies to Donnelley.

[1-3] The agreement to sell this stock was conditional, and the sale was never consummated. Before any of the necessary steps to consummate the sale were taken the parties proceeded along other lines. The Langs and Napier were still stockholders of record, and entitled to vote the stock. (Sec. 2215, Corporations Code.) The proxies given to Donnelley were not coupled with an interest, and the powers of the proxy holder were suspended when

VAN CISE v. LENCIONI et al.

Civ. 14732.

District Court of Appeal, First District,
Division 1, California.

Aug. 29, 1951.

these stockholders appeared in person and elected to vote their stock in person (Sec. 2228, Corporations Code). These persons were properly permitted to vote this stock and no error appears in the court's findings and conclusions in this connection.

[4] The appellants further contend that the finding which was carried into the judgment, that article 6-c was duly and legally stricken and is no longer of any effect, is erroneous because section 3634, subd. (h) of the Corporations Code requires the vote or written consent of the holders of two-thirds of the outstanding shares, in order to adopt any amendment of the articles which would adversely affect any options or rights theretofore granted to stockholders to purchase other shares. It is further argued that even if article 6-c could have been stricken on March 23, 1950, it would still be valid and subsisting as a contract with reference to the proposed sale of stock to San Diego Packing Co.; and that the effect of the judgment is to leave these parties free to transfer their stock to San Diego Packing Co. if they so desire. While this would make no difference if the plan to dissolve the corporation and distribute its assets is carried out, it might be material under other circumstances. Whether or not the appellants had a true option to purchase this stock, it must be held that they had "rights theretofore granted * * * to purchase other shares of the corporation" within the meaning of section 3634(h) of the Corporations Code. Since this amendment was not consented to by the holders of two-thirds of the outstanding stock, the finding here attacked is without support in the evidence.

The judgment is modified by striking therefrom that portion which reads "That Subsection (c) of Article Sixth of the Articles of Incorporation has been duly and legally stricken from the said Articles of Incorporation and is no longer of any effect whatsoever." As so modified, the judgment is affirmed. Each party to pay its own costs.

GRIFFIN and MUSSELL, JJ., concur.

Action by Elmer S. Van Cise against George Lencioni, individually, and Charles H. Evans, doing business as Evans Auto & Truck Rental Co., a corporation, for damages from collision with truck owned by defendant corporation and driven by the individual defendant. The Superior Court, City & County of San Francisco, William F. Traversono, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Peters, P. J., held that the plaintiff was not guilty of contributory negligence.

Judgment affirmed.

1. Automobiles ⇨4

Motor scooter is duly licensed by state, and is therefore entitled to use streets and highways as any other licensed vehicle.

2. Trial ⇨143

It is for jury to resolve inconsistencies and conflicts in testimony of party to action.

3. Appeal and error ⇨930(1)

Upon appeal interpretation of evidence is adopted most favorable to party receiving verdict.

4. Automobiles ⇨245(82)

If truck on through highway was nearly one block from intersection when party on motor scooter started to cross, party on motor scooter was not required, as matter of law, to yield right of way to oncoming truck. Vehicle Code, § 552(a).

5. Automobiles ⇨245(14)

Whether vehicle is approaching so closely to intersection as to constitute immediate hazard to persons attempting to cross intersection is question of fact.

6. Negligence ⇨136(25, 26)

Contributory negligence and proximate cause are normally questions of fact.

7. Automobiles ⇨245(14)

When driver stops at arterial stop and observes approaching vehicle, whether it is negligence to proceed without again looking at approaching vehicle is question of fact. Vehicle Code, § 552(a).

8. Automobiles ⇨245(16)

In action by driver of motor scooter against owner of truck and driver for damages resulting from being hit by truck as he crossed arterial highway intersection jury could consider fact that truck driver saw scooter at all times, yet did not turn aside, blow horn or apply brakes until too late, point and force of impact and skid marks. Vehicle Code, § 552(a).

9. Automobiles ⇨244(36)

In action by driver of motor scooter against owner of truck and driver for damages resulting from being hit by truck as he crossed arterial highway intersection, implied jury finding that accident was proximately caused solely by negligence of truck driver was supported by substantial evidence. Vehicle Code, § 552(a).

10. Trial ⇨325(3)

Where jury poll disclosed that more than one quarter of members disagreed with verdict, trial judge retained control of proceedings, and properly ordered jury to retire and again consider case. Code Civ.Proc. § 618.

11. New trial ⇨142

Affidavit of juror can be considered in support of verdict.

12. New trial ⇨56

Record, including foreman's affidavit showing that jurors' only disagreement was as to amount of verdict for plaintiff and that on final vote ten jurors wished to award \$3,000 and two jurors wished to award \$5,000, sustained determination that defendants were not sufficiently prejudiced by failure to give jury new forms of verdict after they had returned invalid verdict to be entitled to new trial after verdict for plaintiff for \$3,000.

13. Appeal and error ⇨688(2)

Oral arguments are not included in reporter's transcript unless specially requested, and if counsel desire to urge error

in oral argument it is essential that he order oral argument included in transcript. Rules on Appeal, rule 52.

14. Appeal and error ⇨905

In absence of record containing oral argument, appellate court conclusively presumes that no error occurred in oral argument. Rules on Appeal, rule 52.

Phillip Barnett, San Francisco, Robert L. Dreyfus, San Francisco, for appellants.

Ralph Wertheimer, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Elmer Van Cise, was injured when the motor scooter he was operating was hit by a truck owned by the defendant Evans Auto & Truck Rental Co. and being driven by defendant George Lencioni. Plaintiff charged that the accident was proximately caused by the negligence of defendants. They denied negligence and affirmatively pleaded contributory negligence on the part of plaintiff. The jury brought in a verdict for plaintiff in the amount of \$3,000. Defendants appeal from the judgment entered on the verdict.

Appellants do not challenge the amount of the award. They first contend that the record demonstrates contributory negligence on the part of respondent as a matter of law. There is no merit to this contention.

[1] The accident occurred in Healdsburg about 10:30 a. m. on August 23, 1947. Respondent was driving a single-seat motor scooter, which he had operated for about three and a half months prior to the accident. This is a two-wheel motor-propelled vehicle about four feet long and three feet high. Unlike a motorcycle, it has but one driving gear. After the motor is started the vehicle is propelled forward by stepping on the accelerator. Both the accelerator and the brake are foot-operated, both being operated with the same foot. The brake was in good working condition on the day of the accident. The scooter was painted a bright red. At the oral argument counsel for appellants suggested

that to drive such a vehicle on a main highway might itself be contributory negligence. The point is frivolous. Such a vehicle is duly licensed by the state, and is therefore as much entitled to use the streets and highways as any other licensed vehicle.

On the day before the accident respondent had driven his scooter from San Francisco, his then residence, to a small town north of Healdsburg. He was looking for properties in which to invest. Early in the morning of August 23rd he started back towards San Francisco on U. S. 101, a main highway that runs north and south through Healdsburg, and which, in the city, is known as West Street. Within the city this highway is crossed at right angles by a street running east and west known as North Street. The accident occurred in this intersection.

The other vehicle involved in the accident was being driven by appellant Lencioni. It was a 1946 or 1947 model stake body truck that had been rented from appellant Evans Auto & Truck Rental Co. Lencioni, with his wife, was transporting two or three tons of lumber from San Francisco, his residence, to his summer home in Geyserville, which is north of Healdsburg. At the time of the accident Lencioni was driving north on U. S. 101.

The morning of August 23, 1947, was dry and clear. The two streets involved are asphalt paved, straight in line, and level in grade. About 10:30 in the morning in question, respondent, while proceeding south on 101, approached the intersection of that highway with North Street, and noticed a real estate office located on 101 near the intersection. There were many cars parked on 101 north and south of the intersection and he could not readily find a place to park. He turned west on North Street, intending to circle the block and look for a place to park near the real estate office. After he had proceeded about a half block on North Street he turned into an alley, thinking that he could encircle the block in that way. The alley had no outlet to the next street, so he turned

around and then turned east on North Street.

Where highway 101 and North Street intersect there are marked crosswalks for pedestrians across both 101 and North Street. Highway 101 is an arterial highway, that is, there are stop signs for traffic crossing it from North Street. Respondent, travelling east on North Street, still looking for a parking place, stopped his scooter at the westerly line of the crosswalk. Because of the parked cars on the west side of 101 south of the intersection, he could not see very far south on 101. He thereupon "walked" his scooter across the crosswalk to a point even with the curb line of 101, and again stopped, to let by some ten or twelve automobiles that were travelling north on 101. After the last of these cars had passed, and while respondent was still stopped, he first noticed the Lencioni truck travelling north on 101. At that time Lencioni was about three-quarters of a block or a block south of the intersection. Respondent started across the intersection, going about four or five miles per hour or slower. He did not again look towards the approaching truck, but kept his eyes straight ahead on the pedestrian walk on the east side of 101. In the meantime, Lencioni was proceeding towards the intersection from the south at a speed that he estimated at about fifteen miles per hour. He testified that he saw respondent stop at the intersection and proceed slowly across the street. He repeatedly testified that when he first noticed the scooter his truck was just about to enter the south crosswalk of West Street. This testimony not only conflicts with that of respondent as to location of the truck when he started to cross the intersection, but is contradicted by the physical facts. If Lencioni's story is true, he was but about twenty-five feet from the admitted point of impact at a time that he places respondent over fifty feet from that spot. With respondent travelling not more than four miles per hour, and Lencioni admittedly travelling fifteen miles per hour, one does not have to be a mathematician to conclude that, if the two vehicles were in

the positions fixed by Lencioni, the accident would never have happened.

But the accident did happen. Lencioni admitted that after he first observed the scooter he kept his eyes on it right up to the moment of impact, and he testified that he observed that respondent was looking straight ahead. Nevertheless, he did not slow down, change his course, or blow his horn before hitting respondent. He did not apply his brakes until the scooter was half way across the intersection, and then it was too late. He ran into the scooter in the southeast corner of the intersection. At that point respondent was almost across the street. He almost cleared the truck, but the extreme right front bumper of the truck hit the very rear end of respondent's scooter. The scooter was tipped over by the impact onto respondent's left leg. The force of the impact knocked respondent and the scooter across the intersection for a distance of about forty feet. The truck, after the impact, proceeded to the north pedestrian walk of West Street before stopping. There were skid marks leading to the stopped truck about fifteen to twenty feet in length.

The first contention of appellants is that this evidence establishes, as a matter of law, that respondent was contributively negligent. They rely upon respondent's testimony that, after he observed the truck while he was stopped, he proceeded across the busy intersection without again looking to his right to observe on-coming cars. They rely heavily on Lencioni's testimony as to the relative positions of the two vehicles, and in disregard of respondent's testimony, argue that under section 552 of the Vehicle Code, Lencioni, as a matter of law, had the right of way. At the time of this accident subdivision (a) of that section read: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard".

[2-9] The contention is entitled to but scant consideration. Of course respondent's

testimony places the truck three-quarters of a block away when respondent started to cross the intersection. While there are inconsistencies and some conflicts in respondent's testimony, it was for the jury to resolve these conflicts and inconsistencies. This is not a function of the appellate court. *People v. Crownover*, 34 Cal.App.2d 7, 92 P.2d 929; *Angelo v. Esau*, 34 Cal.App.2d 130, 93 P.2d 205; *People v. Holman*, 72 Cal.App.2d 75, 164 P.2d 297. In support of the judgment we must adopt that interpretation of the evidence most favorable to respondent. If the truck was nearly a block away when respondent started to cross, he was not required, as a matter of law, to yield the right of way to the oncoming truck. Whether a vehicle is or is not approaching so closely as to constitute an immediate hazard is a question of fact and not of law. *Zwerin v. Riverside Cement Co.*, 52 Cal. App.2d 715, 126 P.2d 920; *Wilkinson v. Marcellus*, 51 Cal.App.2d 630, 125 P.2d 584; *Hershey v. Laswell*, 63 Cal.App.2d 219, 146 P.2d 509; *Glynn v. Vaccari*, 64 Cal.App.2d 718, 149 P.2d 409. Contributory negligence and proximate cause are normally questions of fact, and only in most unusual cases, of which this is not one, do they become questions of law. See cases collected 19 Cal.Jur. p. 735, § 141. When a driver stops at an arterial stop and observes an approaching vehicle, whether it is or is not negligence to proceed without again looking at the approaching vehicle is a question of fact and not of law. *De Priest v. City of Glendale*, 74 Cal.App.2d 464, 169 P.2d 17; *Jensen v. Hansen*, 12 Cal.App.2d 678, 55 P.2d 1201; *Stephens v. Kaufmann*, 137 Cal.App. 328, 30 P.2d 536; *White v. Davis*, 103 Cal.App. 531, 284 P. 1086; *Armstrong v. Studer*, 2 Cal.App.2d 166, 37 P.2d 475; *Isaacs v. City and County of San Francisco*, 73 Cal. App.2d 621, 167 P.2d 221; *Malinson v. Black*, 83 Cal.App.2d 375, 188 P.2d 788. In addition, the jury was entitled to consider the admitted fact that Lencioni had his eyes on the scooter at all times, yet did not turn the truck nor blow his horn, nor put on his brakes until too late. *Podeszwa v. White*, 99 Cal.App.2d 777, 222 P.2d 683. The jury could also consider

the point and force of the impact, the skid marks, etc. The implied finding of the jury that the accident was proximately caused solely by the negligence of Lencioni is supported by ample, substantial and convincing evidence.

Appellants next contend that the verdict was rendered in a most irregular way, and in a manner prejudicial to appellants. The contention is based upon the following facts: After the jury had deliberated for about an hour and a half it returned to the courtroom and the foreman informed the court that a verdict had been reached. A \$3,000 verdict against both appellants, signed by the foreman, was handed to and read by the clerk. The clerk asked if the verdict was that of at least nine of the jurors. The foreman replied that it was. At the request of counsel for appellants the jury was polled by the clerk. Six jurors answered "yes" and six "no" to the question as to whether the verdict that had been read was their verdict. The judge thereupon polled the jury, and eight jurors answered that the verdict was theirs, and four that it was not. The judge thereupon stated: "I have polled the jury, and it takes nine of your members. Let's not have any discussion and under the circumstances you will have to resume your deliberations. All, right, you may retire with the bailiff."

The jury thereupon retired for a second time, returned to the courtroom in ten minutes, and brought in exactly the same verdict as had first been returned. Upon being polled by both the clerk and the judge, ten members stated that the verdict was their verdict and two stated that it was not.

The above is all that appears concerning the incident in the reporter's transcript.

[10] There can be no doubt that the trial court acted properly in returning the jury for further deliberations after it was discovered that nine members had not agreed with the first verdict. Section 618 of the Code of Civil Procedure provides: "When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court, their names called

by the clerk, or by the court if there be no clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read to the jury by the clerk, or by the court if there be no clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is his verdict. If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case."

Thus, it is quite apparent that when a poll discloses that more than one-quarter of the members of the jury disagree with the verdict, the trial judge retains control of the proceedings, and may properly order the jury to retire and again consider the case. *Earl v. Times-Mirror Co.*, 185 Cal. 165, 196 P. 57; *Megee v. Fasulis*, 65 Cal.App.2d 94, 150 P.2d 281; *Sparks v. Berntsen*, 19 Cal. 2d 308, 121 P.2d 497. Thus, so far as the proceedings are disclosed by the reporter's transcript, everything that was done was in precise accord with the law.

But appellants do not limit themselves to what appears in the reporter's transcript. They rely upon an affidavit of their attorney filed on the motion for a new trial. This affidavit avers that after the poll was taken by the judge and it was disclosed that there was no proper verdict, the foreman discussed the matter with several jurors while they were still in the jury box. It is further averred that when the court ordered the jury to retire and resume deliberations, there was handed to the foreman the blank form of verdict in favor of defendants, and the signed invalid verdict for plaintiff that had already been read, and which had already been stamped by the clerk. After the jury had retired for the second time and was still deliberating, counsel for appellants moved for a mistrial on the ground of irregularity of proceedings. This motion was denied.

It is argued that the discussions in the jury box among the jurors, and ordering the jury to resume deliberations without giving the jury new forms of verdict, was

prejudicial error. It is urged that handing back to the jury the invalid verdict amounted to directing a verdict for respondent.

[11, 12] There was no doubt some irregularity in the proceedings. The discussion that took place between the jurors in the jury box in the confusion that resulted when it was discovered that the original verdict was invalid in no way adversely affected appellants. No doubt it would have been better procedure had new blank forms of verdict been handed the jury when the order was made to resume deliberations, and it undoubtedly was irregular to give them only the invalid filled-in form of verdict already rendered, but such irregularity could not possibly have affected adversely the legal rights of appellants. No doubt, had counsel for appellants called this fact to the attention of the court before the jury retired for the second time, this irregularity would not have occurred. The record shows that counsel for appellants made no such request. In addition, it affirmatively appears from the record that this irregularity did not prejudice appellants. In opposition to the motion for a new trial respondent filed the affidavit of the foreman of the jury. From that affidavit it appears that when the jury first retired it determined in five minutes, by a ten to two vote, that appellants were liable. Then for an hour and a half they debated the amount of the verdict. Two jurors were in favor of awarding \$2,000, and two were in favor of \$5,000, the rest agreed on \$3,000. Finally, they voted to award \$3,000, two voting "no" because they wanted to award \$5,000. Thus, when eight jurors told the judge that the \$3,000 verdict had been approved by them, and four stated that it had not, two of the four disapproved because the verdict was not big enough. When the jury retired the second time, the foreman, according to his affidavit, explained to the jury that the case was wide open again and that they could vote any way they pleased. After ten minutes' discussion ten jurors voted to award \$3,000. The other two voted "no" solely because they wanted to award \$5,000. It is quite clear that this

affidavit of the foreman was properly considered by the trial court on the motion for a new trial, because it did not impeach the verdict, but rather supported it. See cases collected 24 Cal.Jur. p. 877, § 126. No contention is made to the contrary. Thus, it is quite clear that the trial court's determination on the motion for new trial that no prejudice resulted from the irregularity under discussion was amply justified.

The last contention of appellants is that respondent was guilty of prejudicial misconduct in his closing argument to the jury in that over objections of counsel for appellants he read to the jury certain proposed instructions which were not later given by the court. The oral argument does not appear in the record. Appellants rely on an affidavit filed by their counsel on a motion for a new trial in which this charge of misconduct is made. Respondent's counsel does not admit the facts to be as set forth by appellants.

[13, 14] Appellants have not presented a proper record on appeal that will permit this court to consider this assignment of error. Under the Rules on Appeal it is incumbent upon the appellant to present a proper record to the appellate court. The oral arguments are not included in the reporter's transcript unless specially requested. If counsel desire to urge error in the oral argument it is essential that he order the argument included in the transcript. In the absence of such a record it must conclusively be presumed that no error in the argument occurred. Rule 52 of the Rules on Appeal; *People v. Hidalgo*, 78 Cal.App. 2d 926, 179 P.2d 102; see, generally, *Alkus v. Johnson-Pacific Co.*, 80 Cal.App.2d 1, 181 P.2d 72; *People v. Crain*, 102 Cal.App. 2d 566, 228 P.2d 307; *Palpar, Inc., v. Thayer*, 83 Cal.App.2d 809, 189 P.2d 752; *Id.*, 82 Cal.App.2d 578, 186 P.2d 748; *Gardner v. Shreve*, 89 Cal.App.2d 804, 202 P.2d 322. For these reasons, there being no proper record before us, this claimed error cannot be considered by this court.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

PEOPLE v. ARMSTRONG.

Cr. 2280.

District Court of Appeal, Third District,
California.

Sept. 11, 1951.

Rehearing Denied Sept. 24, 1951.

Hearing Denied Oct. 11, 1951.

Wilbur Armstrong was convicted of manslaughter. The Superior Court, Tuolumne County, T. B. Warne, J., denied defendant's motion for a new trial and he appealed. The District Court of Appeal, Van Dyke, J., held that the instructions given sufficiently advised the jury regarding defendant's rights to defend his wife, unborn child and home.

Judgment and order denying new trial affirmed.

1. Homicide $\Rightarrow$ 250

Evidence sustained conviction for manslaughter.

2. Homicide $\Rightarrow$ 301, 303

In prosecution for manslaughter instructions sufficiently advised jury regarding accused's right to defend his wife, unborn child and home.

3. Homicide $\Rightarrow$ 116(3)

If the person who is attacked knows there is no intent to do great bodily harm, then the killing of the one attacking is not justified. Pen.Code, § 198.

4. Criminal law $\Rightarrow$ 814(3)

To charge jurors as to an issue not predicated upon some theory logically deducible from the evidence presents for consideration a question not properly determinable by them.

5. Homicide $\Rightarrow$ 300(7)

In prosecution for manslaughter evidence justified inference that there was nothing in the nature of an attack on part of decedent upon accused and instructions to effect that right of self-defense was not available were applicable.

6. Homicide $\Rightarrow$ 332(2)

Even where defense presented by accused based on justifiable homicide was factually strong if evidence was considered favorably to his cause, appellate court could not invade jury's providence and say jury could not properly have resolved facts against him.

7. Criminal law $\Rightarrow$ 770(2)

The rule that a court should instruct the jury upon every material question upon which there is any evidence whatever deserving of consideration has no application to specific points developed at the trial as opposed to instructions on general principles of law applicable to case.

8. Criminal law $\Rightarrow$ 824(4)

In prosecution for manslaughter, fact that decedent was a trespasser on accused's property was a specific point in case for defense, and did not call for special instruction from court as to its legal effect, in absence of a request therefor by accused.

9. Homicide $\Rightarrow$ 169(1)

Statements in letter written to decedent by attorney at request of accused on behalf of decedent's former wife who had married accused, relative to decedent's threats of taking children contrary to decree of court in divorce action and that decedent was delinquent in matter of child support, had nothing to do with issues in manslaughter prosecution, and were properly excluded.

10. Homicide $\Rightarrow$ 169(2), 339

Portions of letter written to decedent by attorney at request of accused which referred to alleged statement of decedent that he intended to see his children in the marital domicile of his former wife, who was married to accused, and which advised decedent that he had no legal right to be in his former wife's home, were admissible in manslaughter prosecution to show character of decedent's entry upon accused's property, but exclusion was not prejudicial error in view of fact that other portions of letter, which were admitted, were to same effect.

Alden Ames, San Francisco, for appellant.

Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Wilbur Armstrong, the appellant here, was indicted for manslaughter in that on July 3, 1950, he did wilfully, unlawfully and without malice kill one Otis Robinson by

shooting him with a gun. A jury returned a verdict of guilty as charged. Motion for a new trial was denied.

Appellant was the owner of a small farm in Tuolumne County where he lived with his wife Lillian and her three small children by her former marriage to the decedent Robinson. The children were six, five and two years of age. The two men had known each other from 1944, at which time both had been patients at Oak Knoll Hospital. In July, 1949, Lillian divorced Robinson. She married appellant about a month later. She was given custody of the children and Robinson was given the right to see and have the children with him at reasonable times and places. Just before the homicide Robinson had taken his son Roy, aged five, on a trip to Texas. There had been ill feeling between the two men for some years and Robinson had made serious threats against appellant, some of which had been made directly and some of which had been made to others and communicated to appellant. Appellant had informed Robinson about ten months prior to the homicide that he was not to again come upon the appellant's property and arrangements had been made for him to telephone the house when he desired to visit the children, then drive to the gate, which was some distance from the house, at which point the children would be delivered to him. This method of exercising his visitation rights had obtained for some time. Appellant also had threatened to kill Robinson if he would come upon appellant's property and Robinson's threats toward appellant had also assumed the stature of threats to kill. About six months before the homicide and at the request of both appellant and Lillian an attorney had written a letter to Robinson, parts of which were introduced in evidence, wherein he was told that he could not safely assume the right to go upon appellant's property and upon receiving this letter Robinson called upon the justice of the peace, asking for an order permitting him to go onto Armstrong's place, which order was, of course, refused. Appellant had been told by Lillian on several occasions that she was afraid of Robinson and on one occasion when she took the chil-

dren to the gate Robinson told her that if her husband ever came through the gate he would kill him. She told appellant of this threat. After receipt of the letter from the attorney, however, Robinson did not again pass the gate until the time of the homicide. On that day and at about 3 o'clock in the afternoon he telephoned Lillian that he and the boy had just returned from Texas, that the boy's eyes were sunburned and that he wanted permission to keep him over the Fourth. Lillian replied it was all right but wanted to know when he would bring the boy out. He said he did not know, but would telephone before coming. Without telephoning again, and between 7:30 and 8 o'clock p. m. he arrived at the home of appellant, entered the gate in company with the boy and came up onto the back porch or onto the steps thereof, at which point he was killed by appellant. Appellant did not deny that he fired the fatal shot. The autopsy surgeon testified that the bullet from appellant's revolver severed the aorta next to the heart and that the wound would cause almost instantaneous death. Appellant's testimony and that of his wife Lillian was that when Roy's sister, looking through the window out onto the porch, announced that her brother was there appellant rose from the dining table at which the family were seated, went through the screen door onto the porch and asked Robinson what he was doing there, saying he knew he was not supposed to come on the property. Robinson replied, "You s-b I'll come up here any time I want to." Lillian did not see the killing, but appellant testified that Robinson, having so spoken, advanced up the steps toward the porch on which appellant was standing, with his revolver drawn, and that Robinson made a movement with his left hand as though to strike appellant, whereupon appellant struck him with the revolver a blow of sufficient force to throw him off balance and cause him to stagger back down the steps; that Robinson again came up, at which time appellant shot. It appears that Lillian was pregnant at the time, was daily expecting the birth of a child, and that the child was born to her on the following morning. There was

conflict as to the conversation between appellant and respondent at the very time of the killing. Prosecution witnesses testified that just following the shot Robinson called for help several times and then appellant asked him why he was on the property when he had told him not to be there. Another witness gave the same version, but said that appellant used foul language toward Robinson, saying, "What are you doing up here, you so and so, get the heck out of here" and that these words were spoken after the shot had been fired. Still another witness verified the testimony of the others that it was after the shot when appellant asked Robinson what he was doing there, called him a foul name and told him to get out.

[1] Appellant first contends that the evidence is insufficient to support the verdict of guilty. This contention cannot be sustained. It is apparent from the testimony which has been recited that the jury could have drawn the conclusion that appellant needlessly and without justification slew the deceased. In saying this, we do not overlook the strong circumstances favorable to appellant's claim of justifiable homicide. But the jury could have believed that, notwithstanding the testimony of appellant and his wife, the intentions of Robinson were neither actually nor apparently such as to justify the killing. On this point it is enough to refer to the conflict in testimony as to the immediate circumstances of the killing and particularly to the testimony of the prosecution's witnesses which the jury had a right to believe. The jury could have inferred that there was no threat by Robinson as he approached the porch of appellant's home and appellant; but on the contrary that appellant, having armed himself, went upon the porch, carried out his previous threat of killing Robinson if he ever came upon the property, and then simulated the situation testified to by him, by addressing to the dying man the question as to why he was there, coupled with the assertion that he had no right to be there. It is true that when one considers the stress of circumstances obtaining at that moment it is difficult to believe the prosecution's witnesses

as to the timing of those remarks, but it cannot be said that their testimony is incredible and if accepted by the jury as true then the entire picture of self-defense, as relied upon by appellant, takes on a vastly different hue and becomes a planned and needless killing, followed by pretense of justification for the benefit of the near neighbors who testified in contradiction of appellant's story. We are not the triers of fact and must assume the truth to be as the jury inferentially found it to be.

[2,3] Appellant next contends that the jury were not properly instructed as to his rights to defend his wife, his unborn child and his home and urges that if the jury had been properly instructed no conviction would have ensued. It appears from the record here that the jury were quite fully instructed. They were advised of the doctrine of reasonable doubt and were told that appellant was to have the benefit of any construction of the evidence which would appear to be reasonable and would support his claim of innocence even though an equally reasonable construction pointed towards his guilt. Manslaughter was defined properly as the unlawful killing of a human being without malice and the provisions of the code with regard to justifiable homicide were read. The jury were told a killing was justified in resisting any attempt to murder a person or to commit a felony or to do great bodily injury to any person or when done in defense of habitation, property or person against one manifestly intending or endeavoring by violence to commit a felony or against one who manifestly intended and endeavored in a violent manner to enter the habitation of another for the purpose of offering violence to any one therein. The jury were further told that a killing was justifiable in lawful defense of the killer, his spouse, parent, child, master, mistress or servant when there was reasonable ground to fear a design to commit a felony or to do great bodily injury and imminent danger of the design being carried out. This last definition of "justifiable homicide" was given subject to the exception that if the killer was the assailant or the combat was mutual then he must endeavor in good faith to de-

cline further struggle before killing. With respect to the claim of self-defense, which was made by the appellant, the jury were instructed fully as to the necessary elements that must be found before that defense would be available. But appellant especially complains that the court over-emphasized the matter of the permissible defense by appellant of his own safety without giving sufficient prominence to the appellant's right to defend and protect his home, his wife and unborn child. In making this contention, appellant recognizes that the right to defend a wife or child was explained to the jury, but insists that too little was said on the subject so that the jury must have gone to their deliberation believing that justification for the killing rested solely upon appellant's claim that he killed only in defense of his own person. We do not think the record will support the criticism. It is true that more emphasis in the sense of quantum of instruction is laid upon the latter right, but we think it entirely unlikely that the jury could, under the instructions of the court, have lost sight of the accompanying right of defense of habitation, spouse and child; and from the very brevity of the testimony as to the few seconds elapsing between appellant's act in going armed upon the porch of his home and the slaying of Robinson the jury could have inferred that there was no good reason to hold that appellant acted to protect his wife and child, and on the contrary that the real issue was as to whether or not he acted in defense of his own person. With regard to the latter issue, the jury was given the so-called doctrine of the reasonable man who not only believes, but for good reason believes he is in danger of receiving great bodily harm and that the circumstances necessitate killing to avoid such injury. They were told that the circumstances must be such as to excite the fears of such reasonable man and that the killer must act under the influence of such fear alone; that the danger must not only be apparent but must be present and imminent or so appear to the slayer and that his belief of necessity must be well founded. Appellant does not challenge the correctness of these instructions and we

think that the trial court was not only justified in giving them, but that in the full performance of its duty it must have done so. Specifically, appellant complains of the court's instruction that if the jury found that when appellant fired the fatal shot "Robinson was making a mere assault with his hands or fists upon the defendant but not with intent to kill or do great bodily harm to the defendant" and if they further found "that defendant was not deceived as to the character of said assault" then he was not justified in taking decedent's life. At first blush this instruction appears to place too great a burden on the perspicacity of one attacked and we think it is not to be recommended. Upon examination, however, it is apparent the jury is only told that if the one attacked knows there is no intent to do great bodily harm then the killing is not justified and such is the law. *People v. Dawson*, 88 Cal.App.2d 85, 96, 198 P.2d 338; Penal Code, Sec. 198.

[4, 5] Appellant complains of certain instructions as to the effect upon the right of self-defense of the one claiming its protection having been guilty of the initial attack. His complaint is not that the instructions given were not correct, but that they were inapplicable to the facts and constituted instructing upon issues which found no support in the evidence. Such instructions have been held to be erroneous in such cases as *People v. Eggers*, 30 Cal.2d 676, 687, 185 P.2d 1, 7, wherein the court declared: "To charge the jurors as to an issue not predicated upon some theory logically deducible from the evidence presents for consideration a question not properly determinable by them." See, also, *People v. Roe*, 189 Cal. 548, 558, 209 P. 560. But the evidence as hereinbefore recited would have justified an inference by the jury that there was nothing in the nature of an attack on the part of Robinson and that appellant's striking him with his gun was the first attack made; that as a result of this blow decedent was at least temporarily forced back down the steps up which he was going when the blow was struck, and that there thus arose a situation, making applicable the rule contained in the instructions complained of that, "The right

of self-defense is not available to a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault, for in such a case the original intent would control." Similar circumstances justified the court in further telling the jury that "When one makes a felonious assault upon another, or has created appearances justifying that other in making a deadly counter attack in self-defense, the original assailant may not slay his adversary and then avail himself of the plea of self-defense unless, before such slaying, he first and in good faith declines further combat." We say this notwithstanding the significant fact that it appears in the record, without dispute, that Robinson went upon appellant's property knowing that in so doing he was trespassing upon the same after having received ample notice that such act by him had been forbidden.

[6] Appellant next complains of the court's telling the jury with respect to the claim of self-defense that when the "peril has passed and when the attacker has withdrawn from the conflict, the person whom he attacked is not justified in pursuing his former assailant or in attacking him." Several instructions along this line were given, all of which correctly state the law, it being the contention of appellant, however, that they were not justified by the evidence and that the court committed prejudicial error when it invited the jury to consider whether or not appellant might have been the first of the two men to attack the other. But as we have just pointed out, it cannot be said from this record that the instructions were not appropriate. It is true that the defense presented by appellant, based on justifiable homicide, was factually strong when the evidence is considered favorably to his cause. But we cannot invade the jury's province and say they could not properly have resolved the facts against him.

[7, 8] Finally on the matter of instructions, appellant complains that the court

gave no instruction bearing upon the importance in the case of the uncontroverted fact that the decedent was a trespasser. No such instruction was asked, but appellant invokes the rule that the court should instruct the jury upon every material question upon which there is any evidence whatever deserving of consideration. *People v. Carmen*, 36 Cal.2d 768, 228 P.2d 281. This rule, however, is subject to the limitations stated in *People v. Klor*, 32 Cal.2d 658, 662, 197 P.2d 705, and cases therein cited. The rule has no application to specific points developed at the trial as opposed to instructions on general principles of law applicable to the case. We think the exception applies here rather than the rule. The circumstance that Robinson was a trespasser was a specific point in the case for the defense and did not call for special instruction from the court as to its legal effect in the absence of a request therefor by the appellant.

[9, 10] Appellant concludes his brief with the contention that the court committed prejudicial error in withholding from the jury parts of the letter written to Robinson by an attorney at the request of appellant and his wife, which letter has been heretofore referred to. Appellant claims that the entire letter should have been admitted and that the people's objections to a part thereof ought to have been overruled. The letter opened with a statement that it was written on behalf of decedent's former wife relative to decedent's threats of taking the children contrary to the decree of the court in the divorce action which awarded him rights of visitation. The writer then stated that Robinson was delinquent in the matter of child support. It is clear that these matters had nothing to do with the issues in this case and were properly omitted. The letter then referred to a statement claimed to have been made by Robinson that he intended to see his children in the marital domicile of his former wife and the writer advised him that he had no legal right to be in his former wife's home. This part of the letter might well have been admitted, since it had to do with the character

of the entry upon the property which Robinson made on the evening of the killing. But prejudicial error cannot be ascribed to the exclusion. This is so because the next two paragraphs of the letter, which were admitted, were to the same effect and the admission of the excluded matter could have been no more than cumulative.

The judgment and the order denying new trial are affirmed.

PEEK, J., and SCHOTTKY, J. pro tem, concur.



106 Cal.App.2d 480

FEDLER v. HYGELUND et al.

Civ. 7923.

District Court of Appeal, Third District,
California.

Sept. 11, 1951.

Benjamin C. Fedler brought action against Lloyd Hygelund, individually and doing business under fictitious name and style of "Butte Tallow Company," and another, for injuries sustained while riding in truck owned by named defendant who was former employer of plaintiff, on a trip within driver's scope of employment. The Superior Court, Butte County, Harry Deirup, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that evidence on issue of whether there was common understanding between plaintiff and driver that aid would be forthcoming from plaintiff as compensation for ride was sufficient to support implied finding of jury that plaintiff was passenger and not guest.

Judgment affirmed.

1. Appeal and error ⌘930(1)

On appeal on ground that evidence was insufficient to support implied finding of jury, evidence must be considered in light most favorable to respondent.

2. Automobiles ⌘244(20)

In action by former employee for injuries sustained while riding in former employer's truck on trip within driver's scope of employment, evidence on issue of whether there was common understanding between former employee and driver that driver would be given aid in his work as compensation for former employee's ride was sufficient to support implied finding of jury that former employee was a passenger and not a guest. Vehicle Code, § 403.

3. Automobiles ⌘244(20)

In action by passenger for injuries sustained when truck ran away and proceeded down grade out of control after brakes went out, evidence on issue of whether driver had warning that brakes were in dangerous condition when he started down the grade and reasonable inferences which could have been drawn therefrom was sufficient to support implied finding that driver was negligent in operation of truck.

4. Automobiles ⌘242(2)

Where truck in which plaintiff was passenger ran away and proceeded down grade out of control at time that driver had exclusive control of truck, inference of want of due care arose, since ordinarily trucks do not run away down grade unless one having control has been negligent.

5. Automobiles ⌘242(2)

Where plaintiff passenger pleaded negligence of truck driver in general terms and offered evidence suggesting definite negligent acts and omissions, he did not thereby waive right to rely upon inference of negligence arising under doctrine of *res ipsa loquitur* from fact that truck ran away and proceeded out of control down grade when truck was in exclusive control of driver.

6. Negligence ⌘121(2)

Where inference of negligence is raised under circumstances of the case and probabilities, application of doctrine of *res ipsa loquitur* should not be denied merely because plaintiff proves specific acts of negligence.

7. Appeal and error ⇨1001(1)
Negligence ⇨121(2), 136(6)

Doctrine of *res ipsa loquitur* is founded upon common observation and common sense, and, whether instructed or not upon the matter, a jury is competent to draw inference if it desires to do so, and on appeal, if record supports the inference, it cannot be said that record did not support jury's verdict for plaintiff.

8. Evidence ⇨514(2)

In passenger's action for injuries sustained when truck ran away out of control down grade, testimony of a truck driver who had driven the same truck down the same grade as to his tactics in operating brakes, clutch, and gear reduction in driving down that hill concerned facts within his own knowledge and experience and was proper as expert testimony as to way involved truck ought to be operated by describing way witness would do it based upon his experience.

9. Automobiles ⇨181(2)

Person who rides in truck solely for his own pleasure and benefit with any help or assistance he may give to driver during ride volunteered is a "guest" and not a passenger. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest".

10. Trial ⇨296(3)

In action by former employee for injuries sustained while riding in former employer's truck on trip within driver's scope of employment, instruction that former employee was guest if he rode solely for his own pleasure and benefit and if any help or assistance he may have given was volunteered and no assistance was contemplated by or expected by former employer or driver was not erroneous as permitting jury to infer that expectation of some help from former employee would be sufficient to make him a passenger, in view of other instructions defining passenger and guest relations. Vehicle Code, § 403.

Russell A. Harris, Sacramento, for appellants.

Matthew E. Marsh, Coyle E. Bybee, Chico, for respondent.

VAN DYKE, Justice.

Respondent Fedler brought this action to recover damages for personal injuries sustained while riding in a truck driven by appellant Rippin. The truck was owned by appellant Hygelund. The complaint alleged that respondent was a passenger and that the accident and resulting injuries to him were caused by the negligence of Rippin in operating the truck. Appellants denied that respondent was a passenger and alleged that he was a guest. Negligence was denied and it was alleged that the accident was unavoidable. A jury returned a verdict in the sum of \$30,000 for respondent against both appellants and judgment was entered in that amount.

Appellants first contend that the evidence is insufficient to support the implied finding of the jury that the respondent was a passenger and not a guest within the meaning of Section 403 of the California Vehicle Code. It appears from the record that appellant Hygelund owned and operated the Butte Tallow Company located in Chico, California; that Rippin was his employee and at the time of the accident was driving the truck within the scope of that employment; that respondent had been an employee of Hygelund, but at the time of the accident was under a total disability rating by reason of undulant fever contracted some time previously; that while respondent had been so employed he held the position of head butcher and foreman of the Chico plant.

[1] Appellant Rippin made regular trips to various localities in Hygelund's truck to collect animal refuse for use in the tallow business. He testified that about two weeks before the accident plaintiff had expressed the desire to accompany him on one of his trips to Susanville, but that approximately a week later, when he asked respondent if he then wanted to go on a trip about to be made, respondent said

that he did not then feel well enough. About a week later Rippin again asked respondent if he wanted to go to Susanville the following day. Respondent's version of that conversation was as follows: Rippin said to respondent, "How about going along to Susanville with me tomorrow? It is a long, tiresome trip. We will probably run into a little snow and the road will be icy and we will have to put on chains. * * * Probably it will take us fifteen to sixteen hours." Respondent replied that he would go on the trip. The two men departed in the truck the following morning at 4 A.M. from Chico. When they arrived at Lassen Lodge respondent assisted Rippin in putting chains on the truck and later, when they were no longer needed, assisted him in removing them. At Susanville the truck was loaded with offal, respondent assisting in the loading by holding the barrels over the edge of the truck while Rippin emptied the contents into the truck. Respondent also tallied the weights as Rippin loaded the truck. The loading completed, the two men left on the return journey and the accident occurred at a place called Payne's Creek. Before going on this particular trip respondent had taken similar trips to other localities with other employees of appellant Hygelund. These trips were during the period that respondent was disabled from his fever. Concerning these he testified that he did not "invite himself" on these trips; that he did some work on these trips such as helping out with the loading; that on one occasion he went to Susanville with the company's superintendent and on this trip he poured concrete, and cut a door in a wall; that there had been no agreement he was to receive pay for this work, yet he was paid some four days thereafter, and the company also paid the cost of his meals and hotel bill during the trip. There was conflict in the evidence concerning the arrangements that were made for the trip on which he received his injuries. For instance, appellant Rippin testified along the general line that he invited respondent to go on the trip merely as a matter of mutual social enjoyment;

that he did not stipulate for or expect any help in the doing of his work, because that was his job and he was capable of doing it; that the two men were close neighbors and well acquainted; that there was no occasion for him to solicit aid. Under the familiar rule, we must consider the evidence in the light most favorable to respondent.

Section 403 of the Vehicle Code defines a guest as one who accepts a ride without giving compensation for such ride. The proper construction of this language has frequently received the attention of our appellate courts, and in *McCann v. Hoffman*, 9 Cal.2d 279, at page 283, 70 P.2d 909, at page 911, the court reviews numerous cases on the subject and declares; "* * * the nature of the compensation as contemplated by such a statute is as variable as the particular facts involved"; that "many benefits or considerations other than cash or its equivalent have been held to be payment or compensation within the meaning of the language adopted by the Legislature"; and that compensation could exist "when the plaintiff accepted the ride at the behest of the driver to assist the latter in arriving at his destination or fulfilling the object of the journey." We think the contention here advanced must be resolved by considering whether from this record the jury could reasonably infer that the respondent did accept the ride at the behest of Rippin to assist him in fulfilling the objects of the journey he was about to make.

[2] The discussions that occur when the owner or driver of an automobile takes another into the car for a ride are apt in most cases to be sketchy and fragmentary since neither anticipates an accident, nor does either have the guest statute in mind. They are seldom conscious of making anything in the nature of a bargain. Such was the case here. From what occurred the jury could reasonably have concluded that Rippin requested respondent to accompany him; that when he did so he pointed out the difficulties that would probably be incurred and that the trip would be long and tiresome, consuming some 15 to 16 hours; that chains would have to be used. The jury

were further entitled to consider the past relations of respondent and the appellants and the fact that he had been useful in small ways on other trips he had taken. We think the jury were sufficiently supported by the record in their conclusion that there was a common understanding between the two men that the suggested aid would be forthcoming and that it constituted compensation for the ride. *Christiana v. Rattaro*, 81 Cal.App.2d 597, 184 P.2d 682; *Yates v. J. H. Krumlinde & Co.*, 22 Cal.App.2d 387, 71 P.2d 298.

[3-6] It is next contended that the evidence is insufficient to support the implied finding of the jury that appellant Rippin was negligent in the operation of the truck. The testimony relative to this contention shows the following: The truck was a two-ton Chevrolet equipped with a steel box body approximately 4 feet high and 12 feet long. At Susanville it was loaded with about 5 tons of animal refuse. The two men stopped at Inskip Inn for coffee, at which time Rippin observed that he had a "short pedal", that is, the brake pedal was two inches from the floor board. He testified that with a short pedal the driver "pumps" the brake pedal to get more pressure. The brakes were hydraulic. After leaving the inn, Rippin shifted from the first to the fourth or highest gear. As the truck reached the crest of Inskip grade its speed was 30 to 35 miles per hour. After starting down the grade Rippin shifted back to third gear, but the truck continued to gain speed. He then endeavored to apply the brakes and discovered that they did not take effect. He then attempted to change to a lower rear axle gear by means of a switch located on the dashboard. Still gaining speed, he attempted to shift to second gear and at that point discovered that the clutch was out. The truck proceeded down the grade out of control until it turned over, injuring respondent. Rippin said he did not know what caused the brakes to go out, but as to the clutch he said, "I could have jerked it when I flipped it into the two-speed and tore that out." There was evidence that the mechanical condition of the truck had been checked some three

weeks before the accident and that the brakes were at that time in satisfactory shape. After the accident it was found that the brake cylinder on the right rear wheel had exploded, due in the opinion of one witness to overheating, also that the brakes showed signs of excessive wear, the brake bands having only 40% efficiency remaining. On that type of truck the bursting of the brake cylinder eliminates brake efficiency except as to the mechanically-controlled emergency brake. Rippin testified that he had used the brakes considerably going downgrade with the heavy load and that could have had something to do with his losing the brakes; that the brakes could have burned out. While Rippin also testified that he had observed nothing wrong with the equipment until the failure of the brakes and the going out of the clutch after he had already embarked upon the downgrade, the jury were not obliged to believe that such was the case and could infer from the observation of the short pedal and the necessity of pumping to get brake pressure and from Rippin's testimony that he could have burned the brakes out, that he did in fact have warning that his equipment was in a dangerous condition when he started down Inskip grade. We think from the facts related that the question of Rippin's negligence was for the jury to determine and that their determination is supported by substantial evidence and by the reasonable inferences which they could have drawn therefrom. Indeed, the jury could have considered that because the truck had been for some time and was at the time the accident happened under the exclusive control of Rippin and because ordinarily trucks do not run away down grade unless the one having the control of the truck has been negligent, that Rippin had in some way failed to exercise due care. Such facts constitute circumstantial evidence from which an inference of want of care may be drawn. In short, the doctrine of *res ipsa loquitur* was applicable to the situation portrayed by pleadings and the evidence here. Plaintiff had pleaded negligence in general terms and, while he had offered evidence suggesting definite negligent acts and omis-

sions he had not thereby waived his right to rely upon the evidentiary value of the circumstantial evidence just referred to. Much less had such circumstantial evidence been eliminated from the record by the introduction into evidence of testimony as to the acts and conduct of Rippin and as to the condition of his equipment. As said in *Leet v. Union Pac. R. R. Co.*, 25 Cal.2d 605, 621, 155 P.2d 42, 51, 158 A.L.R. 1008: "If, because of the circumstances of the case and the probabilities, an inference of negligence is raised, the doctrine should be applied, it is difficult to see why its application should be denied merely because plaintiff proves specific acts of negligence. There is no reason why such proof should wholly dispel the inference any more than it would in any other case. The plaintiff is penalized for going forward and making as specific a case of negligence as possible. If he endeavors to make such a case he runs the risk of losing the benefits of the doctrine to which the circumstances entitle him. Rather than place him in such a position he should be encouraged to prove as much as possible. The end result is not injurious to the defendant. He is not injured by the fact that the inference of negligence arose. The circumstances established a foundation therefore based upon probability. Indeed, he is in a better position as he has specific evidence to meet before the trier of fact that may be helpful to him. The case goes to the trier of fact with the general inference of negligence, plus other evidence of specific acts of negligence, to be weighed against defendant's showing. There is no reason for applying a different test for determining when the inference is wholly dispelled as a matter of law in a case where *res ipsa loquitur* is applicable, than is used in the case of any other inference. The instances in which an inference is dispelled are rare * * *. Whatever the test may be, there is no occasion for a different one when considering the inference arising from the application of the doctrine of *res ipsa loquitur*. Hence, we conclude that evidence of specific acts of negligence does not deprive plaintiff of the benefit of the doctrine, unless the case

is one where the inference would be dispelled as a matter of law under the same rules that apply in cases generally."

[7] Certainly it cannot be said from the record here that the introduction of evidence as to specific negligent acts or omissions so dispelled the inference as in effect to eliminate it from the case. It is true that respondent did not ask the trial court to instruct the jury upon the doctrine of *res ipsa loquitur*, but that does not mean that when we search the record to determine whether or not it supports the verdict we can ignore the presence of the inference simply because the jury were not instructed upon the matter. The doctrine is grounded upon common observation and common sense, and, whether instructed or not upon the matter, the jury is competent to draw the inference if it desires to do so. We cannot say that the jury in this case did not use their common knowledge and common sense and conclude that by reason of the circumstances Rippin was negligent in some way unexplained by the testimony proceeding from either side. If they did so they would be applying the doctrine exactly as they might have applied it had the respondent stopped short by proving the circumstances justifying the inference of negligence. Had he done so and had the jury with or without instruction defining the doctrine of *res ipsa loquitur* determined this case by drawing the inference of negligence it could not be said that the record did not support the jury's verdict.

[8] Appellants next contend that the trial court committed reversible error in admitting testimony of the witness Jones as to the way he would operate such a truck so loaded on that particular grade. By occupation, Jones was a truck driver and was familiar with the truck involved in the accident which injured respondent. He had driven it on the company's business and he had driven it loaded down the Inskip grade. He knew the road and he described the grade as winding and fairly steep. He said that the truck had four speeds forward "conventional" and had a lower axle which gave four more speeds,

totaling eight speeds forward and two backward. Over objection as to materiality and competency he testified as follows: "Well, when I approach this hill I slow down to a speed where I shift into lower gears and shift it into second gear and use my brake and compression both to go down this hill, it is impossible to go down using compression and brakes alone. * * * At the top of the hill I slow down where I can shift into a lower gear." When he testified that in order to take that truck with its load down the Inskip grade it was necessary to use both motor compression and brakes and that neither alone would suffice, he was testifying as to facts within his own knowledge and experience and such testimony was admissible as it had to do with the conditions under which the truck was being operated by Rippin at the time of the accident. Bearing in mind that Rippin, after starting down the grade, attempted to work back through the gears to get compression and so endeavoring threw the gear switch as part of the process of gear reduction, thus, as he said, perhaps disabling the clutch, it became proper to introduce evidence tending to show that in the proper operation of the truck the gear reduction should have been accomplished at the beginning of the grade or just before entering it. This was a matter which well might be beyond the common experience of the jury, bearing in mind the complicated gear structure and the driving tactics required of one driving a heavily-loaded vehicle down a steep and winding grade. Such an operation may well be different from the driving of a passenger car down the same grade. The proper method of doing this was therefore a proper subject of expert testimony and the witness had qualified in that respect. Had he therefore been asked as such expert to describe the proper manner of launching that vehicle upon that grade no objection would have been valid. But he was first asked what his "own procedure" was on entering that grade with a loaded truck and there was some discussion between court and counsel as to the admissibility of the answer to that question. He was then asked if he would describe

"the proper method of proceeding down over that hill at that particular point in that truck", and he stated that he would describe it the way he did it. Objection was again interposed because the question was not limited to the mechanical operation of the truck and the witness might be a different type of driver from Rippin and still both be safe drivers. Counsel for the appellants added that he had no objection to the witness testifying that he would do certain things on going down a grade, but as to what he would do under the same circumstances confronting Rippin was inadmissible in evidence. The court overruled the objection and the witness stated, "Well, I will describe it the way I did it, whether it is proper or not" and counsel for the respondent stated that was what he wanted and "not to say the proper way." The evidence above narrated was then given. We think the fair import of the witness' testimony was that he was describing the way the vehicle ought to be operated by describing the way he would do it, based upon his experience as a truck driver and as having driven that truck under similar conditions to those under which Rippin was operating it. So considered, we think the introduction of the testimony was not erroneous and certainly would not justify the reversal of the judgment.

[9, 10] Appellants requested the court to give the following instruction: "If you believe from the evidence that the plaintiff Benjamin C. Fedler rode on the automobile truck of the defendants solely for his own pleasure and benefit, and any help or assistance that he may have given to the defendants, or either of them, during such ride, was volunteered by the plaintiff, then you are instructed that the plaintiff herein was a guest at the time and place of this accident and was not a passenger." This instruction is practically verbatim the same as that refused in the case of *Yates v. J. H. Krumlinde & Co.*, supra. The instruction there received the approval of the appellate court and its refusal was held to be error. As far as it went we think the instruction stated the law. It was apparently aimed at a possible con-

tention or argument that even though the respondent embarked upon the journey *solely* for his own pleasure and *solely* for his own benefit, and therefore as a guest, he might change his status by voluntarily rendering service en route. As the court in *Yates v. J. H. Krumlinde & Co.*, supra, said at page 390, of 22 Cal.App.2d, at page 300 of 71 P.2d citing *McCann v. Hoffman*, supra, and *Walker v. Adamson*, 9 Cal.2d 287, 70 P.2d 914: “* * * we must now take it to be settled that if a person accepts a ride from another for his own pleasure, he does not become a passenger for compensation merely because he may perform some incidental voluntary service en route.” The instruction as requested could properly have been given. However, the court modified or amended the same by inserting therein the following language, “and that no assistance was contemplated or expected”, so that the instruction then told the jury that if the respondent rode on the truck solely for his own pleasure and benefit and if any help he might have given during the ride was volunteered by him and if *no assistance was contemplated or expected*, then he was a guest at the time of the accident. It is argued that the underlined portion of the instruction permitted the jury to infer that appellants’ expectation of some help from respondent would be sufficient to make him a passenger. But when the instruction is read with others defining the terms “guest” and “passenger” the criticism is unwarranted. The jury were told that a guest was one who was invited, expressly or impliedly, to enjoy the hospitality of a driver of a vehicle; who accepted such hospitality; who rode either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver or his principal as compensation for the ride other than the mere pleasure of the rider’s company. Further, the jury were told that where the driver or his principal received compensation which was the chief inducement for the rider’s transportation and which was given and received as compensation and as a business transaction then such rider was a passenger. If the reference in the criti-

cized instruction to contemplation or expectation of assistance be read in the light of the foregoing, then we think the jury could not have been led into thinking that mere expectation on the part of appellants that respondent would render some assistance would, standing alone, make him a passenger.

The judgment is affirmed.

PEEK, J., and SCHOTTKY, Justice pro tem., concur.



L. B. LABORATORIES, Inc. v. MITCHELL.

Civ. 18177.

District Court of Appeal, Second District,
Division 3, California.

Aug. 31, 1951.

Rehearing Granted Sept. 18, 1951. *

Action by the L. B. Laboratories, Inc., against Walter A. Mitchell for damages in having to pay interest and late filing penalties for federal taxes, as well as counsel fees for negotiations with the Treasury Department. The Superior Court, Los Angeles County, Carl A. Stutsman, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to show the defendant negligent in the performance of his professional duties.

Judgment reversed.

1. Limitation of actions —32(1)

Action by taxpayer against certified public accountant, who had been employed to prepare tax returns, for damages in having to pay interest, late filing penalties for federal taxes, and counsel fees for negotiations with the Treasury Department, was for negligence and not breach of contract and two year statute of limitations applied to all claims. Code Civ.Proc. § 339, subd. 1.

2. Principal and agent —79(1)

Filing of tentative returns by certified public accountant, who was employed by

* For subsequent opinion see 237 P.2d 84.

taxpayer to prepare tax returns, constituted partial performance and filing completed returns constituted full performance, but incompleteness and incorrectness of tentative returns and delay in filing completed returns were elements which went to question of negligence of performance.

3. Negligence ⇨4

Where there is failure to employ knowledge, skill and judgment which is engaged to be rendered in professional employment, or other employment of highly specialized nature, courts base recovery upon negligence.

4. Negligence ⇨4

Member of the learned professions, and any one who undertakes employment because of his possession of exceptional skill, impliedly represents that he possesses and will employ degree of learning and skill usually possessed by those in good standing practicing their specialities in same locality and impliedly agrees to use his best judgment but does not guarantee results.

5. Negligence ⇨4

Certified public accountant impliedly represented that he possessed and would employ degree of learning and skill usually possessed by other certified public accountants in good standing practicing in same locality and impliedly agreed to use his best judgment but did not guarantee results.

6. Contracts ⇨326

While failure to achieve guaranteed result is actionable, independently of negligence, this is not true where there is no guaranty of result.

7. Contracts ⇨312(1)

Where contractual undertaking is to employ special skill there is no breach of duty because of errors of judgment if such skill and operator's best judgment are employed.

8. Action ⇨27(2)

Where contractual duty to employ special skill is breached by negligent performance, cause of action is for negligence alone.

9. Principal and agent ⇨79(1)

In action by taxpayer against certified public accountant, who had been employed to prepare tax returns, for damages in having to pay interest, late filing penalties for federal taxes and counsel fees for negotiations with Treasury Department, showing of negligence on part of accountant would not have given taxpayer cause of action until taxpayer paid additional sums it would not have been required to pay if accountant's services had been properly rendered.

10. Negligence ⇨134(1)

Negligence forming basis of cause of action against certified public accountant had to be established by competent evidence, or such evidence as law required to establish breach of professional duty.

11. Evidence ⇨474½

Whether certified public accountant, who allegedly failed to prepare and file tax returns on time, employed learning, skill and care usually employed by those in same profession in like matter was not within common knowledge and experience of non-experts.

12. Principal and agent ⇨68

Every failure of agent to file completed income tax returns on time is not negligent breach of duty.

13. Negligence ⇨4

When act is negligent if done without reasonable skill, skill which actor is required to exercise to avoid being negligent in doing of act is that which he, as reasonable man, should recognize as necessary to prevent act from creating unreasonable risk of harm to another.

14. Evidence ⇨474½

The intricacies of income tax laws, regulations, policies and practices are not matters of common knowledge

15. Principal and agent ⇨79(5)

In action by taxpayer against certified public accountant, who had been employed to prepare tax returns, for damages in having to pay interest, late filing penalties for federal taxes and counsel fees for negotiations with Treasury Department, evidence

failed to support finding of negligence on part of accountant in not having filed completed tax returns on time.

16. Principal and agent ⇐79(9)

In action by taxpayer against certified public accountant, who had been employed to prepare tax returns, for damages in having to pay late filing penalties for federal taxes, accountant would not be liable for any loss sustained by taxpayer in excess of amount paid in compromise of penalties as distinguished from release of liability for additional taxes.

17. Principal and agent ⇐79(5, 9)

Where taxpayer negotiated tax settlement and sought to recover amount of penalties and counsel fees from certified public accountant, who had been hired to prepare tax returns, on basis of negligence, burden was on taxpayer to prove amount paid in settlement of penalties alone and if overall settlement was incapable of segregation as between additional liability for excess profits and liability by way of penalty, taxpayer could not recover penalties or counsel fees.

Sheppard, Mullin, Richter & Balthis, Gordon F. Hampton and E. Talbot Calister, of Los Angeles, for appellant.

Walter G. Danielson and H. Spencer, St. Clair, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant Mitchell, a certified public accountant, appeals from a judgment for plaintiff in the amount of \$17,428.83 rendered after a trial to the court.

The complaint, filed December 7, 1948, alleged defendant was specially employed to prepare plaintiff's tax returns for the calendar years 1943 and 1944, that defendant failed to prepare and file these returns until 1946, and as a result plaintiff was damaged in having to pay interest and late filing penalties for federal taxes, as well as counsel fees for negotiations with the Treasury Department. These grievances are stated in the form of five causes of action: (1) For interest and penalties resulting from late filing of 1943 federal returns; (2) for interest resulting from late

filing of the 1943 State return; (3) for interest and penalties resulting from late filing of 1944 federal returns; (4) for interest resulting from late filing of the 1944 State return; (5) for counsel fees incurred in negotiating a settlement with the Treasury Department. In the discussion which follows we break the five into (1) causes of action arising because of interest payments, and (2) causes of action arising because of penalties, thus taking part of the first and third causes of action together with the fifth.

Defendant is a certified public accountant who has conducted his own practice in Los Angeles since 1935. He held himself out as a specialist in tax matters and had prepared returns for plaintiff in 1941 and 1942. On February 7, 1944, defendant wrote a letter to plaintiff agreeing to conduct an income tax review of plaintiff's books and prepare state and federal tax returns for the year 1943. A similar agreement was made in January, 1945, covering the 1944 tax returns. On March 15, 1944, defendant filed "tentative" 1943 returns which consisted of entries of \$20,000 for "net income" and \$5,300 for income tax due, which amount was paid by plaintiff at that time. These entries were estimates based on the corresponding figures on the corporation's 1942 tax return. Mitchell asked for and was granted an extension of time until May 15, 1944, to file an amended or completed return. A second extension was granted until June 15, 1944, at which time he filed another return which was identical with the "tentative" return previously filed. Thus in 1944 no 1943 return fully listing income and deductions was filed but the estimate tax was paid on time. In 1945 the same "tentative" and "completed" procedure was followed, with the indicated tax being paid. Finally, in March, 1946, defendant filed "amended" returns for 1943 and 1944 which clearly contained the necessary information. The additional indicated tax was paid by plaintiff at the time the "amended" returns were filed. A similar procedure was followed with respect to the California franchise returns for 1943 and 1944. In the margin we have set out the estimates and payments

made over the two-year period as well as the figures composing the damages as found by the trial court.¹

On January 9, 1947, after the "amended" returns were filed, an Internal Revenue agent made an audit of plaintiff's books and determined that there should be an assessment for additional taxes and penalties in the amount of \$52,386.46. A portion of Mrs. Olson's salary for each year was disallowed. The agent stated to defendant that since the Olsons owned all the stock excessive salary might be, in part, regarded as dividends, and as such, not deductible from the corporation income. The agent also informed defend-

ant there would probably be a late filing penalty unless reasonable cause for such delay in filing completed returns were shown. Defendant prepared a comprehensive affidavit stating that the late filing was not due to an intent to evade the law, and that the final returns were late because the corporation relied on defendant and he was unable to do the work because of insufficient accounting assistance due to the manpower shortage. Olson, president of the plaintiff corporation, refused to sign the affidavit. His reason was that it presented the Swedish officers of the corporation in an unfavorable light. Defendant later prepared and filed his own late

¹ The various tax figures involved in this case are as follows:

	1	2	3	4	5	6	7	8
	Paid at time tentative return filed	Indicated tax March 22 1946	Paid at time amended return filed 3-22-46	Interest paid March 22 1946	Additional taxes due after Treasury Audit	Total taxes paid	Statutory Penalties Proposed	Compromise payments in addition to deficiencies
FEDERAL								
Income:								
1943	5300.00	4908.55	(391.45)	0.00	(refund)	4908.55	1227.21	613.61
1944	5300.00	6255.29	955.29	68.88	69.93	6325.22	1581.30	790.65
Decl Val								
Excess Profits								
1943	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
1944	0.00	1064.10	1064.10	65.69	415.53	1479.63	369.91	184.95
Excess Profits								
1943	0.00	18606.14	18606.14	2352.74	5265.47	23871.61	5967.90	2983.95
1944	0.00	44047.24	44047.24	2715.07	5066.22	49113.46	12278.36	6139.18
STATE								
1943	766.12	1324.99	553.87	67.71	0.00	1324.99	0.00	0.00
1944	705.04	2433.11	1727.07	106.50	0.00	2433.11	0.00	0.00
				5366.59	10817.15		21424.63	10712.34
				(4)	(5)		(7)	(8)

The judgment awarded by the court below is composed of:

The interest paid (column 4) \$ 5366.59
 The compromise payment (col. 8) 10712.34
 Counsel fees (not shown above) 1350.00

Total \$17428.93

The amounts listed in column 5 were paid by plaintiff at the time of the settlement and are not directly involved in this lawsuit.

The total of column 7 is the *statutory penalty* which was not imposed but rather a compromise sum as indicated by the total of column 8 was paid by plaintiff.

filing affidavit. On behalf of plaintiff a protest was filed by defendant to the proposed additional assessment of \$52,386.46, and he later met with the Conference Section of the Technical Staff, Pacific Division, Bureau of Internal Revenue. The protest was denied and in June, 1947, defendant requested a hearing before the complete staff. The hearing was set for March 15, 1948, and when notified defendant informed Mr. Olson who immediately called his attorney, Mr. Danielson. They dismissed defendant and turned the negotiations over to Alva Baird, an attorney and tax practitioner. A compromise settlement was reached regarding penalties and the proposed deficiency assessments, and plaintiff paid the amount agreed upon. See Note 1. It is this compromise sum which is the major element of damage in this action.

[1] Defendant pleaded the statute of limitations. The first issue for our determination is whether any of the claims are barred in whole or in part. Plaintiff claims the action to be one for damages resulting from breach of a written contract of employment and that the four-year statute applies. If so, none of the claims is barred. Code Civ.Proc., sec. 337(1). Defendant claims the gravamen of the action is negligent performance of the contract, that is, failure to use the skill of the profession, and thus the two-year tort statute applies to bar all causes of action. Code Civ.Proc., sec. 339(1). We conclude that the action is for negligence and not breach of contract, and that the two year statute applies. This would bar the claims based on interest payments, March 22, 1946, but not the claims based on the settlement. Penalties and counsel fees, November 23, 1948.

[2] In support of its contention that the action is for breach of contract, plaintiff claims complete failure of performance on the part of defendant. It contends that the tentative returns were nullities and that their preparation and filing amounted to not even partial performance by defendant. The court found that they were

nullities and of no force or effect whatever. We will agree that if this were true and if there was complete failure of performance on defendant's part, recovery would necessarily have to be for breach of contract. But we think the finding was in error and agree with defendant that the filing of the tentative returns constituted partial performance, that the filing of the completed returns constituted full performance except for the delay, and that the incompleteness of the tentative returns, and the delay in filing completed returns are elements of performance which go to the question of negligence. Plaintiff filed returns and paid taxes, although the returns were incorrect and incomplete. It now says, in effect, that it was in the position of one who had filed no returns. The two defaults and their consequences are dissimilar. The incomplete returns were recognized by the Bureau of Internal Revenue and plaintiff was not, and could not have been, accused of having wilfully failed to file returns. If defendant was guilty of breach of duty it was because his imperfect performance constituted negligence.

[3-5] The courts have uniformly based recovery upon principles of negligence where there is failure to employ the knowledge, skill and judgment which is engaged to be rendered in professional employment, or other employment of a highly specialized nature. A member of the learned professions, and for that matter any one who undertakes employment because of his possession of exceptional skill, impliedly represents that he possesses and will employ the degree of learning and skill usually possessed by those in good standing practicing their specialties in the same locality. He impliedly agrees to use his best judgment but does not guarantee results. *Roberts v. Parker*, 121 Cal.App. 264, 8 P.2d 908. "In all those employments where peculiar skill is requisite, if one offers his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretensions are unfounded, he

commits a species of fraud upon every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully, and without fault or error; he undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses consequent upon mere errors of judgment." (Cooley on Torts (4th Ed.), Vol. 3, p. 335.) Lawyers are in this category. *Hays v. Ewing*, 70 Cal. 127, 11 P. 602; *Gambert v. Hart*, 44 Cal. 542; 3 Cal.Jur. 670. The rule has been applied to abstractors, architects and financial agents, *Cooley*, supra, p. 336; also to engineers, *Cowles v. City of Minneapolis*, 1915, 128 Minn. 452, 151 N.W. 184; explosive experts, *Jackson v. Central Torpedo Co.*, 1926, 117 Okl. 245, 246 P. 426, 46 A.L.R. 338; oculists, *Price v. Ga Nun*, 1895, 11 Misc. 74, 32 N.Y.S. 801, 802; river pilots, *The Tom Lysle*, D.C.Pa.1891, 48 F. 690, 693; threshers, *Van Nortwick v. Holbine*, 1901, 62 Neb. 147, 86 N.W. 1057; and accountants, *Smith v. London Assur. Corp.*, 1905, 109 App.Div. 882, 96 N.Y.S. 820; see also, *In Re Kingston Cotton Mill Co.*, 1896, 2 Ch. 279, 288.

[6-8] While the failure to achieve a guaranteed result is actionable, independently of negligence, this is not true where there is no guaranty of the result. Where the undertaking is to employ special skill there is no breach of duty if such skill and the operator's best judgment are put forth. Under such circumstances, mere errors of judgment are not actionable. Where the duty is breached by negligent performance the cause of action is for negligence alone. In *Harding v. Liberty Hospital Corp.*, 177 Cal. 520, 524, 171 P. 98, 100, after reviewing the California cases the court said: "Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury, and that the

fact that the parties stand in contractual relation to each other does not operate to change the rule or extend the time for the commencement of such actions." See *Denning v. State*, 123 Cal. 316, 55 P. 1000; *Basler v. Sacramento, etc., Ry. Co.*, 166 Cal. 33, 134 P. 993; *Krebenios v. Lindauer*, 175 Cal. 431, 166 P. 17; *Marty v. Somers*, 35 Cal.App. 182, 169 P. 411. In the *Denning* case the theory of the action was breach of contract on the part of the employer to furnish a safe place for work, and in holding the action was in tort, the court said, 123 Cal. at page 323, 55 P. at page 1002: "Here the contract of employment has nothing whatever to do with the liability, except to create a duty on the part of the employer—a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages. Nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz. that of employer and employe, and under the old system of pleading was always classed as an action *ex delicto*."

[9] Plaintiff's right to recovery depended upon its ability to prove defendant was negligent within the foregoing rules. If negligence had been proved, no cause of action would have arisen until plaintiff paid additional sums which it would not have been required to pay if defendant's services had been properly rendered. If defendant were liable for negligence, section 339(1), Code of Civil Procedure would apply, *Jensen v. Sprigg*, 84 Cal.App. 519, 258 P. 683, and any action based upon the interest payments made on March 22, 1946, would have been barred in two years. It is unnecessary to consider the point raised that since plaintiff had the use of its money while the interest charge was accumulating, no detriment was suffered. The trial court found that the statute of limitations was tolled as to all five causes of action. The finding was irrelevant as to the sums paid in the 1948 settlement, and without support in the evidence as to the sums paid in March, 1946. Plaintiff, of course, cannot claim concealment by de-

defendant of the fact that the interest payments were made more than two years before their action was commenced.

[10,11] The court found that defendant had been negligent in failing to prepare and file proper returns on time. The most important question in the case is whether this finding of negligence has support in the evidence. Since the cause of action was for negligence it was necessary that negligence be proved by competent evidence, or such evidence as the law requires to establish breach of professional duty. If it can be said to be of common knowledge, under the facts in evidence, that defendant did not employ the learning, skill and care usually employed by those in the same profession in like matters, and that defendant's dereliction involved an unreasonable risk of loss to his client, the finding is supported. Upon the other hand, if the question was one as to which expert evidence was required, the finding is without support, inasmuch as there was no expert testimony introduced by plaintiff. In the inquiry whether defendant was negligent, numerous factual elements were to be taken into consideration. Defendant's work was handicapped by the absence of his four men accountants who were in military service, and defendant was unable to fill their positions. The account books of plaintiff were inaccurate, showing for the year 1943 a profit of \$30,-554.37, which was later shown by defendant's audit to be \$41,526.73. As soon as defendant obtained additional help in December, 1945, he made an audit of the books, which took six weeks of continuous work. The failure to file completed returns on the due date, or within the time extended, would not necessarily have resulted in the imposition of penalties. The matter rested largely within the discretion of the personnel of the taxing authorities. This was an important fact bearing upon the question whether the matter of delay was, under the circumstances of the case, a material departure from standard practice.

Section 291(a) of the Internal Revenue Code, 26 U.S.C.A. § 291(a), provides that the penalty shall be exacted "In case of

any failure to make and file [a] return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, *unless* it is shown that such failure is due to reasonable cause and not due to willful neglect, * * *." The Commissioner's general interpretation of the exception in the statute is that if the delinquency occurs notwithstanding the exercise of ordinary care and caution, the penalty will not be charged. Many cases under this section hold that no penalties will be imposed where a taxpayer in good faith relies on the advice of a tax expert. See, *Orient Investment & Finance Co. v. Commissioner*, 1948, 83 U.S.App.D.C. 74, 166 F.2d 601, 3 A.L.R.2d 612. It would have been material to inquire whether Mitchell had reasonable cause for believing that the facts stated in the affidavit which he prepared for the signature of Olson would be accepted as sufficient to relieve plaintiff from the payment of penalties, and if so, whether such belief and reliance would accord with standard practice of accountants, under the same or similar circumstances. In this connection Mitchell testified that he informed Olson that it was his opinion the filing of tentative returns under the circumstances would be accepted as evidence of good faith and that a sufficient showing could be made to secure a waiver of penalties. He testified that he so believed. He filed returns for Taylor Soap & Chemical Company, Inc., a subsidiary of plaintiff, for 1944. The accounts of the subsidiary were confused with those of plaintiff. Tentative, and later completed, returns were filed for the subsidiary in the identical manner followed in filing plaintiff's returns. Mitchell represented the company when the circumstances of the case were reviewed and no late filing penalties were assessed. It was in evidence that Mitchell had likewise filed tentative and later completed returns for another corporation, and that although a penalty had been recommended, it was eventually waived. This testimony, if believed, indicated that he was exercising his best judgment and believed he was following

a safe practice. The answers to these several questions are not within the common experience and knowledge of the nonexpert.

[12] It is not enough to say that defendant failed to file sufficient returns on time, that this was the basis of the claim for penalties, and that plaintiff compromised the claim, yet in final analysis no more than this was proved. It cannot be denied that the dereliction involved some risk of harm to plaintiff through the imposition of penalties. That would be true of any default for which no acceptable excuse was given under the penalty provisions. But it is clear that it cannot be held, as a matter of law, that every failure of an agent to file completed income tax returns on time is a negligent breach of duty. The inquiry here was whether defendant realized or should have realized that there was an unreasonable risk.

[13-15] "When an act is negligent if done without reasonable skill, the skill which the actor is required to exercise to avoid being negligent in the doing of the act is that which he, as a reasonable man, should recognize as necessary to prevent the act from creating an unreasonable risk of harm to another." Rest., Torts, sec. 299, p. 803. The intricacies of income tax laws, regulations, policies and practices, are not within common knowledge. Only those versed and experienced in that field would be qualified to judge whether defendant's conduct failed to measure up to standard practices, or, in other words, whether among competent accountants and tax specialists it would be deemed to involve unreasonable risk. Expert testimony was required for the reasons that it is required in malpractice cases where resort must be had to technical knowledge in order to pass judgment on the questioned conduct. *Perkins v. Trueblood*, 180 Cal. 437, 443, 181 P. 642; *Engelking v. Carlson*, 13 Cal.2d 216, 221, 88 P.2d 695. In the absence of evidence which would support a finding of negligence under the rules stated, a reversal of the judgment is demanded.

The complaint alleged that defendant "negligently and carelessly prepared said

tax returns in that he failed to properly set forth therein all items of income and deduction," and that "as a direct and proximate result of the negligence and carelessness of the defendant" plaintiff was damaged, etc. The answer denied negligence and alleged that any loss suffered by plaintiff was due to its own negligence and carelessness as a direct and proximate cause thereof, and that plaintiff voluntarily attempted the course that led to its alleged losses. Upon the trial plaintiff changed from its theory of negligence to one of breach of contract, and its counsel stated: "I do not yield to the suggestion that this is a negligence case. And I might here respond that the reason I didn't ask Mr. Marsh as to what was the standard, whether the returns were prepared in accordance with the degree of skill and care practiced by other certified public accountants in this community, is that that question would have imported an action in tort, malpractice, and I am not suing on malpractice." Plaintiff still maintains this position. Defendant forcefully complains that plaintiff's switch from the theory of negligence to one of breach of contract took him by surprise, inasmuch as he was prepared to defend against the charge of negligence and had not anticipated or prepared to meet the claim that the action was for breach of contract alone. It is clear that plaintiff pleaded one theory of recovery and recovered on another. It abandoned the theory upon which recovery could have been had if negligence had been proved for an untenable theory of breach of contract. Nothing in the complaint would justify the elimination of the charges of negligence, leaving the cause of action for simple breach of contract. The court found that defendant breached his contract and that his failure to comply therewith was due to his carelessness and negligence, thus attempting to embrace both theories and to determine that if plaintiff was not entitled to recover on one theory it could recover on the other. We do not doubt that defendant was taken by surprise at the trial but find it unnecessary to determine whether he was prejudiced to an extent that would require a retrial upon that ground.

[16, 17] There was another issue in the case that appears to have been given scant consideration at the trial, although it is argued strenuously by the appellant. The salary of Olson, as president of plaintiff corporation, was \$33,686.44 in 1943. The net income of the corporation was \$41,526.73. In 1944 Olson's salary was \$44,705.12, and the net profits of the company before taxes amounted to \$76,122.77. Some question had been raised on behalf of the government whether the amounts paid to Olson as salary should be disallowed in part, thus increasing the amounts of profits which would be subject to excess profits tax. If, for example, the 1944 salary had been disallowed to the extent of its increase of \$11,018.68 over 1943, the additional tax due from the corporation would have amounted to 85½ per cent, or \$9,420.98. (We accept appellant's figures, which are not questioned by respondent.) In the settlement that was made, the Treasury Department waived objection to the large salary paid to Olson in each year, although approximately one-half of the salary paid to Mrs. Olson was disallowed. The settlement was nominally a compromise of the penalties claimed, approximately 50 per cent of the claimed penalties being accepted in settlement. The entire matter of plaintiff's liability was an open one and an element of the proposed assessment of penalty may have been the waiver of a claim for additional tax. An important question in the case will be whether the settlement represented a compromise of a liability for additional taxes, as well as the claim for penalties. In no event should defendant be held liable for any loss sustained by plaintiff for more than the amount paid in compromise of the penalties, as distinguished from the amount, if any, paid for the release of liability for additional taxes. Since the settlement was negotiated entirely by plaintiff, and was made without defendant's consent, the burden should be on plaintiff to establish what, if any, amount was paid in settlement of penalties alone. If there was an overall settlement incapable of segregation as between additional liability for excess profits and liability by way of penalty, we do not see how plaintiff

could recover. Counsel fees in negotiating the settlement should be considered on the same basis.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.



106 Cal.App.2d 471

WHITESIDE v. UNITED THEATRES et al.

Civ. 7919.

District Court of Appeal, Third District,
California.

Sept. 11, 1951.

Hearing Denied Nov. 7, 1951.

Action by Terry T. Whiteside against the United Theatres, a corporation, and another for damages for personal injuries. The Superior Court, Nevada County, James Snell, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Schottky, J. pro tem., held that the evidence was insufficient to sustain the judgment against the corporate defendant.

Affirmed in part; reversed in part.

1. Principal and agent ⇨22(1)

Declarations of agent testified to by third persons were not admissible to prove agency.

2. Theaters and shows ⇨6(25)

In action by theater patron against corporation and individual as alleged owners of theater for damages for personal injuries, evidence, including statutory presumptions as to ownership of property, was insufficient to show part ownership of theater by corporate defendant. Code Civ. Proc. § 1963, subs. 11, 12.

3. Theaters and shows ⇨6(25)

In action by theater patron against corporation and individual as alleged owners of theater for damages for personal injuries, evidence, including statutory presumptions as to ownership of property, supported implied finding of jury that individ-

ual in active control and operation of the theater was owner. Code Civ.Proc. § 1963, subs. 11, 12.

4. Appeal and error ☞994(2)

In action by theater patron against corporation and individual as alleged owners of theater for damages for personal injuries, it was for jury to weigh testimony of individual defendant against presumptions and other evidence. Code Civ. Proc. § 1963, subs. 11, 12.

5. Appeal and error ☞1064(1)

Theaters and shows ☞6(39)

In action by theater patron against corporation and individual as alleged owners of theater for damages for personal injuries, evidence warranted giving of instructions on disputable presumptions relating to ownership of property by individual and no prejudice resulted to corporate defendant, in view of fact that evidence was insufficient to sustain judgment against it. Code Civ.Proc. § 1963, subs. 11, 12.

6. Appeal and error ☞1066

Trial ☞252(8)

In action by theater patron against corporation and individual as alleged owners of theater for damages for personal injuries, instructions upon agency, correct abstract statements of law, should not have been given, in view of fact that only evidence of agency of corporation was inadmissible, though no prejudice resulted to individual defendant. Code Civ.Proc. § 1963, subs. 11, 12; Civ.Code, §§ 2334, 2338.

Russell A. Harris, Sacramento, for appellant.

Floyd H. Bowers, Roseville, for respondent.

SCHOTTKY, Justice pro tem.

On September 28, 1947, respondent was a patron of the Del Oro Theatre in Grass Valley. While walking between two rows of seats in said theater she stepped on a walnut and as a result fell and sustained certain personal injuries. She filed an action for damages on January 14, 1948, alleging in the first paragraph of her com-

plaint: "At all times herein mentioned the defendant, United Theatres, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and jointly with the defendant Jack Keegan, was and now is the owner of and engaged in a theatre and picture-show business within the City of Grass Valley, County of Nevada, State of California, under the firm, name and style of the 'Del Oro Theatre', wherein the said defendants offered entertainment to the public for an admission."

Paragraph I of the answer of defendants and appellants is as follows: "Answering Paragraph I, admit that the United Theatres has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and admit that the defendant Jack Keegan was and now is an employee in the theatre known as the Del Oro Theatre, located in the City of Grass Valley, County of Nevada, State of California, but deny each and all and every the allegations in said paragraph I contained not herein specifically admitted."

At the close of plaintiff's case defendants made a motion for a nonsuit upon the ground that there was no proof of ownership or control or operation of the theater by either of the defendants, and upon the ground that there was no proof of negligence. The motion was denied. At the conclusion of all the testimony in the case defendants moved for a directed verdict which motion was also denied by the court. The jury returned a verdict in favor of plaintiff and against both defendants for \$4,100.80, and defendants' motion for judgment notwithstanding the verdict was denied. The appeal is from the judgment entered on said verdict.

Appellants do not contend that the evidence is insufficient to prove that respondent's injuries were caused by the negligence of whoever were the owners and operators of the theater, or that the amount of damages involved is excessive; but appellants contend (1) that the evidence is insufficient to prove the ownership and operation of the theater in question by appellants or

either of them; and (2) that the court erred in giving certain instructions to the jury.

It is apparent from the complaint that respondent's counsel proceeded on the assumption that appellants were the owners and operators of the Del Oro Theatre. Appellants' answer is very carefully worded so as to include a denial of this allegation in the clause "but deny each and all and every the allegations in said paragraph I contained not herein specifically admitted," and the answer is not verified by any of the appellants, but by their counsel. Counsel for respondent apparently did not realize until the day before the trial, which was held on April 5, 1949, more than one year after the accident, that the ownership was to be contested.

Respondent introduced testimony relating to how she received her injuries and the nature and extent thereof, but, in view of the fact that appellants do not argue that respondent's injuries were not caused by negligence and do not contend here that the amount of damages awarded was excessive, it is unnecessary to summarize this testimony.

Respondent sought to connect appellants with the ownership and operation of the Del Oro Theatre chiefly by testimony relating to the activities of Ford B. Lytle, a claims adjuster with offices in Sacramento. She testified, over the vigorous objections of appellants, that Lytle called on her a few days after the accident, and informed her that he was a representative of the United Theatres and the Del Oro Theatre, and that he had received a letter from appellant Keegan regarding her claim. She referred Lytle to Mr. Bowers, her attorney.

Over the vigorous objections of appellants, Mr. Bowers, the attorney of record for plaintiff, testified that he and Mr. Lytle had engaged in numerous negotiations concerning the case. Several letters concerning the negotiations were introduced into evidence. Bowers testified that "Mr. Ford D. Lytle called at my office and he told me he was an attorney at law and that he represented the defendants in this case and the United Theatres, and I asked him who

owned the Del Oro Theatre and he said it was owned by the United Theatres, that they were the people that he represented." On October 16, 1947, F. P. Dunnington, Jr., of Lytle & Dunnington wrote the following letter to Bowers: "We have been advised by our client, Mrs. Terry T. Whiteside, that you are representing her in a claim against the United Theatres. We are the claim representatives for the insurer of the United Theatres in the Sacramento area. We shall be glad to discuss the matter with you at your convenience." Lytle requested and was granted permission by Bowers to have plaintiff examined by a physician selected by Lytle. The examination was conducted by Doctor Haig of Sacramento in November, 1947.

Other negotiations were conducted between Bowers and Lytle after the complaint was filed January 16, 1948. Lytle accepted service on behalf of the United Theatres. On April 14, 1948, Lytle wrote to Bowers, the last paragraph providing: "The understanding between you and me is that the Defendant need not appear or plead, and that no advantage will be taken of the failure to appear and to plead. However, I hate to be putting this off so long and would much prefer, as stated above, to bring the matter to a head, one way or another." Negotiations for a settlement failed, and Lytle by letter dated April 30, 1948, stated: "Under the circumstances, I have referred the matter to the office of Russell A. Harris, Esq., who will no doubt be in touch with you at an early date concerning the matter." The answer was filed June 5, 1948, by Russell A. Harris, attorney for defendants.

Lois LeDuc, City Clerk of Grass Valley, a witness called by respondent, testified that as part of her duties she issued business licenses in Grass Valley, and over objection of appellants further testified that between July 1, 1946, and the date of her testimony (April 5, 1949) she issued the business licenses for the Del Oro Theatre in Grass Valley; that the licenses were issued to the Del Oro Theatre, and Mr. Keegan gave the check for them; that she did not know if the name Del

Oro Theatre appeared on the check; that she did not know whether appellant Keegan signed the check as owner or manager of the Del Oro Theatre; that she did not know the name of the account upon which the check was drawn; that said business licenses contained a statement that Del Oro Theatre had paid into the City Treasury \$60 license fee; that the licenses issued to Del Oro Theatre never contained the name of appellant Keegan, but appellant Keegan did have a business license in his own name for his own real estate and insurance business.

Appellants in their defense called only two witnesses, appellant Keegan and Victor Vesley, janitor at the theater. Appellant Keegan testified that he had a real estate and insurance business of his own and that he was also manager of the Del Oro Theatre; that he had a license in his own name for the real estate and insurance business, but that the license for the Del Oro Theatre was in the name of the Del Oro Theatre and his name did not appear on said license; that the \$50 fee for said license was paid by check of the Del Oro Theatre signed by him (Keegan); that said check was not drawn against his funds but against the funds of the Nevada County Theatres, Inc.; that no money of his own was put into the said account; that he was the manager of the said Del Oro Theatre but that he had no interest whatsoever in said theater; that he was an employee of the Nevada County Theatres, Inc., and had been so employed since 1937; that prior to the year 1937 he was interested in another theater and at about that time he sold his interest to the Nevada County Theatres, Inc., and retained no interest whatsoever in any one of those theaters; that he is paid a salary; that social security deductions are made from his salary; that he had an immediate superior by the name of C. V. Taylor, who was also an employee of the Nevada County Theatres Inc.; that he makes a daily check of maintenance conditions of the Del Oro Theatre and makes reports to the San Francisco office of the Nevada County Theatres, Inc., every month; that he had no authority to con-

tract for any supplies for Del Oro Theatre over \$5 value and that anything over \$5 value was requisitioned from the office in San Francisco; that an accident report referring to respondent's accident was made out by him and one copy was sent to Cosgrove and Company, insurance brokers in San Francisco, and another copy was sent to the Nevada County Theatres, Inc.; that he is not a stockholder in either the Nevada County Theatres, Inc., or the United Theatres.

Appellants contend that the above evidence is insufficient to establish that they were the owners of the Del Oro Theatre. They argue that the statements and declarations of Lytle are incompetent to prove the fact of his agency and cannot bind appellants. They cite *Union Const. Co. v. Western Union Tel. Co.*, 163 Cal. 298, at page 305, 125 P. 242, at page 244, where the well established rule is thus stated: "Unless at least *prima facie* evidence of such authority appears, such conversations are not admissible. If, in the present instance, there is no sufficient evidence of the identity of the person answering the call as the agent of the defendant at its office, the evidence was properly excluded. It may be added that the statement of that person that he was such agent, was not, in and of itself, competent evidence of the agency. Agency is not provable by the mere declarations of the agent, not made under oath or in the presence of the principal, unless communicated to and acquiesced in, by the principal."

Appellants also cite *Scott v. Los Angeles Mountain Park Co.*, 92 Cal.App. 258, at page 263, 267 P. 914, at page 917, where this court said: "In support of their contention that the testimony referred to and sought to be elicited was admissible to prove the agency of H. A. Lloyd, the appellants cite the rule stated in 2 Corpus Juris, 933, which reads as follows:

"The rule that the declarations of an agent are as against his principal inadmissible to prove the fact of his agency does not apply to his testimony as a witness on the trial in which such fact is in issue; and consequently the testimony of the agent, unless he is disqualified for some other reason,

is competent to establish the fact of his agency, and the existence of facts from which the agency may be inferred,'—citing, also, *Raftis v. McCloud River Lumber Co.*, 35 Cal.App. 397, 170 P. 176.

"That the witness Lloyd might have been placed upon the witness stand and asked as to all the facts tending to show his authorization to act as an agent for the defendant is really what is supported by the rule just stated, and not what he may have told somebody in relation thereto. This action being between the plaintiffs and the defendant, the witness Lloyd could have testified directly as to his agency by stating whatever there was, if anything, tending to show his appointment or authorization to act as agent, but to put a witness on the stand to testify to what she had heard Mr. Lloyd state or what representations he had made was an entirely different matter and not in anywise supported by the authorities cited, but absolutely contrary thereto."

Respondent in reply contends that under the facts of this case she is entitled to rely upon the disputable presumptions contained in section 1963, subdivisions 11 and 12, of the Code of Civil Procedure, "That things which a person possesses are owned by him", and "That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership".

[1,2] So far as appellant United Theatres is concerned there is no evidence in the record connecting it with the Del Oro Theatre except the declarations of Ford B. Lytle, testified to by respondent and her attorney. As hereinbefore pointed out, the agency of Lytle cannot be proved in this manner and we are therefore compelled to hold that the judgment against appellant United Theatres is without support in the record, and that the presumptions relied upon by respondent do not aid her in her effort to sustain the judgment against said appellant.

However, we believe the situation is somewhat different so far as appellant Keegan is concerned. He was in active

control and operation of the theater which was conducted under the fictitious name of Del Oro Theatre. No certificate designating the owners of the Del Oro Theatre was filed with the County Clerk of Nevada County pursuant to section 2466 of the Civil Code. The city license was in the name of Del Oro Theatre, and the license fee was paid by a check signed by him, and the City Clerk did not know whether appellant Keegan signed the check as owner or manager. Appellant Keegan testified that the check was drawn against the funds of the Nevada County Theatres, Inc., but the check itself was not introduced in evidence. Appellant Keegan also testified that he had no interest in the theater other than as manager, that he was paid a salary and that social security deductions were made from his salary; but it is significant that while the Employees Compensation and Insurance record of the janitor at the theater, Vesley, was offered in evidence, no such record was offered to show that appellant Keegan was an employee of the Del Oro Theatre. Furthermore, no officer of the appellant United Theatres, or of Nevada County Theatres, Inc., testified in the case.

[3,4] While it must be conceded that the preponderance of the evidence indicates strongly that appellant was the manager, we cannot say upon the record here, in view of the presumptions referred to, that the implied finding of the jury that appellant Keegan was an owner of the Del Oro Theatre is without support in the record. It was for the jury to weigh the statements and denials of appellant Keegan against the presumptions and other evidence. If the trial judge considered the verdict against the weight of the evidence, it would be a proper case for the trial court to grant a motion for a new trial; but in the instant case the record does not disclose that any such motion was made.

Appellants' second main contention is that the court erred in giving certain instructions to the jury.

The court instructed the jury on the disputable presumptions noted above. The

court gave the following instructions on agency:

"You are instructed that where a principal with full knowledge of all the circumstances deliberately ratifies the acts, doings or omissions of another, assuming to act as his agent, he will be bound thereby as fully as though it had been done originally with the principals' authority."

"You are instructed that section 2334 and section 2338 of the Civil Code of California, which were in effect at the time of the accident and are now in force and effect in California provide as follows:

"Section 2334: A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.

"Section 2338: Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

[5] So far as the instructions as to the disputable presumptions are concerned, we are unable to agree with appellants that there is nothing in the evidence to warrant giving them. They were certainly proper so far as appellant Keegan was concerned, and, in view of our conclusion that the evidence does not support the judgment against appellant United Theatres, no prejudice has resulted to it.

[6] As to the instructions upon principal and agency, such instructions, if improper, could only affect appellant United Theatres, the judgment against whom, as we have already indicated, must be reversed. The instructions were correct as an abstract statement of law, but in view of the fact that the testimony as to the declarations of Lytle was inadmissible to prove his agency, the instructions should

not have been given. However, no prejudice as to appellant Keegan resulted from the giving of said instructions.

No other points raised require discussion.

In view of the foregoing the judgment is affirmed as to appellant Jack Keegan and reversed as to appellant United Theatres, a corporation.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER and EDMONDS, JJ., dissenting.



106 Cal.App.2d 504

MacSWEENEY ENTERPRISES, Inc. v. TARANTINO et al.

Civ. 14717.

District Court of Appeal, First District,
Division 1, California.

Sept. 13, 1951.

Action by MacSweeney Enterprises, Inc., doing business as "Tarantino's," against J. C. Tarantino, and others, individually and doing business as Bell Smoked Fish Company, and others for an injunction and for damages from using the name "Tarantino's" on labels of a cocktail sauce. The Superior Court, City and County of San Francisco, Edward P. Murphy, J., granted the injunction and defendants appealed. The District Court of Appeal, Peters, P. J., held that defendants had unfairly used their surname as a trade name and that such use was properly enjoined.

Judgment affirmed.

1. Trade-marks and trade-names and unfair competition $\S$ 93(3)

In action by restaurant owner for damages and to enjoin use of name "Tarantino's" by manufacturer as trade name for cocktail sauce, evidence supported finding that manufacturer deliberately adopted name "Tarantino's", which was his family name, as trade name and deliberately simulated script used by restaurant owner in attempt to create impression that it was

sponsored by restaurant owner and in order to capitalize on good will and reputation of restaurant.

2. Trade-marks and trade-names and unfair competition ⇨73(1)

Person may not use his own name to advertise his product when he resorts to deception intended to confuse buying public and which would injure another rightfully using name, and such deceptive practices may be enjoined even though injunction prevents person from using his own name to advertise his products.

3. Trade-marks and trade-names and unfair competition ⇨73(1)

Use of one's own name is not absolute.

4. Trade-marks and trade-names and unfair competition ⇨93(1)

Proof of actual confusion is not necessary in action for trade mark infringement or unfair competition when facts are such that it can be concluded that confusion would result to ordinary purchaser.

5. Trade-marks and trade-names and unfair competition ⇨93(1)

Where purpose of action is to enjoin unfair competition, actual market competition need not always be proved. Civ. Code, §§ 3369.

6. Trade-marks and trade-names and unfair competition ⇨75

Where purpose of action is to enjoin unfair competition, it is not essential to prove fraudulent intent, but injunction is proper if natural consequences of defendant's conduct is such as to cause deception.

7. Trade-marks and trade-names and unfair competition ⇨73(1)

Where restaurant owner had established reputation of restaurant under trade name "Tarantino's" and party with same surname manufactured cocktail sauce and used trade-name in deliberate attempt to mislead public into believing that product was sponsored or made by restaurant owner, such activities were properly enjoined even though it limited use of defendant's own name.

Joseph L. Alioto, Walter F. Calcagno, San Francisco, for appellants.

Bernard B. Glickfeld, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, MacSweeney Enterprises, Inc., is a corporation owned and directed by J. Eugene McAteer and Daniel J. Sweeney, Jr. The corporation owns and operates "Tarantino's," a well-known San Francisco restaurant located on Fisherman's Wharf. The defendant Bell Smoked Fish Company is a corporation owned and operated by five members of the Tarantino family, several of whom are also individual defendants. The corporate defendant is engaged in the business of packing and marketing fish and in manufacturing and distributing certain allied products. All such products for many years and now, except the sauce here involved, have been marketed under the trade name of "Tara Bell."

A few months before the filing of this complaint the defendants placed on the market a cocktail sauce, labelled "Tarantino's Cocktail Sauce." The word "Tarantino's" on this label is the singular possessive as is the name of the restaurant, and is in a form of script almost identical with that used by plaintiff to advertise its restaurant. Plaintiff does not manufacture for sale a cocktail sauce but, on the theory that purchasers of the sauce would believe it was being marketed by the restaurant, brought this action for an injunction and for damages. The trial court denied damages, but perpetually enjoined the defendants from using the name "Tarantino's," or any word similar to it, on the labels of the cocktail sauce. Defendants appeal.

The facts are not in substantial dispute. Tarantino's Restaurant is located at 206 Jefferson Street on Fisherman's Wharf. About May of 1944 appellant J. C., and Peter Tarantino, leased those premises from the State of California. All property on the wharf is owned by the State. The two lessees secured the premises with the idea in mind of opening a restaurant there. The premises had never been used for this

purpose before this time, nor had any of the Tarantinos ever been in the restaurant business. A partnership between the two Tarantinos was organized for this purpose, and J. Eugene McAteer was hired as manager of the proposed restaurant. McAteer suggested to the partners, and it was agreed, that the new restaurant would be called "Tarantino's." Certain contracts were entered into by the partnership in preparation for the operating of a restaurant on the premises, but, before the restaurant was opened, the Tarantinos decided that they did not wish to continue. On January 23, 1946, the two partners sold out to Daniel J. Sweeney, Jr., who apparently was acting not only for himself but also for McAteer. An agreement was entered into whereby the two Tarantinos transferred to Sweeney their interests in the proposed restaurant and in all contracts executed in connection therewith. The contract contains this clause: "The transfer of their total interest in the partnership by first party [J. C. Tarantino] and second party [Peter Tarantino] is intended to give to third party [Daniel J. Sweeney, Jr.], in addition to all other rights, the use of the name 'Tarantino's.'" This contract is important only for the purpose of showing the derivation of the name of the restaurant and of the legal right of plaintiff to use the name. It gave plaintiff no rights at all against the corporate defendant or against several of the individual defendants who were not parties to it.

In April of 1946 Sweeney and McAteer, as partners, opened the restaurant under the name "Tarantino's." In 1947 the business was incorporated under the name of "MacSweeney Enterprises, Inc.," Sweeney and McAteer being the sole stockholders. The corporation operates the restaurant under the name "Tarantino's." In connection with the restaurant a gift shop is operated, but the corporation does not manufacture for sale any sauce of any kind.

From the beginning of operations the restaurant has been successful. It has acquired a national and even an international reputation. In 1948 it did a gross business of almost three-quarters of a million dollars. It receives mail from all over the

world, about 50% of which is simply addressed, "Tarantino's, Fisherman's Wharf, San Francisco." Over the past three and a half years the corporation has spent between \$50,000 and \$60,000 in advertising. In all such advertising, on its letterheads, and on the restaurant, the name "Tarantino's" is featured, and, from the beginning, a particular type of script has been used for this purpose.

The Bell Smoked Fish Company, among other things, manufactures and distributes several sauces and dressings. For example, for many years it has manufactured a Tarrare Sauce and a Louis Dressing. These and other products of the company have been put out under the trade name "Tara Bell," which name is conspicuously displayed on the labels. These labels contain no reference to Fisherman's Wharf, although the company's office is located there, and make no mention of the Tarantino name.

About July of 1949 the Bell company started to manufacture and to market a cocktail sauce. This it put out under the name "Tarantino's Cocktail Sauce," which designation is prominently displayed at the top of the label. The word "Tarantino's" is printed in script practically identical to that used by the restaurant. The singular possessive form of the name was used, identical with that used by the restaurant, although there were five Tarantinos active in the Bell company. No explanation of why the plural possessive was not used was given. At the bottom of the label appears "Bell Smoked Fish Co., Fisherman's Wharf, San Francisco 9, California." Prior to putting out this sauce the Bell company had never put out any product under the name "Tarantino's."

This cocktail sauce first came to the attention of McAteer about September of 1949 after many of the restaurant customers had told him that they had purchased "some of our sauce," or asked him if it was the restaurant's sauce. McAteer thereupon called upon J. C. Tarantino who informed him that the name had been selected upon the advice of counsel. McAteer consulted his attorney, and this law suit resulted.

J. C. Tarantino, one of the appellants, is president of the Bell company, and is also individually engaged in the business of buying fish livers. He has never engaged in business in San Francisco under the name "Tarantino's," and, as far as he knows, none of the other appellants has ever used that name in any business, except that some ten to fifteen years prior to the trial the Bell company had some placards printed requesting sportsmen to have their fish smoked at the Bell company. These placards had the name "Tarantino's" on them. The bills and invoices of the Bell company do not contain the name "Tarantino's." The invoices of J. C.'s individual business contain his own name, but not the name "Tarantino's." No bank accounts are carried in that name, nor has any advertising ever been done under that name (except for the sportsmen placards above mentioned) until the cocktail sauce was distributed. J. C. is thoroughly familiar with the restaurant operations of respondent, and, in fact, his company has sold fish products to respondent since it opened for business. This appellant at all times here involved knew the type of script used by the respondent to advertise its restaurant.

J. C. further testified that the decision to put out the cocktail sauce was made at an informal meeting of the board of directors of the Bell company, at which time the board decided to put the sauce out under the family name. The board did not discuss the type of label to be used. Before manufacturing the sauce J. C. consulted his attorney about the propriety of using the family name, and, after being assured by the attorney that that was proper, ordered the labels prepared. He testified that he did not tell the printer what type of script to use, but left that to the printer's discretion, and, when the labels were prepared, approved them.

The name "Tarantino" is well-known on Fisherman's Wharf. The father of the individual appellants operated on the wharf when it was known as "Meiggs Wharf," and at that time represented the local fishermen in selling their fish to wholesalers and retailers. Father Tarantino had an office in a building which, at that time, was the only

structure on that side of the wharf. The name is a highly-regarded Italian name, but it is not solely connected with the fish business, there being in San Francisco a Tarantino poultry business, a dry cleaners, and an electric company.

The gross volume of the Bell company averages around \$750,000 a year, the sales of the cocktail sauce constituting only a small portion of this volume. J. C.'s individual liver business grosses about a million dollars a year.

The trial court found, among other things, that, prior to manufacturing the cocktail sauce, the defendants had never identified any of their products with Fisherman's Wharf, nor had they ever used the name "Tarantino's" on any of their products; that the actions of defendants in adopting the name and the form of label was "deliberate and calculated to deceive the public into believing that Plaintiff's restaurant is the manufacturer or preparer" of the cocktail sauce; that such actions have injured plaintiff's standing, reputation and good will; that "said actions of the Defendants created, and do create, confusion in the Plaintiff's business and does deceive the public into the purchase of a sauce preparation which is not that of the Plaintiff; that said actions of the Defendants have caused confusion and damage to the Plaintiff and injury to the public in general; that the actions of the Defendants have mislead and caused patrons of the Plaintiff to believe that the Defendants distributed the product made or prepared by the Plaintiff"; that defendants have marketed said cocktail sauce as that of plaintiff and have made a profit thereon based on the good will and reputation of the plaintiff. Based on these findings the defendants and their agents were "perpetually commanded to desist and refrain, and are enjoined, directly or indirectly, or by any means or methods from using in any way, shape or manner upon or in connection with the marketing of the cocktail sauce for sea food, the name of 'Tarantino's,' and that said Defendants be perpetually commanded to desist and refrain from advertising and promoting in any manner or form the name 'Tarantino's'".

in connection with the cocktail sauce; and that Defendants be enjoined from using the name 'Tarantino's' or any name, phrase or device similar thereto on a labeling of said cocktail sauce and any form of printing simulating said name of 'Tarantino's.'"

[1,2] The findings that appellants deliberately adopted the name "Tarantino's" to designate their cocktail sauce, and deliberately simulated the script used by respondent, in an attempt to create the impression that it was sponsored by respondent and in order to capitalize on the good will and reputation of respondent, are amply supported and justified by the evidence. The legal question presented is whether a person may use his own name to advertise his product when he resorts to deception intended to confuse the buying public and which inevitably would injure another rightfully using the name. We have no hesitancy in holding that such deceptive practices may be enjoined even though such injunction deprives a person from using his own name to advertise his product.

Appellants argue that a family name is incapable of exclusive appropriation and cannot be monopolized. However true that may be as a general rule where fraud and deception are not employed, the principle has no application where those elements are present. This is demonstrated by the very cases cited by appellant. One of the principal cases relied upon by appellant is *Tomsky v. Clark*, 73 Cal.App. 412, 238 P. 950. At page 418 of 73 Cal.App., at page 952 of 238 P., the court stated: "Every man has the absolute right to use his own name in his own business, even though he may interfere with and injure the business of another bearing the same name, *provided he does not resort to any artifice or do any act calculated to mislead the public as to the identity of the establishments or to produce injury to the other beyond that which results from the similarity of names.* [Citing cases.] *As just stated, equity will not allow a person to resort to artifice or contrivance in the use of his name as a result of which the public is deceived as to his business or products.* But in such case it is not the use of a man's own name

that is condemned; it is the dishonesty practiced in the use of it. [Citing cases.]" (Italics added.) See, also, *Ida May Co., Inc. v. Ensign*, 20 Cal.App.2d 339, 66 P.2d 727; *Dunston v. Los Angeles Van & Storage Co.*, 165 Cal. 89, 131 P. 115; *Alhambra Transfer & Storage Co. v. Muse*, 41 Cal. App.2d 92, 106 P.2d 63; *American Automobile Ass'n. v. American Automobile Owners Ass'n.*, 216 Cal. 125, 13 P.2d 707, 82 A.L.R. 699; *American Distilling Co. v. Bellows & Co.*, 102 Cal.App.2d 8, 226 P.2d 751; *Jewish Publications, Inc., v. Gordon*, 91 Cal.App.2d 376, 205 P.2d 65, 206 P.2d 61.

[3] The use of one's own name is not absolute. In *Jackman v. Mau*, 78 Cal.App. 2d 234, 177 P.2d 599, the dispute was over the names "Jackman" and "Jackmau." The court stated, 78 Cal.App. at page 238, 177 P.2d at page 602: "Another element involved in cases of this character is the watchfulness of the law in protecting the public from the fraud or deceit resorted to by a pretender to falsely lead the buying public to believe that they are purchasing the goods of the merchant who, through a trade name and honest effort, has established a reputation and public demand for his product. [Citing a case.] And the fact that defendant was using his own name does not shield him from injunctive action if such use is calculated to cause confusion or to deceive. As was said in *Hoyt Heater Co. v. Hoyt*, 68 Cal.App.2d 523, 527, 157 P.2d 657, 659, 'One must use his own name honestly and not as a means of pirating the good will and reputation of a business rival; and where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business'".

There is a good discussion of this problem and a good collection of cases in *Dernberg, "Trade-Mark Protection and Unfair Trading"* beginning at p. 361. As the author points out, there is an important distinction between the use of a family name as a firm name, and the use of such name in the trade-mark sense. Here appellants are not attempting to use the challenged name as a company name, but are

attempting to use it as a trade-mark. When that is coupled with deception, the court may and should enjoin.

[4] Appellants next argue that no one could have been deceived by the challenged label. Any one, so it is stated, of reasonable intelligence would know that the cocktail sauce was manufactured and marketed by the Bell company, and not by respondent. This, however, was a question of fact. Proof of actual confusion is not necessary. If the facts support the conclusion that a purchaser of ordinary intelligence could reasonably be confused, that is all that is required. *American Distilling Co. v. Bel-lows & Co.*, 102 Cal.App.2d 8, 226 P.2d 751. That is this case.

[5] Appellants also argue that they are not in competition with respondent because respondent is not engaged in the manufacture and marketing of cocktail sauce. This is a factor to be considered, but it is not controlling. The proper rule was stated as follows in *Winfield v. Charles*, 77 Cal.App.2d 64, 175 P.2d 69, 72, where the court pointed out that section 3369 of the Civil Code defines unfair competitors as including "unfair or fraudulent business practice." After pointing out that, although the parties were not in competition, the plaintiff had built up a good reputation in the general field under the name "Win-field," and that defendant was attempting, in a related field, to capitalize on the reputation of plaintiff, the court stated, 77 Cal.App.2d at page 70, 175 P.2d at page 73:

"It is unnecessary, in such an action, to show that any person has been confused or deceived. It is the likelihood of deception which the remedy may be invoked to prevent. [Citing a case.] 'It is sufficient if injury to the plaintiff's business is threatened or imminent to authorize the court to intervene to prevent its occurrence.' *Sun-Maid Raisin Growers v. Mosesian*, 84 Cal. App. 485, 497, 258 P. 630, 635. Although surnames may not be appropriated as trademarks, 'Long association of a name with a product results in that name taking on a new or secondary meaning, which meaning submerges the primary meaning of the word as a man's name merely, and

the new meaning survives as the identification, in the market, of a product and its source.' *J. A. Dougherty's Sons v. Dougherty*, D.C.1940, 36 F.Supp. 149, 151. Both plaintiff and defendant are engaged in the manufacturing business, both have well-equipped machine shops, and it appears that both have machinery adaptable to manufacture articles other than those they at present manufacture. Appellant argues that the record shows that plaintiff and defendant do not manufacture the same articles or solicit the same trade and customers. Plaintiff's name has become a valuable asset in connection with any equipment associated with automobiles, and the evidence shows that the bulk of defendant's business is manufacturing automobile jacks and wrenches. However, it is not always necessary to prove actual market competition where the purpose of the action is to secure injunctive relief. It was stated in *Wood v. Pepper*, 55 Cal.App.2d 116, at page 122, 130 P.2d 220, 224: "'We are aware, however, that equity may be invoked without market competition. Emphasis should be placed on the word 'unfair,' rather than 'competition'.'"

"Plaintiff has established a reputation for reliability and meritorious products. If articles which are not produced by him are attributed to him or associated with his name, the injury is obvious. The court stated in the case of *Del Monte Special Food Co. (appellee) v. California Packing Corporation (appellant)*, 9 Cir., 34 F.2d 774, at page 775: 'The injury to the appellee by the use of the Del Monte Brand by the appellant does not result from preventing sale by appellee of oleomargarine of its own, *but from a representation to the public that it produces a product which it does not in fact produce and over which it has no control.* Its reputation for quality is therefore placed to some extent in the hands of a corporation who owes it no allegiance and has no concern in maintaining the high reputation established by the appellee, and who may utilize that reputation to sell the public an inferior production.' (Italics added.) Furthermore, in the interest of fair dealing courts of equity will protect the person first in the field do-

ing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public. For this purpose the second in the field may be enjoined from using the name, even though the principal places of business are at a considerable distance from each other. *Benioff v. Benioff*, 64 Cal.App. 745, 748, 222 P. 835. 'No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. * * The universal test question is whether the public is likely to be deceived.' 63 C.J. 414; *Pohl v. Anderson*, 13 Cal.App.2d 241, 242, 56 P.2d 992."

[6] It is not essential to prove fraudulent intent. An injunction is proper if the natural consequences of defendant's conduct is such as to cause deception. *Hoover Co. v. Groger*, 12 Cal.App.2d 417, 55 P.2d 529; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 P. 879; *Wood v. Pepper*, 55 Cal.App.2d 116, 130 P.2d 220.

[7] Here it is a reasonable inference from the evidence that the name "Taran-

tino's" was used by appellants in a deliberate attempt to confuse and to mislead the public into believing that the product was sponsored or manufactured by respondent. It was proper to enjoin such activities.

Appellants also object to the extent of the injunction, claiming that it has deprived them of using their family name in their business. The injunction does not so provide. It simply prohibits the use of the name "Tarantino's" in connection with the marketing of the cocktail sauce. In view of appellants' actions in connection with this product, this was a reasonable limitation in the activities of appellants. The use of the family name in connection with other activities of the corporation is not enjoined. The appellants have improperly used their family name in a trade-mark sense. The injunction goes no further than was reasonably necessary to protect respondent's rights in view of appellants' past actions.

The judgment appealed from is affirmed.

We concur:

BRAY and FRED B. WOOD, JJ., concur.

37 Cal.2d 459

**CALIFORNIA HOME EXTENSION ASS'N
v. HILBORN.**

L. A. 21360.

Supreme Court of California, in Bank.

June 29, 1951.

Action by the California Home Extension Association, a corporation, for money had and received against Bert Hilborn who filed a cross-complaint alleging a joint adventure for sale of land and seeking his share of profits. From the portion of the judgment of the Superior Court of Riverside County, O. K. Morton, J., awarding a certain sum as his share of the profits of the enterprise, to the cross-complainant, plaintiff appealed. The Supreme Court, Edmonds, J., held that exclusion of testimony of witnesses as to statement of employee to effect that employee had been working for salary of certain sum per month plus expenses, constituted prejudicial error.

Portion of judgment appealed from reversed.

Prior opinion, 227 P.2d 904.

I. Joint Adventures ¶5(3)

In action by corporation against alleged former employee for moneys had and received wherein employee filed cross-complaint alleging joint adventure for sale of land and seeking his share of profits, question whether alleged employee was to receive 50 percent of profits or certain sum per month plus expenses, was for jury.

2. Evidence ¶213(1)

Fact that statements were allegedly made during a conference at which parties were attempting to compromise their difficulties does not justify exclusion of evidence of statements if it was otherwise admissible.

3. Appeal and Error ¶1056(1)

Evidence ¶218

In action by corporation against alleged former employee for money had and received wherein employee filed cross-complaint alleging joint adventure for sale of land and seeking his share of profits, where evidence on issue was highly conflicting, testimony as to statement of employee, during conference to adjust difficulties, to effect that employee had been

working for salary of certain sum per month plus expenses was admissible as admissions against interest and exclusion of testimony constituted prejudicial error. Code Civ.Proc. § 1870, subd. 2.

Robert E. Austin, John N. Helmick, Los Angeles and Joseph Seymour, Riverside, for appellant.

Jerome L. Richardson and George E. Jones, Riverside, for respondent.

EDMONDS, Justice.

California Home Extension Association sued for money had and received. By answer and cross-complaint, Hilborn alleged a joint venture for the sale of land and was awarded \$36,500 as his share of the profits of the enterprise. The corporation's appeal from that portion of the judgment principally attacks the findings as not being supported by the evidence and charges that the judgment is inconsistent with the pleadings and with the findings. Hilborn alleged the following facts:

On June 1, 1940, Home Extension Association, through its agent M. V. Harttranft, induced him to terminate his then employment to become a vice president, assistant secretary and sales manager of the corporation. Compensation for his services was fixed at 50 per cent of the net profits of all land sold as a result of the sales promotions conducted by him, with a \$75 per month drawing account to be charged against such profits. Believing these representations, the pleading continued, Hilborn entered into an oral contract with the corporation, through Harttranft, in accordance with them. The corporation promised to reduce the oral contract to writing, and continued to do so until January 1, 1945.

Hilborn also alleged that he accepted the terms of the oral contract and, from June 1, 1940, until the filing of his cross complaint, fully performed all of his duties under it. He managed various sales campaigns and collected monthly payment for the sales of property and commissions on property sold and resold by the corporation. All

payments and contracts of sale were sent to the corporation at its head office, and no money was retained by him. On January 1, 1945, the corporation notified Hilborn that the contract was terminated. Two months later, Hartranft died.

The issues presented by Hilborn largely concern the nature of his association with the corporation. More specifically, the amount, if any, now due to or from him depends upon whether he was employed on a salary, or with the right to a share in the profits of the sales made under his direction. There is no dispute in regard to the services he performed, but the evidence as to the basis of compensation is sharply conflicting.

The record shows that the corporation was organized and controlled by Hartranft. He was its president, managing director, and the holder of practically all of its stock. Hartranft determined all matters of business and policy, and drafted the resolutions which, without the formality of a directors' meeting, were shown on the corporate records as having been adopted.

For six months following June, 1940, Hilborn's services were performed at the main office of the corporation in connection with a land selling program known as "War Gardens." For the next two or three months, he worked on another tract of land. This project, however, was abandoned as a failure. The corporation then acquired property in Riverside County, and opened an office in which it installed Hilborn as manager in charge of the sales campaign. Hilborn remained there until his employment was terminated.

The terms of Hilborn's association were not reduced to writing at the time of the commencement of his services for the corporation. He testified that, when the matter was first discussed, Hartranft said "he would invite me to come down and join the California Home Extension Association on a campaign program in which we would divide equally the profits to operate—that he had three or four places in mind that he would like to establish colonies, and in going down that was the consideration that I went under."

In March, 1940, the parties met in San Francisco and, at that time, Hilborn testified, "I told him that I would go down and work up a colony with him, using my ability as a campaign operator, providing he had such a colony in mind and wanted to undertake it; and at that time, the compensation was fixed and reiterated. * * He said that if I would come down under those conditions that my compensation would be fifty per cent of the profits of such a campaign. * * * I told him I would do it."

For a written contract, Hilborn relied upon a document which, according to his testimony, he received by mail from Hartranft in May, 1941. It reads as follows:

"We hereby elect Bert Hilborn, a stockholder, in the California Home Extension Association, as a vice-president and assistant Secretary of CHEA. He is also elected manager of the Arlington Branch of this corporation and will act as our sales manager for the La Sierra District land-selling campaign, on the same basis as the Crestmore campaign now being liquidated. He shall continue to receive a drawing account plus actual expenses, of Seventy Five (\$75.00) dollars per month and his compensation as sales campaign manager shall be on a fifty-fifty basis of the profits acquired by CHEA. All titles of purchase and sale; all legal matters and determination of policy, as well as advertising, will be conducted by CHEA.

"Cal Home Extension Assn.
By M V Hartranft
Prest"

Hilborn said that he signed the original of this document and gave it to Hartranft, retaining the carbon copy. He identified the signature as that of Hartranft, with which signature he was familiar. Mrs. Hartranft also testified that she recognized her husband's signature on the letter.

The corporation disputed the authenticity of the signature, and produced a handwriting expert who stated that, in his opinion, the signature is a tracing. He also said that the document was typed by the same person and upon the same machine as other papers admittedly written by Hilborn. Hilborn

declared that he had not traced the signature, and denied that he wrote the letter or that it was produced upon the typewriter in his possession with his knowledge. The record includes evidence that the typewriter upon which it is claimed the letter was written was not in Hilborn's possession until two or three weeks after the date of the questioned document.

Upon this evidence, the trial court found that the relationship was that of joint venturers. Judgment was rendered on the basis of the net profits of the land sold as a result of real estate campaigns conducted by Hilborn, less the amounts of certain cash advances.

[1] In attacking the findings and judgment, the corporation contends that, as a matter of law, the testimony of Hilborn concerning the letter assertedly signed by Hartranft is unworthy of belief. For that reason, it argues, the judgment should be reversed. However, Hilborn's identification of the document, taken in connection with other evidence concerning the dealings he had with the corporation, does not show such evidentiary weaknesses and abnormalities as to render it improbable that the transactions occurred as related by him. Certainly, the evidence is not such as to compel a finding in favor of the corporation.

The appellant points to the fact that during the first 13 months of his association, Hilborn was paid, from time to time, amounts ranging from \$20 to \$30, which were entered upon the corporation's books as "salary." The record also includes a letter from the auditor of the corporation to Hilborn stating that Hartranft " * * * thought it best to make a straight salary proposition for you instead of the way you have been going. Therefore starting the 1st of July you will be paid \$200 per month, which includes the \$30.00 car allowance." The corporation also relies upon the records of the corporation which list as "salary" semimonthly payments to Hilborn for three and one-half years, which, as adjusted for income tax and other deductions, represent compensation at the rate of \$200 per month. Checks for these amounts, drawn by the corporation for salary, were

received and retained by Hilborn without question or objection, which fact, the corporation argues, strongly indicates an acceptance of salary as payment in full for his services.

In opposition to this evidence is the testimony of Hilborn to the effect that he was employed upon a profit-sharing basis. The letter assertedly received by him corroborates his statements in this regard. It also appears that he was elected vice president and assistant secretary of the corporation and appointed as manager of the Arlington Branch of the corporation and sales manager for the Arlington district.

Hilborn's explanation of the corporate records was that checks issued to him were entered as "salary" solely for the purpose of interoffice bookkeeping. They were received by him, he said, under the terms of his agreement providing for a drawing account and after Hartranft told him his advances would be charged to him in that way. The testimony of the auditor of the corporation is to the same effect. He said that, although the checks for \$200 were listed " 'Salary' on the books," they were payments to Hilborn for expenses, allowance for automobile expense and advances upon the drawing account.

Hilborn testified to a conference, occurring a few days after Hartranft's death, at which Mrs. Hartranft and Robert Austin, attorney for the corporation, were present. At the conference, Hilborn said, he was asked to return to work with the corporation, and he agreed to do so. However, when Austin dictated an agreement which was signed by Mrs. Hartranft on behalf of the corporation, Hilborn refused to sign it. This document was received in evidence. Hilborn denied having said at the conference that his former association with the corporation was as an employee for a salary of \$200 per month and expenses.

The corporation then offered the testimony of Mrs. Hartranft and Robert Austin. Austin was asked to relate the conversation at the conference. After various objections to the testimony were sustained, the corporation made an offer of proof that Hilborn had stated his claims against the corpora-

tion as being for five or six hundred dollars advanced by him to the corporation, damages for wrongful attachment of his property and the filing of a complaint against him with the Real Estate Commission. Another statement by him, according to the offer of proof, was that his employment with the corporation had been for a salary of \$200 per month plus expenses and he wished to return to work at the same salary. The objection to the evidence was sustained upon the ground that " * * * the conference of the parties was for the purpose of compromising their difficulties, and, therefore, is not admissible." The corporation pointed out that the evidence was offered for the purpose of impeaching Hilborn, but the court refused to change the ruling. The same objection was sustained as to the testimony of Mrs. Hartranft concerning the conversations at the conference.

The corporation contends that the trial court erroneously refused to admit this evidence which, it asserts, contradicts Hilborn's claims in the case and is admissible as an admission against interest. Code Civ.Proc. § 1870, subd. 2. Hilborn argues that the ruling of the trial court does not constitute reversible error because the offered testimony relates principally to collateral matters and, even if admitted, would not have changed the judgment of the court.

[2, 3] Although the statements were allegedly made during a conference at which the parties were attempting to compromise their difficulties, that fact does not justify exclusion of the evidence if it was otherwise admissible. *Rose v. Rose*, 112 Cal. 341, 44 P. 658; *Scott v. Sciaroni*, 66 Cal. App. 577, 226 P. 827. The major issue is whether Hilborn was associated in a joint venture, the profits of which were to be divided equally, or was an employee at a salary of \$200 per month and expenses. The evidence upon this point is highly conflicting. Hilborn relied upon his own testimony in regard to the letter which, he claims, was signed by Hartranft and his explanation of the corporate records showing checks issued to him for "salary." Clearly any evidence as to a statement by Hilborn that he had been working for a

salary of \$200 per month and expenses, if believed, would have discredited his testimony and refuted his claim for a share of the profits from the sales of land. Under these circumstances, it cannot be said, as Hilborn argues, that the evidence was merely cumulative upon collateral matters. It was vital to the defense of the corporation and the ruling excluding it was prejudicially erroneous.

That portion of the judgment appealed from is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



37 Cal.2d 445

WILLIAMS et al. v. MARSHALL et al.

L. A. 21141.

Supreme Court of California, in Bank.

June 29, 1951.

Roy O. Williams and another brought action against Frank D. Marshall and another based upon asserted false representations made by defendants when they sold a ranch to plaintiffs. The Superior Court, Riverside County, William D. Dehy, J., rescinded the contract and awarded money judgment to plaintiffs, and defendants appealed. The Supreme Court, Edmonds, J., held, *inter alia*, that where plaintiffs negotiated for adjustment in sale price from time misrepresentations were discovered until notice of rescission, action brought 15 months after date of sale was not barred by laches.

Affirmed.

Schauer and Spence, JJ., dissented.

Prior opinion 223 P.2d 644.

I. Vendor and Purchaser ⇐44

In action by purchasers of ranch against vendors for rescission on ground of fraud, evidence supported finding that purchasers were without experience in farming citrus groves and had no knowledge of citrus groves in Hemet Valley and of the available water supply.

2. Principal and Agent Ⓒ195

In action by purchasers of citrus groves against vendors for rescission on ground of misrepresentation of number of acres and available water supply, failure of trial court to make findings concerning the status of one alleged to be agent of purchasers and his knowledge concerning citrus growing and water conditions of the land in question was not reversible error when there was no material evidence to support such a finding.

3. Vendor and Purchaser Ⓒ44

In action by purchasers against vendors of ranch which contained citrus trees for rescission on ground of misrepresentation as to acreage, computation of sale price by multiplication of number of acres by given price per acre, and other evidence, supported finding that acreage involved was material to contract and that ranch was not sold as a single unit for a stated sum.

4. Vendor and Purchaser Ⓒ44

In action by purchasers against vendors of ranch for rescission on ground that vendors misrepresented citrus tree acreage of ranch, notation by purchaser that there were 4,000 trees with 90 trees to an acre did not show independent knowledge of purchaser that there were only 35 acres of citrus fruit trees, after allowance for acreage devoted to other trees, in absence of showing that purchaser understood that the 4,000 trees was total tree acreage.

5. Vendor and Purchaser Ⓒ44

In action to rescind contract of sale of ranch for alleged misrepresentation as to citrus tree acreage, evidence showed practice to include only ground planted to trees and necessary for cultivation of orchard in computation of tree acreage, though boundary to land ran to middle of street.

6. Appeal and Error Ⓒ1008(1)**Equity** Ⓒ71(2)

There is no artificial rule as to lapse of time which will justify application of doctrine of laches, but each case must be determined upon basis of its facts, and, in ab-

sence of palpable abuse of discretion, finding of trial court will not be disturbed.

7. Vendor and Purchaser Ⓒ119

A vendee who has been defrauded by his vendor is entitled to a reasonable time to investigate falsity of representations, and time so consumed cannot be charged as unreasonable delay and will not justify application of doctrine of laches.

8. Vendor and Purchaser Ⓒ119

Where purchasers had negotiated with vendors concerning shortage of acreage and water continuously from dates when falsity of representations in regard thereto was discovered, refusal of trial court to bar action of rescission brought 15 months after date of sale because of laches was not a palpable abuse of discretion entitling vendors to reversal of judgment.

9. Estoppel Ⓒ110

Waiver is an affirmative defense and defendant relying thereon must set it up in answer.

10. Vendor and Purchaser Ⓒ123

In action by purchasers to rescind contract of sale of ranch because of misrepresentations regarding citrus tree acreage and availability of water, where vendors' only allegation relating to waiver was that purchasers had delayed any right of rescission to the prejudice of vendors, finding that purchasers had not done so to vendors' prejudice was sufficient.

11. Fraud Ⓒ31

A defrauded vendee may, in the same action, seek rescission or damages in the event rescission cannot be obtained.

12. Fraud Ⓒ31

In action by purchasers against vendors for rescission, or, in the alternative, damages, based upon misrepresentations by vendors as to number of acres of citrus trees and availability of water, purchasers were not required to make an election between the alternative remedies, and judgment of rescission and award of money for care and protection of property by purchasers was proper.

Best, Best & Krieger, James H. Krieger, W. S. Andrus and Gerald Brown, Riverside, for appellants.

Thompson & Colegate and Robert D. Allen, Riverside, for respondents.

EDMONDS, Justice.

Roy and Marguerite Williams were awarded a money judgment in an action based upon asserted false representations made in connection with the purchase of real property from Frank D. and Grace Edna Marshall. The court also ordered that the contract of sale and note and a deed of trust be canceled. Upon the appeal from the judgment, the findings and judgment are attacked as having no evidentiary support.

The Marshalls owned and operated a 90-acre ranch in Hemet. Some of the land was planted to citrus fruits, walnuts and apricots; the balance was unimproved. The trees were irrigated with water supplied by a local company. The water right, represented by certificates appurtenant to the land, was for 56 acre feet or 215.36 miner's inches of water, each 30 days.

The Williamses, both doctors, resided in Arizona. They had previously purchased land in Hemet for investment purposes but neither of them was experienced in ranching or farming operations.

The record also shows that Harvey Steele, a real estate broker and the father of Mrs. Williams, obtained from the Marshalls a contract which, for 60 days, gave him the exclusive right to sell their property. This agreement, signed by Frank D. Marshall, read in part: "Property location: Park Hill District. Price \$130,000. * * * Total acres: 56 in trees—90A. total—6A. cots, 3A. Placentias, 1A. grapefruit, 23 Valencias, 23 Navels." Then followed a statement as to the net return from crops for 1942 to 1945, followed by: "Water 2.00 Lake Hemet on 56A. Water any time, any amount."

According to Steele, Marshall told him that the ranch consisted of 56 acres in trees with 47 acres in citrus fruit, 6 acres in apricots, and the rest in walnuts, and that the ranch was entitled to "water any

time, in any amount." When Steele brought a prospective buyer to the ranch, Marshall repeated that the property contained 56 acres in trees, 47 of which were citrus.

Three months after the expiration of the 60 days, Mrs. Williams was visiting her father in Hemet. She learned that the ranch was to be sold and her father introduced her to Marshall. She interrogated Marshall in regard to the data included in the agreement and, in particular, as to the quantity of citrus acreage, the water situation and the income and expenses of the property for the past years. Marshall verified the information stated in the listing agreement and assured her that there was ample water to satisfactorily irrigate the orchard.

Following this conversation, she and Marshall drove along the roads separating the various sections of the ranch, and she walked through one quarter of it. This was the only occasion upon which she visited the ranch until after the contract of sale had been executed.

While Mrs. Williams was in Hemet, her husband arrived. He read the data in the listing agreement and, in company of Steele, drove around the boundaries of the ranch. The following morning, he walked through one section of it and there met the Marshalls. Williams testified that this was the only visit he made to the ranch prior to the execution of the contract of sale.

After the Williamses returned to Arizona, they decided to purchase the ranch. By telephone, they requested Steele to arrange the escrow upon specified terms. The price was fixed at \$123,500, including the crops. The escrow instructions which they signed included their agreement to pay \$37,050 cash and to execute a promissory note for \$86,450, to be secured by a deed of trust on the property.

The transaction was completed and the property conveyed to the Williamses in July, 1946. In the following December, or in January, 1947, the Williamses suspected that there was a shortage in citrus acreage. In a letter to Marshall, dated

January 19, 1947, Dr. Williams wrote: "It was our understanding that there were 56 acres of trees. Have been surveying the place off the best I could myself by the stepping-off method, and using the maps you gave us and there doesn't seem to me that there is that amount, but I am sure it is not far short of it. If you can give us any additional data on this question, wish you would kindly do so." On January 25th, Marshall replied that he could do no more "than has been done," but made no specific reference to the claimed shortage in acreage.

From a study made of the area by an engineer, the Williamses learned that the acreage in citrus trees was less than 47 acres. On March 31st, Dr. Williams again wrote Marshall and said: "In my letter of the 19th, I expressed question as to the acreage, and asked you how you arrived at the figure of 47 acres of citrus (23 navel, 23 valencia and 1 grapefruit as per the signed listing in my possession). I had asked George [the Williamses' manager of the ranch], several months back, to have a survey estimating the acreage. I just received this information. He estimated 41 acres in citrus. If this is correct, your figure is 6 acres short of the real estate method of figuring (to the center of road). I do not question the sincerity of your representation that there were 47 acres, a difference of 6 acres, but am sure you would agree were you in my place, this is too much to pass over. I believe an adjustment of at least \$2,000.00 an acre and interest on the same would be perfectly proper. Am paying the interest today, as figured by the bank, but under protest as to the exact amount."

Marshall's reply dated April 7th reviewed the transaction and told Dr. Williams that he "thoroughly explored the ranch; walked up and down every tree row; made notes of all the 'sick' trees; talked of the possibility of putting down a well; and finally, you came to the decision to purchase the property known as the 'Park Hill Ranch.'" Dr. Williams' request for an adjustment in price was rejected on the ground that the sale was of a ranch and not of "so many trees."

Dr. Williams, by a letter of April 10th, summarized his position as follows: "Your statement that you were 'selling Park Hill Ranch as a ranch and not so many trees' is the crux of the problem. When purchasing the ranch we felt that we were purchasing so many trees which made the value to the Park Hill Ranch. It was a great disappointment to us to receive a preliminary appraisal of a number of acres about 6 acres short of the 47 that had been represented to us."

Receiving no reply to this letter, Dr. Williams again, on April 15th, complained of the discrepancy in acreage and said: "This makes the cost per acre, I have been told, the highest anyone has paid in the valley. You will admit that cost per acre is a common method of figuring the relative value of citrus acreage. These are points one weighs when making a purchase, and came in for my consideration at the time of making my own decision to buy. I trust you will weigh this matter carefully. If I am in the wrong in any detail, I shall be very happy to be convinced. If not, I am sure your desire is to do the right thing." Marshall did not reply and on May 5th, Dr. Williams wrote: "From our last correspondence it seems that we had arrived at an impasse in our views on the subject of acreage."

In May, the Marshalls left California for a vacation in Canada. Upon their return in October, they received a letter written by Dr. Williams on September 23d, which read in part: "Mr. Steele was in Tucson visiting us last week and made us an offer for our equity in Park Hill which we feel is very fair. He is taking over the management beginning the first of the month and would doubtless interview you soon. We are liquidating our assets there in the valley, having changed our plans of moving over there. As you know, I interviewed Mr. Wood, our attorney in Riverside, over our misunderstanding in acreage. He very much wanted me to give him a free hand in this matter, but I settled with him, taking it out of his hands and paving the way for negotiating directly with you. Mr. Steele purchasing our equity, I imagine this will all be 'water over the dam.' The

whole thing has been very regrettable and painful to us and has helped discourage us with the valley."

This was the last letter written by Dr. Williams and, to that time, the only complaint which had been made in regard to the representations concerning the ranch related to the asserted shortage in citrus acreage. However, in the summer of 1947 the Williamses discovered that they were unable to obtain any water from the water company for the month of August. No water was available from that source for the balance of the year or for the early part of the following year. They purchased water from nearby property owners having wells, but the amounts so obtained were insufficient to irrigate the trees. In an effort to augment this supply they drilled a well upon the property at a cost of \$10,000, but obtained no water. The shortage of water continued and the citrus trees were severely damaged.

Although Dr. Williams did not mention the water situation to Marshall, Steele, who was then managing the ranch, complained about it. Marshall testified that in October, after he returned from Canada, he and Steele, acting for the Williamses, "were talking back and forth to see whether it would be possible to avoid litigation in the matter."

Steele's negotiations with Marshall continued until March, 1948, when Marshall agreed to see Mrs. Williams in an attempt to adjust their differences. This meeting did not occur and a notice of rescission, dated March 12, 1948, was served upon Marshall. On March 23d, Marshall wrote Dr. Williams expressing his surprise at receiving the notice of rescission because "The latest talk I had with you was a telephone conversation with your wife, in which it was mutually agreed we would get together and iron out our difficulties." The present action was filed shortly thereafter.

In addition to the foregoing facts, the record includes evidence that the true acreage in citrus trees was only 38.15, including 1.29 acres in the right-of-way owned by the county. It also appears that there were only 4 acres planted to apricots, and 2

of the 3 acres of walnut trees were in the public right-of-way.

Evidence was also presented tending to prove that, prior to the sale of the ranch, the Marshalls had endeavored to locate water upon the land but were informed that no water could be had. They did not give the Williamses this information. Marshall testified that there were times when the water supply had been insufficient for irrigation. He then had to purchase water from nearby wells but he did not tell the Williamses these facts. According to the testimony of an expert, the amount of water apportioned by the water company to the owner of 56 shares of stock would irrigate only 24 acres of citrus trees.

Upon this evidence, the trial court found: At the time the Marshalls made the statements and representations concerning the acreage and water supply, they knew them to be false. The statements were made for the express purpose of deceiving the Williamses and to induce them to purchase the property. Prior to the sale, the Williamses made no investigation or survey as to the citrus acreage or of the water supply available to the property. The falsity of the representations concerning the citrus trees was not discovered until March, 1947; the true situation concerning water came to light a few months later. The Williamses offered to restore everything of value they had received from the Marshalls upon condition that the money paid by them was returned, but the offer was refused.

Judgment was rendered against the Marshalls for \$37,668.64, the amount which had been paid upon the contract and trust deed. \$3,250 was added for the expenses, in excess of profits, incurred by the Williamses for the care and protection of the property. The court also decreed that the contract of sale and the deed of trust be canceled.

Upon their appeal from the judgment, the Marshalls contend: (1) The evidence does not support the finding that the Williamses were without experience in farming citrus groves and had no knowledge of citrus groves in the Hemet Valley and of the available water supply. (2) The trial court failed to make a finding upon the issue of whether Steele was the agent of the Wil-

liamses and had knowledge of the conditions of the Marshall ranch which was imputed to his principals. (3) There is insufficient evidence to sustain the finding that the Marshalls made fraudulent representations as to the acreage in citrus trees and the water supply. (4) The trial court erred in finding that the Williamses were not guilty of laches, and failed to make a finding upon the issue of waiver. (5) The Williamses should have been compelled to elect either the remedy of rescission or damages.

In support of their position, the Marshalls point to evidence that the Williamses had lived in San Bernardino County for seven or eight years. They contend that the climatic conditions in that area are similar to those in the Hemet Valley. Other evidence relied upon is that the Williamses had once resided on an apple orchard for six months and, in 1944 and 1945, owned citrus properties in Hemet Valley which they visited.

[1] However, this evidence is not conclusive. As explained by the Williamses, the ownership of the citrus ranches was for the purpose of investment and they did not manage the properties. They testified that they were unfamiliar with management of citrus groves and the water conditions in the Hemet Valley. In summary, although there is some conflict in the evidence regarding the knowledge of the Williamses, it was resolved in their favor.

[2] The trial court made no express finding upon the issue concerning the status of Steele and his knowledge, if any, of citrus growing and water conditions. However, there is no material evidence to support such a finding, and under such circumstances a judgment will not be reversed for the failure to make one. *New Blue Point Min. Co. v. Weissbein*, 198 Cal. 261, 244 P. 325, 45 A.L.R. 781.

The Williamses admit that Steele had previously managed other property in the Hemet Valley for them, brought the Marshall ranch to their attention, and acted as their agent in opening the escrow. But they insist that there is no evidence that Steele was their agent or had any au-

thority to act for them in the negotiations leading up to the purchase of the property. To the contrary, say the Williamses, they acted entirely for themselves in the negotiations. They declare that Steele's authority in connection with the escrow was limited to passing on to the escrow holder data for instructions embodying the terms which they stated to him after the completion of their negotiations with the Marshalls and their decision to purchase the ranch in reliance upon the representations made by the Marshalls. These conclusions are fully supported by the record.

[3] The Marshalls assert that the evidence shows that they sold the ranch as a single unit for a stated sum and not on a measured representation of net acreage in citrus trees. Accordingly, they argue that the Williamses may not complain of any shortage in net acreage. In essence, the contention is that the exact number of acres of citrus trees was not material to the contract of sale. However, there is sufficient evidence to the contrary to support the findings and judgment. In addition to the testimony of the Williamses concerning the representations made to them, Marshall testified that his method of determining the sales price for the ranch was the multiplication of the number of citrus acres by a given price per acre. Under these circumstances, it may hardly be said that the quantity of citrus acreage was not within the contemplation of the parties and of the essence of the contract.

It is contended that the Williamses had independent knowledge that there were only 35 acres of citrus trees and for that reason they may not rely upon the representation of the sellers. This argument is based upon the notation on the back of the listing, in the handwriting of Mrs. Williams, which reads: "Total trees 4,000 (90 to acre)." Marshall argues that by simple computation, these figures equal approximately 44 acres in trees. By subtracting from this figure of 6 acres in apricots and the 3 acres in walnuts, there is a remainder of 35 acres in citrus trees. This figure, say the Marshalls, approximates the acreage which the trial court found had been conveyed to the Williamses.

[4] The contention is without merit. Marshall denied that he told Mrs. Williams that there were a total of 4,000 trees on the ranch, or that there were 90 trees per acre, although Mrs. Williams testified that he gave her the information which she wrote down. This conversation, she declared, immediately followed Marshall's statements as to the number of acres planted to citrus trees. It is not clear whether he then referred to the number of trees of citrus fruit or to the number of trees of all kinds. However, there is no evidence that Mrs. Williams did not understand Marshall's statement to mean that there were 4,000 citrus trees on the ranch and this is consistent with other portions of their conversation. In further support of the findings is the testimony of the Williamses concerning their reliance upon the representation of Marshall as to their being 47 acres in citrus trees, and that they would not have purchased the ranch at the price asked had they known the true facts.

In connection with their argument, the Marshalls complain that the trial court erred in computing the acreage. They assert that, as shown by the record, the accepted method of computing acreage is to measure to the center of the adjoining streets. They also refer to the official subdivision map of the area which bears the notation "measurements and acreage given to the center of streets." Following this method, the Marshalls surveyed the ranch and found 43.17 acres of citrus trees.

[5] The contention is based upon the premise that the evidence conclusively proves an established custom to compute citrus acreage by measuring to the center of streets bordering an orchard. On the contrary, the record shows a general practice to survey around the perimeter of a grove to a distance approximately 10 feet beyond the outside row of trees, thus including only the ground planted to trees and necessary for cultivation of the orchard. The Marshalls introduced evidence tending to prove that, in determining the boundary lines of the ranch and for tax purposes, it is usual to measure to the center of all adjoining streets. No claim is made that there was any misrepresenta-

tion as to the boundary lines of the ranch or the total number of acres included within them. The controversy concerns the number of acres planted to citrus trees within those boundaries, and the evidence in that regard is uncontradicted.

The finding that the Williamses were not guilty of laches or unreasonable delay in rescinding is also attacked as having no evidentiary support. It is contended that by paying interest and principal on the trust deed, drilling a well, and failing to give a timely notice of rescission, the Williamses affirmed the contract and waived the right to rescind.

[6] The courts have frequently declared that there is no artificial rule as to the lapse of time which will justify the application of the doctrine of laches. Each case must be determined upon the basis of its facts, and in the absence of a palpable abuse of discretion the trial court's finding upon the issue will not be disturbed upon appeal. *Hunt v. L. M. Field, Inc.*, 202 Cal. 701, 705, 262 P. 730; *McDevitt v. Butte City Ranch*, 7 Cal.App.2d 252, 254, 46 P.2d 290.

[7] A vendee who has been defrauded by his vendor is entitled to a reasonable time to investigate the falsity of the representations and the time so consumed cannot be charged as unreasonable delay. *Dunn v. Security-First Nat. Bank*, 131 Cal. App. 541, 21 P.2d 647. Although in December, 1946, or January of the following year, the Williamses suspected that the ranch did not have 47 acres of citrus trees, they had no definite information in regard to the area. Marshall was immediately asked for information but none was obtained from him. Dr. Williams then ordered an investigation. This was completed in March, 1947. Maps of the area showed a shortage of approximately 6 acres. Dr. Williams informed Marshall of this fact by letter, and demanded an adjustment in the price of the property. In the same letter Marshall was told that a payment then due upon the trust deed note would be made but under protest as to the amount. Marshall refused to make any concession as to the purchase price and did

not reply to four other letters. The water shortage was not discovered until August, 1947, when the Marshalls were in Canada. Upon their return in October and until March, 1948, when the notice of rescission was served, Steele, then representing the Williamses and Marshall were, as stated by the latter in a letter to Dr. Williams, "talking back and forth to see whether it would be possible to avoid litigation in the matter."

[8] The Marshalls argue that these facts do not support a finding that the Williamses were "lulled into inaction by their adversary," thereby excusing a delay of 15 months before serving a notice of rescission. Considering all the circumstances, it cannot be said the trial court's action was a palpable abuse of discretion entitling the appellants to a reversal of the judgment. The argument to the effect that the Williamses were given no hope for a settlement is refuted by the record. Just after the notice of rescission was served, Marshall wrote that he was greatly surprised because he thought that it had been "mutually agreed" that the parties "would get together and iron out our difficulties." This statement is certainly contrary to the present contention that there were no negotiations between the parties, and that Marshall did nothing to lull the Williamses into inaction. On the contrary, the evidence shows continuous negotiations concerning the shortage of acreage and of water from the dates when the falsity of the representations in regard to the amount of each of them was discovered until the service of the notice of rescission, which promptly followed the last conversation between the parties. "Where a party protests promptly on discovering that he has been defrauded in making a contract, and enters into negotiations for a peaceable settlement which fail, a complaint filed within a reasonable time after such failure is not barred by laches." *Reiniger v. Hassell*, 216 Cal. 209, 210-211, 13 P.2d 737, 738.

[9,10] As to the argument that the trial court erred in failing to make a specific finding upon the issue of waiver. "(T)he law is settled that waiver is an

affirmative defense and a defendant relying thereon must set it up in his answer." *Wood v. Jotham Bixby Co.*, 29 Cal.App.2d 294, 299, 84 P.2d 204, 207; *Wienke v. Smith*, 179 Cal. 220, 225, 176 P. 42. Despite the contrary contention of the Marshalls, the second and third affirmative defenses of their answer disclose no such plea, with the possible exception of the following language: "Plaintiffs have delayed any right of rescission that they might have to the material prejudice of defendants, and by reason thereof plaintiff should not be allowed to deny the validity of said contract. * * *" Upon this pleading the trial court found that "It is not true that the plaintiffs have delayed their right of rescission to the material or any prejudice of the defendants. * * *" And in its last finding of fact, the trial court recited: "The Court having heretofore found in favor of the plaintiffs and against the defendants on the issues of fraud and misrepresentation, rescission, laches and waiver. * * *"

[11,12] At various stages of the trial, the Marshalls unsuccessfully moved the trial court to compel an election between the alternative remedies of rescission and damages. They argue that as a result of these erroneous rulings, they were compelled to defend upon both theories. A defrauded vendee may, in the same action, seek rescission or damages in the event rescission cannot be obtained. *Bancroft v. Woodward*, 183 Cal. 99, 190 P. 445. There is no good reason why the plaintiff in such an action should be compelled to make an election between those remedies during the course of the trial, and such a rule would be contrary to fundamental principles of law.

The judgment is affirmed and the purported appeal from the order denying a new trial is dismissed.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice.
I dissent.

Section 1691 of the Civil Code provides that "Rescission, when not effected by con-

sent, can be accomplished only by the use, on the part of the party rescinding, of *reasonable diligence* to comply with the following rules:

"1. He *must rescind promptly*, upon discovering the facts which entitled him to rescind, if he is free from duress, [etc.] * * *, and is aware of his right to rescind * * *." (Italics added.)

This rule is sound and the code section which declares it should not be, in effect, repealed by decisions such as that of the majority of this court in the present case.

Although the relief granted is said to be "a money judgment in an action based upon asserted false representations," it is in reality a decree permissible only in an equity suit¹; it enforces a rescission and restores to the plaintiffs the sums paid to and for the benefit of the defendants. As appears from the majority opinion, the sale of the land in controversy was completed in July, 1946; the purchasers "suspected" a shortage of acreage in December, 1946, or January, 1947, and wrote to the vendors complaining of it on January 19, 1947; the purchasers knew of and spent \$10,000 endeavoring to correct the water shortage in the summer of 1947; notice of rescission was not given until March, 1948.

The right to rescind is lost by delay. Diligence is "a condition of the right to rescind," and "There have been many cases in which delays for much shorter periods than a year have been held to be fatal to the right to rescind. [Citations.]" *Clanton v. Clanton*, 1942, 52 Cal. App.2d 550, 556, 126 P.2d 639, 642; see also *Campbell v. Title Guarantee & Trust*

Co., 1932, 121 Cal.App. 374, 377, 9 P.2d 264, where it is said, quoting from *Schneider v. Henley*, 1923, 61 Cal.App. 758, 763, 215 P. 1036, 1038, "it would appear that 30 days is about the utmost length of time which the courts are disposed to allow to the purchaser for rescission, unless there are unusual circumstances in the case excusing longer delay"; *King v. Los Angeles County Fair Ass'n*, 1945, 70 Cal.App.2d 592, 596, 161 P.2d 468.

No such unusual circumstances appear here. On the contrary, as stated in the majority opinion, vendor Marshall replied in January, 1947, to purchaser Williams' letter regarding a "suspected" shortage of acreage, that he could do no more "than has been done." Instead of exercising their right to rescind, the purchasers delayed for more than two months before communicating again with the vendors. Williams then again wrote to Marshall with reference to the shortage of acreage. It was only after the property in question had been seriously damaged that Steele, representing the Williamses, commenced negotiations with the Marshalls to determine whether litigation could be avoided. Certainly it cannot be said that Marshall "lulled [the Williamses] into inaction" by telling them, as soon as they reported to him their suspicion of fraud, that he could do no more "than has been done."

The judgment, resting as it does upon the theory of rescission and restitution, is as a matter of law contrary to the requirements of diligence and promptness set forth in section 1691 of the Civil Code, and is irreconcilably inconsistent with the many cases which have heretofore upheld the re-

1. The opening paragraph of the majority opinion declares that "Roy and Marguerite Williams were awarded a money judgment in an action based upon asserted false representations made in connection with the purchase of real property from Frank D. and Grace Edna Marshall. The court also ordered that the contract of sale and note and a deed of trust be canceled." But on page 376 of 235 P.2d the actual facts (showing that the judgment is in truth a decree in equity enforcing rescission as distinguished from

a judgment for damages in an action at law) appear; the more accurate statement there is: "Judgment was rendered against the Marshalls for \$37,668.04, the amount which had been paid upon the contract and trust deed. \$3,250 was added for the expenses, in excess of profits, incurred by the Williamses for the care and protection of the property. The court also decreed that the contract of sale and the deed of trust be canceled."

quirements of the statute. While a cause of action for damages might be made out, both the quoted statute and the cited cases demonstrate that the majority opinion enforcing restitution on rescission is untenable. Conformity to law requires a reversal of the judgment and a new trial.

SPENCE, J., concurs.



37 Cal.2d 510

PEOPLE v. RILEY.

Cr. 5185.

Supreme Court of California, in Bank.
June 29, 1951.

Proceeding by the State to determine the sanity of Leandress Riley, who was incarcerated in San Quentin under a final judgment imposing the death penalty. The Superior Court, Marin County, entered order that defendant was presently sane and he appealed. The Supreme Court, Spence, J., held that no appeal could be taken by either party from an order in a statutory proceeding to determine the present sanity of a defendant, who had been delivered to the warden at the state prison under judgment of death, based upon a jury's verdict finding defendant sane or insane.

Appeal dismissed; motion for augmentation of record denied.

Schauer, Shenk and Carter, JJ., dissented.

1. Criminal law $\S$ 1023(12), 1024(1)

No appeal can be taken by either party from order in statutory proceeding to determine present sanity of defendant, who has been delivered to warden of state prison under judgment of death, based upon jury's verdict finding defendant sane or insane. Pen. Code, $\S\S$ 3700-3704.

2. Criminal law $\S$ 981(2)

Statutory proceeding to determine present sanity of defendant under sentence of death, initiated after final judgment, is not one to determine guilt or innocence of defendant, but is anomalous proceeding pro-

vided to determine whether judgment of conviction, having become final, should be presently executed. Pen. Code, $\S\S$ 1367, 3700-3704.

3. Criminal law $\S$ 981(2)

Determination of sanity made in one statutory inquiry does not foreclose further inquiry at later date into mental status of defendant awaiting execution, if warden of state prison has reason to believe that another inquiry should be initiated to determine defendant's sanity as of that later time. Pen. Code, $\S$ 3704.

4. Insane persons $\S$ 85

Under statutes providing for determination of present sanity of person delivered to warden of state prison under judgment of death, convicted person, who may become insane following his conviction, has no constitutional or inherent right to have execution of his sentence suspended by reason of insanity. Pen. Code, $\S\S$ 1367, 3700-3704.

5. Insane persons $\S$ 85

At common law, granting of application for suspension of death sentence because of insanity was discretionary with court or executive power in exercise of clemency.

6. Criminal law $\S$ 1219

Convicted person awaiting execution has only such rights and remedies as may be conferred by statutory provisions, and such provisions should be construed in light of their historical background. Pen. Code, $\S\S$ 3700-3704.

7. Criminal law $\S$ 981(2)

Statutory proceeding to determine present sanity of defendant under sentence of death does not purport to be true adversary proceeding surrounded by all safeguards and requirements of common-law jury trial. Pen. Code, $\S\S$ 3700-3704.

8. Criminal law $\S$ 1023(12)

No appeal could be taken by defendant, who had been delivered to warden of state prison under judgment of death, from order in statutory proceeding to determine his present sanity based upon jury's verdict finding defendant sane. Pen. Code, $\S\S$ 3700-3704.

9. Constitutional law ☞268
Criminal law ☞641(1)

Statutory provisions directing inquiry as to present sanity of defendant under sentence of death do not require appointment of counsel for defendant and trial court's failure to take such action, upon defendant's appearance in court without counsel, would not offend the standards of due process. Pen. Code, §§ 3700-3704.

10. Jury ☞70(1)

Where no jury was summoned to hear statutory proceeding to determine present sanity of defendant under sentence of death, trial court properly ordered special venire be summoned to try cause. Pen. Code, §§ 1046, 3700-3704.

11. Criminal law ☞981(2)

In statutory proceeding to determine present sanity of defendant under sentence of death, unanimous concurrence of jury, as in criminal trial, was not required for rendition of valid verdict. Pen. Code, §§ 3700-3704.

12. Criminal law ☞981(2)

Hearing to determine present sanity of defendant, who has been delivered to warden of state prison under judgment of death, has none of the elements of a criminal proceeding but rather is collateral, and is special proceeding of a civil nature. Pen. Code, §§ 3700-3704.

13. Constitutional law ☞257

Due process of law does not require unanimous verdict, as criminal trial procedural safeguard, to apply in post conviction procedures.

14. Criminal law ☞1128(1)

Motion for augmentation of record, to include various factual matters which were not presented to trial court at time of hearing to determine present sanity of defendant delivered to warden of state prison under judgment of death, was unauthorized. Pen. Code, §§ 3700-3704.

Edmund G. Brown, Atty. Gen. and Clarence A. Linn, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

In a proceeding initiated, pursuant to section 3701 of the Penal Code, to determine the sanity of defendant Leandress Riley, who was then incarcerated in San Quentin under a final judgment imposing the death penalty, a jury found him to be "presently sane." The trial court accordingly made its order pursuant to section 3703 of the Penal Code; and from such order defendant attempts to take this appeal.

On September 20, 1949, defendant was found guilty of first degree murder and was sentenced to be executed. The judgment was affirmed by this court upon an automatic appeal. *People v. Riley*, 35 Cal. 2d 279, 217 P.2d 625.

During incarceration at the state prison and while awaiting execution, defendant became somewhat uncooperative and uncommunicative. Such conduct on the part of defendant created some doubt in the warden's mind as to defendant's sanity, and he called six psychiatrists to examine defendant. The views of these experts were submitted to the jury in the present sanity proceeding. They were not entirely in accord in their conclusions. While they apparently agreed that defendant was suffering from a genuine fear concerning his fate as the date of his impending execution approached, they disagreed on the matter of whether or not defendant was feigning the majority of the symptoms to which they referred in their respective reports. Three of the six psychiatrists—Dr. Rapaport, Medical Director of the Agnew State Hospital; Dr. Williams, Medical Director of the Mendocino State Hospital; and Dr. Miller, Medical Director of the Napa State Hospital—were of the opinion that defendant was sane and was feigning the majority of his symptoms. The other three experts—Dr. Schmidt, Dr. Rogers, and Dr. Kirksey, all psychiatrists at San Quentin—while concluding that defendant was insane, gave certain testimony on cross-examination

Jerome A. Duffy, San Rafael, under appointment by Supreme Court, for appellant.

which tended to detract from the force of their general conclusions. For example, defendant's condition was described as a "mild mental instability," with "too much of the feigning element" at times. Dr. Schmidt testified that "one out of every twelve people received at San Quentin is * * * insane." He further stated that in his opinion defendant would improve if the "prospect of capital punishment * * * was removed." The jury, by a vote of nine to three, found defendant to be sane. The order from which this attempted appeal is taken was thereupon entered.

[1] At the outset, respondent made a motion to dismiss this appeal upon the ground that the trial court's order in this type of proceeding is not subject to such review. Apparently this precise question has not been previously determined in this state, but consideration of the applicable statutory provisions sustains respondent's position—that no appeal may be taken by either party from an order in such proceeding based upon a jury's verdict finding a defendant sane or insane.

The procedure for determining the question of the sanity of a prisoner under sentence of death is specified in sections 3700 to 3704 of the Penal Code. Section 3700 declares that "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the * * * succeeding sections, unless an appeal is taken." Section 3701 provides for the determination of the question of defendant's sanity after he has been delivered to the warden at the state prison: "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the

question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry." Section 3702 prescribes the procedure for the hearing: "The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, * * *." Section 3703 states that "The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof * * *." Section 3704 provides, as here pertinent, for the procedure after the court's order is entered: "If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; * * *."

[2] From a reading of these statutory provisions, it is apparent that the instant proceeding, initiated after final judgment, is not one to determine the guilt or innocence of a defendant, but is an anomalous proceeding provided by statute to determine whether the judgment of conviction, having become final, should be presently executed. In line with the humane principle expressed in section 1367 of the Penal Code that no person shall "be * * * punished for a public offense, while he is insane", the sole purpose of this collateral proceeding is to determine whether a defendant who has been sentenced to death is "presently sane."

[3] But there is no real finality to any verdict or order entered in such proceeding. Recognizing that the mental condition of a convicted person may change from time to time, there is statutory provision for the determination of a defendant's restoration to sanity following an adjudication of his insanity at the time of the prior inquiry into the matter. Pen.Code, § 3704. Likewise a determination of sanity made in one inquiry so initiated does not foreclose a further inquiry at a later date into the mental status of a defendant awaiting execution, if the warden has reason to be-

lieve that another inquiry should be initiated to determine a defendant's sanity as of that later time.

[4, 5] A study of the historical background of the cited statute does not disclose that a convicted person, who may become insane following his conviction, has any constitutional or inherent right to have the execution of his sentence suspended by reason of such insanity. At common law the granting of an application for such suspension appears to have been discretionary with the court or the executive power in the exercise of clemency, as a merciful dispensation, an act of grace. In such cases there was no absolute right to a hearing and the ruling of the trial court was not subject to review by appeal. Blackstone's Commentaries, Book IV, pp. 395-396 [Cooley's Fourth Ed., 1899, Vol. II, pp. 1523-1524]; State ex rel. Lyons v. Chretien, 114 La. 81, 38 So. 27, 28; People ex rel. Best v. Eldred, 103 Colo. 334, 86 P.2d 248, 249-250. The same humane considerations which early prompted the court or the executive to exercise the power to grant suspensions in such cases probably motivated our Legislature in adopting the cited statutory provisions.

[6] Under these circumstances, it seems clear that a convicted person awaiting execution has only such rights and remedies as may be conferred by the statutory provisions and that these provisions should be construed in the light of their historical background. To this point, it has been held that after conviction and the imposition of sentence, due process of law does not require that a judicial hearing be held to ascertain the "present" sanity of a convicted person, Nobles v. State of Georgia, 168 U. S. 398, 405-409, 18 S.Ct. 87, 42 L.Ed. 515, or that the determination of such question be subject to judicial review. Solesbee v. Balkcom, 339 U.S. 9, 12-13, 70 S.Ct. 457, 94 L.Ed. 604.

[7] Moreover, it is plain that while there is adequate statutory provision for the protection of a defendant who may have become insane after his conviction and sentence, People v. Sloper, 198 Cal. 601, 607-608, 246 P. 802, the prescribed inquiry

does not purport to be a true adversary proceeding surrounded by all the safeguards and requirements of a common-law jury trial. Nobles v. State of Georgia, supra, 168 U.S. 398, 405, 18 S.Ct. 87, 42 L.Ed. 515. The rights of a defendant as an offender on trial for an offense are not involved. But if, following his conviction and his delivery to the warden of the state prison for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, and the latter, *not the defendant*, petitions the court for a hearing before a jury, a proceeding which is distinguished by its designation as an "inquiry." Pen.Code, § 3701. No provision is made for the assignment of counsel or notice of hearing to the defendant, but only the district attorney is required to attend the hearing. Pen.Code, § 3702. Likewise, it is the district attorney who may produce witnesses, and subpoenas for such purpose are to be issued by him as in a grand jury inquiry rather than by the county clerk as is the usual process followed in a court proceeding. Pen.Code, § 3702. Such provisions—wherein no reference is made to any right of the defendant to be represented by counsel, to cross-examine witnesses, or to offer evidence—indicate a course of procedure imposed upon the district attorney closely akin to an ex parte inquiry initiated on the same premise as proceedings instituted in the exercise of the common-law power of informal judicial or executive clemency.

[8] These statutory provisions establish the measure of a defendant's right to any determination of the question of his present sanity, "purely a matter of legislative regulation", Nobles v. State of Georgia, supra, 168 U.S. 398, 409, 18 S.Ct. 87, 91, 42 L.Ed. 515; People v. Trippell, 20 Cal. App.2d 386, 389, 67 P.2d 111, a postconviction proceeding as distinguished from the ordinary criminal proceeding to determine the issue of a defendant's guilt. Williams v. State of New York, 337 U.S. 241, 246-247, 69 S.Ct. 1079, 93 L.Ed. 1337. In the absence of statutory provision for an

appeal from the order made in consequence of the jury's finding as to a defendant's postconviction sanity, it is apparent that the Legislature, in acting upon a subject properly within its control, intended that there should be no such judicial review from the adjudication of the matter as determined in the trial court. It therefore follows that the order which defendant seeks here to have reviewed must be held nonappealable, and his purported appeal therefrom must be dismissed.

This case, however, is one of first impression and in the interest of furnishing guidance to the trial courts in the conduct of such sanity proceeding, it seems appropriate to discuss briefly the points raised by defendant herein. In passing, it might be mentioned that defendant makes no challenge of the sufficiency of the evidence to sustain the verdict and order, but he limits his contentions solely to alleged errors of procedure.

[9] Defendant first claims that he did not have effective legal representation in that counsel was not appointed to act on his behalf until a few minutes before the scheduled hour of 10 o'clock on the morning designated for the hearing, so that counsel had no time to prepare himself adequately for the presentation of defendant's case. While, as above noted, our statutory provisions do not require such appointment of counsel in this type of collateral proceeding and the trial court's failure to take such action, upon defendant's appearance in court without counsel, would not offend the standards of due process, *Solesbee v. Balkcom*, supra, 339 U.S. 9, 10-12, 70 S.Ct. 457, 94 L.Ed. 604, the court here is to be commended in that it very properly did appoint counsel for defendant, for the purpose of affording him the fullest protection in the sanity proceeding. Furthermore, in fairness to defendant's appointed counsel, it should be said that an examination of the record reveals that he acted zealously and competently in aid of defendant in every phase of the case—introducing expert testimony of the mentioned psychiatrists from San Quentin, diligently examining and cross-examining wit-

nesses at the hearing, and arguing to the jury the evidentiary considerations bearing upon the question of defendant's mental condition. Accordingly, defendant may not justifiably complain on this score, as he had effective legal representation. It should be further stated that the district attorney is to be commended for the very fair and objective manner in which he handled this proceeding, which type of conduct on his part is precisely that contemplated by the statutory provisions relating to such inquiry. Pen.Code, §§ 3701-3702.

[10] Defendant next objects to the procedure followed in the impanelment of the jury. It appears that upon the filing of the petition for inquiry into defendant's present sanity, the court fixed the time for the hearing and "ordered that a jury be summoned and impanelled from the regular jury list of the County of Marin." See Pen.Code, § 3701. However, on the day scheduled for the hearing, it was discovered that no jury had been summoned and the court thereupon "ordered that a special venire be summoned to try the cause." From the 24 persons so summoned, 12 were selected to hear the inquiry. Apparently no objection was made to the special venire. Moreover, it appears from the record that both defendant's counsel and the district attorney exercised meticulous care in the examination of the prospective jurors—that two were challenged by respondent; two were excused by stipulation of counsel; and no objection on behalf of defendant was made as to any individual juror. Defendant makes no attempt to show that he was prejudiced in any manner by reason of the impanelment of the jurors as so drawn. It is well established that the court has discretion to order a special venire according to the prevailing circumstances, whether the proceeding be civil, Code Civ.Proc. § 226 or criminal, Pen.Code, § 1046, and the propriety of such procedure has been consistently recognized in this state. *People v. Vincent*, 95 Cal. 425, 427, 30 P. 581; *People v. Suesser*, 142 Cal. 354, 359-360, 75 P. 1093; *Estate of Wall*, 187 Cal. 50, 54, 200 P. 929; *Hoffman v. Southern Pac. Co.*, 101 Cal.App. 218, 231, 281 P. 681; *Foster*

v. Hudson, 33 Cal.App.2d 705, 709, 92 P.2d 959.

[11-13] Defendant finally contests the validity of the jury's verdict of nine to three, and maintains that a unanimous concurrence should be required as in a criminal trial. The governing statutory provisions, Pen.Code, §§ 3701-3704, contain no express provision in this regard. It appears from the record that the trial court, at the suggestion of both defendant's counsel and the district attorney, instructed the jury that if nine agreed upon a verdict, that would be sufficient. The correctness of such instruction must be sustained in this type of proceeding, instituted for the sole purpose of determining defendant's "present" mental status. As above noted, such sanity hearing has none of the elements of a criminal proceeding but rather is collateral thereto, and, as such, has been designated a "special proceeding of a civil nature," to which the rules prevailing in criminal trials have no application. *People v. Lawson*, 178 Cal. 722, 728-729, 174 P. 885; also 24 C.J.S., Criminal Law, § 1619b(3), p. 203. While it appears that in other proceedings prescribed by statute for the determination of questions of sanity, the Legislature has expressly provided that a verdict may be rendered "by at least three-fourths of the jury", Welf. & Inst. Code, §§ 5125-5129, relating to the jury trial of mentally ill or insane persons; §§ 5400-5408, dipsomaniacs and inebriates; §§ 5500-5516, sexual psychopaths, and that the governing statutory provisions here make no reference whatsoever to the agreement required for a legal verdict, Pen.Code, §§ 3701-3704, in view of the special, anomalous nature of this particular type of proceeding, it is reasonable to conclude that the Legislature intended that the nine-to-three verdict would suffice herein. *People v. Lawson*, supra, 178 Cal. 722, 728-729, 174 P. 885. To this point, it might further be said that due process of law does not require a unanimous verdict, as a criminal trial procedural safeguard, to apply "in post-conviction procedures." *Solesbee v. Balkcom*, supra, 339 U.S. 9, 12, 70 S.Ct. 457, 94 L.Ed. 604.

[14] Defendant has also presented for consideration a motion for the augmentation of the record, whereby he would include herein various factual matters which were not presented to the trial court at the time of the sanity hearing. Such motion finds no support in the law. *People v. Porter*, 82 Cal.App.2d 585, 586-587, 186 P.2d 704.

From the foregoing discussion, it is clear that defendant has been afforded the full protection accorded by statute for inquiry into his present sanity, and that he had a fair hearing thereon. However, the judicial procedure so provided does not contemplate that the order made by the trial court upon the determination of the jury should be subject to appeal. To require such judicial review would submit the possibility of carrying out a sentence to interminable delay "inconsistent with the due administration of justice." *Nobles v. State of Georgia*, supra, 168 U.S. 398, 407, 18 S.Ct. 87, 42 L.Ed. 515. As was said in *Solesbee v. Balkcom*, supra, 339 U.S. 9, at page 13, 70 S.Ct. 457, at page 459, 94 L.Ed. 604: "To protect itself society must have power to try, convict, and execute sentences." Our statutory provisions envisage a postconviction sanity hearing conducted with entire fairness to a defendant, but, as a matter of clemency so regulated by the Legislature, the determination is left for final disposition in the trial court. *Nobles v. State of Georgia*, supra, 168 U.S. at page 409, 18 S.Ct. 87, 42 L.Ed. 515.

The motion for augmentation of the record is denied. The purported appeal from the order entered pursuant to section 3703 of the Penal Code is dismissed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concurred.

SCHAUER, Justice. I dissent.

The majority hold that the "sanity hearing has none of the elements of a criminal proceeding but rather is collateral thereto, and, as such, has been designated a 'special proceeding of a civil nature,' to which the rules prevailing in criminal trials have no application," that the defendant has no

right of appeal, and, accordingly, dismiss what they designate as the "purported appeal."

But section 963 of the Code of Civil Procedure provides that "An appeal may be taken from a superior court in the following cases:

"1. From a final judgment entered in an action, or *special proceeding*, commenced in a superior court * * *." (Italics added.) In *Aldrich v. Superior Court*, 1901, 135 Cal. 12, 14, 66 P. 846, it was succinctly held that "If the proceeding [in this case for restoration of sanity] sought to be instituted by the said application to the superior court * * * was one provided for in our system of procedure, or in any way recognized by our law, it was either an 'action' or a 'special proceeding' (Code Civ.Proc., §§ 20, 21, 22, 23); and, under either view, the final judgment entered therein was appealable (Code Civ.Proc., § 963)." In the light of the specific and inclusive language of sections 20¹, 21², 22³, 23⁴, and 963 of the Code of Civil Procedure it is impossible for me to understand how

any contrary holding could reasonably be reached. See, also, *In re Bank of San Pedro*, 1934, 1 Cal.2d 675, 680, 37 P.2d 80.

It is also to be noted that this court has held (and the holding does not appear ever to have been challenged) that "The proceedings provided by the Penal Code for the determination of the question of present sanity in order to determine whether a defendant possesses sufficient mental capacity to be tried, or having been tried and convicted, to be adjudged to punishment (section 1367 et seq.), or, having been adjudged to suffer death, is sane within the meaning of our law precluding execution of such a judgment upon an insane person (section 1221 et seq., Pen.Code), are special proceedings of a civil nature." *People v. Lawson*, 1918, 178 Cal. 722, 728, 174 P. 885, 888. It is section 1367 of the Penal Code which expressly adopts into our statutory law the humanitarian principle, old and respected even in the days of Blackstone⁵, which prohibits the trial or punishment (including execution) of an insane person. A comparison of the procedure

1. Section 20 provides: "Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this state."
2. Section 21 provides: "These remedies are divided into two classes:
"1. Actions; and,
"2. Special proceedings."
3. Section 22 provides: "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."
4. Section 23 provides: "Every other remedy is a special proceeding."
5. As stated in 4 Blackstone's Commentaries, page 24: "Also if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found

guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry the Eighth, a statute was made, which enacted that if a person, being *compos mentis* (of sane mind) should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 and 2 P. and M., c. 10. For, as is observed by Sir Edward Coke, 'the execution of an offender is for example, *ut poena ad paucos, metus ad omnes perveniat* (that the punishment may reach the few, but the fear of it affect all): but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.' But if there be any doubt, whether the party be *compos* or not, this shall be tried by jury."

provided for trial in the superior court of the issues raised on a question of insanity when it arises before, during or after trial, but before judgment⁶, with that to be taken when the question is raised after judgment of death and before execution⁷, discloses no substantial ground for allowing an appeal in the one case and denying it in the other. Both procedures show legislative recognition of a necessity for, and a right to pursue, judicial enforcement of the rights declared in section 1367. The right of appeal in the first case has heretofore consistently been upheld see e. g., *People v. West*, 1914, 25 Cal.App. 369, 143 P. 793; *People v. Lawson*, 1918, supra, 178 Cal. 722, 174 P. 885, but if the majority view now announced is to be consistently applied the right of appeal in any case based on the humanely recognized right (the majority say not "right," but mere "merciful dispensation, an act of grace") declared in section 1367 should be denied.

As far back as *People v. Ah Ying*, 1871, 42 Cal. 18, 21, this court, in reversing a conviction for murder in a case wherein the trial court had failed of its own motion to suspend the trial pending determination of a question of present sanity, said, "There is no plea of present insanity required. If at any time a doubt arose as to the sanity of the defendant, it was the duty of the Court, of its own motion, to suspend the trial or further proceedings in the case, at whatever stage the doubt arose, until the question of sanity was determined. Common humanity requires that one should not be tried for his life while insane * * *." No more should an insane man be put to death. The majority holding here seems to me to be a regrettable retrogression in the standards of civilization.

Since the majority decision dismisses the appeal no useful service would be rendered by a discussion herein of its merits.

For the reasons stated the motion to dismiss the appeal should be denied.

SHENK and CARTER, JJ., concurred.

6. See Pen.Code, § 1368 et seq.

* Subsequent opinion 241 P.2d 985.

SOUTHWESTERN INV. CORP. v. CITY OF LOS ANGELES.

Civ. 14899.

District Court of Appeal, Second District,
Division 1, California.

Sept. 12, 1951.

Hearing Granted Nov. 9, 1951.*

The Southwestern Investment Corporation moved to recall a remittitur issued by the District Court of Appeal to the Superior Court of Los Angeles County on affirmance of a judgment for defendant in movant's action against the City of Los Angeles to establish a trust for leasehold dumping rights on part of certain land acquired by the city, to reinstate the cause on the calendar of the District Court of Appeal for hearing and determination, and to amend such court's fact findings and conclusions of law so as to accord with the pleadings, a stipulation, and the evidence. The District Court of Appeal, White, P. J., held that the District Court of Appeal inadvertently held that the city acquired the right to fill an entire pit, instead of only a strip across it for extension of a boulevard, and decided the cause under a misapprehension of the facts.

Remittitur recalled and cause placed on the calendar for argument and hearing as to why the District Court of Appeal should not make certain fact findings contrary to and in addition to those made by the trial court.

1. Appeal and Error ⇨1218

The District Court of Appeal has power to recall its remittitur to lower court in proper case.

2. Appeal and Error ⇨1217

Usually, appellate tribunal loses jurisdiction of cause when remittitur is sent to and filed in lower court, wherein cause is then pending.

3. Appeal and Error ⇨1186

The function of remittitur is to return to court below a cause brought up on appeal.

4. Appeal and Error ⇨1221

The District Court of Appeal is without appellate jurisdiction over its own judgments and has no power to review or modify.

7. See Pen.Code, § 3701 et seq.

fy its judgment after cause has passed from its control by issuance of remittitur to lower court.

5. Appeal and Error ⇨1218

Where appellate court's judgment and consequent sending of remittitur to court below are secured by fraud or imposition, or court is led astray to decide case under misapprehension of true facts, remittitur may be recalled on theory that appellate court never lost jurisdiction because an order secured by fraud and false suggestion is a nullity.

6. Appeal and Error ⇨1218

The rules as to when a remittitur may be recalled should not be applied so rigidly as to defeat the ends of justice.

7. Appeal and Error ⇨1218

On appeal from judgment for defendant city in action to establish trust for dumping rights in certain pit, contradictory statements in opinion of District Court of Appeal showed that court inadvertently held that city acquired right to fill entire pit, instead of only a strip across it for extension of boulevard, and decided cause under misapprehension of facts, so as to entitle plaintiff to recall of remittitur sent to Superior Court after affirmance of judgment.

8. Appeal and Error ⇨934(2)

The rule that all amendments and inferences favor judgment appealed from is inapplicable, where documentary evidence shows without conflict that trial court's finding is in direct contravention of judgment.

9. Appeal and Error ⇨1218

A corporation president's affidavit as to his unsuccessful efforts to obtain redress of claimed wrongs to corporation through city council, state Legislature, amendment of city charter, an attorney, and city bar association and lawyers' club, after corporation's attorneys resigned, sufficiently explained long lapse of time between Supreme Court's denial of corporation's petition for hearing and presentation of its motion to recall remittitur sent to Superior Court by

District Court of Appeal after affirming judgment for city in corporation's action to establish trust for dumping rights in part of land acquired by city.

10. Appeal and Error ⇨1218

A remittitur by reviewing court to lower court will not be recalled unless matters relied on by party moving for recall thereof would have compelled different result had they been considered by reviewing court.

11. Appeal and Error ⇨1218

Recall of remittitur, sent by appellate court to lower court, is extraordinary remedy, never to be utilized to obtain review by appellate tribunals of their own judgments.

12. Appeal and Error ⇨1218

A motion to recall remittitur, sent from appellate court to lower court, will be considered only where appellate court's judgment and consequent remittitur were accomplished by fraud or imposition or appellate court was led astray so as to decide case under misapprehension of facts; such consideration being predicated solely on theory that appellate court never lost jurisdiction.

Harold B. Cooper, El Monte, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., John L. Flynn, Deputy City Atty., Los Angeles, for respondent.

WHITE, Presiding Justice.

Appellant, after an adverse final determination by this court of the above entitled cause, has moved to recall the remittitur, "to reinstate the cause on the calendar of said court for hearing and determination, and to amend, under section 956a, Code of Civil Procedure, the findings of fact and the conclusions of law so that they will be in accordance with the pleadings, a stipulation in the trial court, and the evidence, particularly defendant-respondent's own records, city clerk's file No. 4550 (1934), and No. 690 (1935), which file is Exhibit

No. 4, and particularly the testimony of defendant-respondent's own officials".

Recall of the remittitur is sought upon the grounds that (1) this court decided the cause under a misapprehension of the true facts; (2) that the sending down of the remittitur was an inadvertence caused by fraud or imposition upon the court.

The appeal on the merits was decided January 28, 1946, 72 Cal.App.2d 689, 165 P. 2d 497, to which decision reference is made for a full statement of the factual background which gave rise to this litigation. Appellant petitioned for a rehearing which was denied February 14, 1946, and on March 28, 1946, appellant's petition for a hearing in the Supreme Court was denied. On March 30, 1946, the remittitur issued to the county clerk. On November 3, 1950, appellant filed the motion now under consideration.

[1-5] There can be no doubt that, in a proper case, this court has power to recall a remittitur. Usually and ordinarily when a remittitur has been sent to and filed in the court below, the appellate tribunal loses jurisdiction of a cause. The function of a remittitur is to return to the court below the cause which has been brought up on appeal. Upon the filing of the remittitur in the lower court, the cause is pending therein, and not in this court. In other words, this court is without appellate jurisdiction over its own judgments, and after the cause has once passed from its control by the issuance of a remittitur, it is without power or authority to review or modify it. But, as was stated in *Isenberg v. Sherman*, 214 Cal. 722, 725, 7 P.2d 1006, 1007, "However, that rule has no application to a situation where the judgment of this court and the consequent sending down of the remittitur has been secured by fraud or imposition, or where the court has been led astray so as to decide the case under a misapprehension as to the true facts. If such be shown to be the case, this court may recall the remittitur. The theory upon which this power is exercised is not that the court, in this manner, resumes jurisdiction over a cause, but that the court has never lost jurisdiction, because an order secured by

fraud and false suggestion is a nullity, and cannot be deemed to be the order of the court. It therefore follows that in such a case the court has never lost jurisdiction. The case of *Trumpler v. Trumpler*, 123 Cal. 248, 55 P. 1008, discusses the principles involved at some length. At page 252 of 123 Cal., 55 P. [at pages] 1008, 1009, it is stated:

"The general principles governing the jurisdiction of this court over a case which has been here, after the issuance of remittitur, and the power of the court to recall a remittitur, have been well settled. They were first elaborately stated in the case of *Rowland v. Kreyenhagen*, 24 Cal. 52. In that case the court, having stated that as a general rule this court cannot exercise any jurisdiction over a case in which a remittitur has been issued by its order and filed in the court below, say as follows: "But this general rule rests upon the supposition that all of the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or the opposite party; for, if it appears that such has been the case, the appellate court will assert its jurisdiction and recall the case."'"

In accordance with the foregoing principles, it has been held that a remittitur may be recalled where the reviewing court was imposed upon by counsel, *Trumpler v. Trumpler*, 123 Cal. 248, 253, 55 P. 1008, where the decision was predicated upon a mistake of fact by the appellate court. In *re Rothrock*, 14 Cal.2d 34, 38, 92 P.2d 634; see *Holloway v. Galliac*, 49 Cal. 149, or was improvidently rendered without due consideration of the facts of the case, *Municipal Bond Co. v. City of Riverside*, 138 Cal.App. 267, 288, 32 P.2d 661; cf. *Haydel v. Morton*, 28 Cal.App.2d 383, 385, 82 P.2d 623, or was the result of inadvertence upon the part of the court. In *re Bill's Estate*, 7 Cal.Unrep. 174, 74 P. 704 (order reversing judgment inadvertently made when there was no appeal from the judgment). See also *In re McGee*, 37 Cal.2d 6, 229 P.2d 780, 781, 782.

The principle of resumption of jurisdiction is not involved, and the right to recall a remittitur is predicated upon the ground

that this court cannot be divested of its jurisdiction by an irregular or improvident order.

[6] The question for determination is whether the present application comes within the limits of the foregoing rules. And we are disposed to say that in those cases, rare though they may be, in which a remittitur should be recalled, the foregoing rules should not be applied so rigidly as to defeat the ends of justice. *Greenfield v. Mather*, 32 Cal.2d 23, 35, 194 P.2d 1.

[7] In support of its contention that this court decided the cause under a misapprehension of the true facts, appellant urges the following claimed contradictions appearing in the opinion.

In the first paragraph of the opinion appears the following: "On May 13, 1927, the plaintiff acquired from the owner, Henry G. Weyse, an exclusive leasehold right to use the pit for dumping purposes until the same should be filled * * *." [72 Cal. App.2d 689, 165 P.2d 497, 498.]

That thereafter, in the opinion we find the statement: "On November 22, 1929 * * * Weyse deeded to the city a 90 foot right of way across the pit for the purpose of extending Washington Boulevard * * *."

It must be conceded that at no place in this court's opinion does it appear that after May 13, 1927, Henry G. Weyse reacquired from appellant, or from anyone else, any possessory rights to the pit, or to any portion thereof. Thus, argues appellant, it was held that the grantor of the respondent city of Los Angeles conveyed to the latter what he had already conveyed to appellant.

In the next to the last paragraph of the opinion of this court it is stated: "Appellant's criticism of the other findings of fact and conclusions of law is likewise without merit, as is the contention that the court failed to find upon material issues."

Examination of the opinion discloses that the word "other" refers to all of the findings except findings I, VI, and VIII. The last above-mentioned statement in the opinion covers finding II, which is as follows: "That on the 22nd day of November, 1929, defendant City of Los Angeles acquired

* * * all possessory rights of whatever nature to a strip of property * * * through * * * the 'Blue Diamond Pit,' by grant deed from Henry G. Weyse. * * *"

Appellant urges that this court upheld finding II notwithstanding the statement in the first paragraph of our opinion that appellant, and not Henry G. Weyse, owned the exclusive possessory rights to use the entire pit for dumping purposes from May 13, 1927 "until the same should be filled".

It is next set forth that in the third paragraph of the opinion this court stated: "'In the latter part of the year 1934,' quoting from the Settled Statement of Appeal, 'one Clay McCarty made an offer to the City * * * (of) the right to fill the space in the 90-foot right-of-way and necessary slopes across the Pit. * * * On March 12, 1935, the City Council adopted a resolution accepting the above offer on certain conditions. These conditions included a requirement that * * * the city be granted * * * 'the nine acres to be conveyed by H. G. Weyse,' and a release (from the Southwestern) 'of all dumping rights within the 90-foot right of way * * *'".

That in the fourth paragraph of the opinion the following appears: "Pursuant to the proposed settlement an escrow was opened on March 14, 1935, and on April 16, 1935, new escrow instructions were filed which increased the acreage to about 12 acres, covering all of the property north of the temporary roadway."

It is true as contended by appellant herein that nowhere in the opinion does it appear that the city council amended its original resolution of March 12, 1935 (hereinafter referred to as appearing in the opinion), and an examination of Exhibit No. 4 discloses that this resolution was not amended. Thus, argues appellant, such "new escrow instructions" which purported to increase "the acreage to about 12 acres", did not conform to the contract entered into by the city council, and "were, consequently, incorrect, unlawful, fraudulent and void". *Security-First Nat. Bank v. Clark*, 8 Cal.App.2d 709, 712, 713, 48 P.2d 167; *McQuillan on Municipal Corporations*, 1950

Ed., Vol. 10, sec. 29.21. It is then urged that the escrow was "incorrect and fraudulent" and could not be a legal instrumentality in the transaction, but that the opinion of this court states that such escrow was the instrumentality "by which the city acquired a fee title to the Blue Diamond Pit * * *".

Appellant next challenges the statement contained in the foregoing opinion of this court that "There is nothing of record in the instant case which in any manner tends to rebut the presumption that 'private transactions have been fair and regular' (C.C.P. Sec. 1963(19)), or the corresponding presumption that 'official duty has been regularly performed', (C.C.P. Sec. 1963 (15))."

In support of such challenge, appellant directs our attention to statements made by two judges of the superior court before whom these proceedings were pending in the early stages thereof (these judicial utterances were not before us on consideration of the appeal herein).

The first such statement appears in a memorandum opinion of Judge Clarence M. Hanson of the Superior Court of Los Angeles County, rendered in ruling upon a demurrer and motion. It is as follows: "It is not to be gainsaid that the contract entered into between the plaintiff and those who purported to bind the city is invalid for want of approval by the City Council. But the contract is not invalid as to the plaintiff alone; it is likewise invalid as to the city. But from that invalid contract there flowed to the city an asset which, except for the contract, it was not entitled to and would not have received. The city cannot keep property for which its agents agreed to pay, or as here, to grant a permit, any more than can an individual. When the city does business it must do so on business terms and not on the theory that it can get something for nothing. Section 386 is not here a shield—indeed, it is not involved despite the ingenious and admirable argument of counsel for the city. Demurrer overruled; motion denied."

The second statement was made by Honorable Clement L. Shinn, then a judge of the Superior Court of Los Angeles County,

upon the conclusion of a phase of this litigation pending before him. It is as follows:

"The Court: If this transaction could be set aside because of the inherent dishonesty in it, I wouldn't hesitate a minute to give the plaintiff a judgment.

"(Remarks by Mr. Mealey.)

"The Court: Well, call it immorality or whatever you want to call it. How the city—

"(Interruption and remarks by Mr. Mealey.)

"The Court: I know what your position is, Mr. Mealey, but if any individual had done what the city has done here, no one could accuse him of being honest in his business dealings."

It does appear that because of conflicting findings the opinion of this court, while recognizing that the city acquired the right to fill the space in a 90-foot strip and necessary slopes across the pit, which space was necessary for the extension of Washington Boulevard across said property, inadvertently holds that the city acquired rights to fill the remainder or all of the pit, a fact which is negated by the offer made to and accepted by the city council. Manifestly if, as stated in the opinion, appellant herein "On May 13, 1927, * * * acquired from the owner, Henry G. Weyse, an exclusive leasehold right to use the pit for dumping purposes until the same should be filled", said owner could not on November 22, 1929, deed "to the City a 90-foot right of way across the pit" for the simple reason that on and after May 13, 1927, said Weyse did not own any possessory rights to the pit.

Undoubtedly, for the foregoing reason, as appears from the opinion, "the city demanded a quitclaim deed from the Southwestern * * * 'conveying all their rights in and under the 90-foot right of way and the nine acres to be conveyed by H. G. Weyse,' and a release 'of all dumping rights within the 90-foot right of way owned by the City across the Pit.'"

It does appear that the findings are in conflict and that the opinion filed herein inadvertently held that the city acquired

rights to the entire pit while in reality the transaction in question contemplated (as shown by the offer to sell to the city and the city council's resolution of acceptance) the right of the city to fill the 90-foot strip and the slopes across the pit for the extension of Washington Boulevard.

In the opinion of this court we also find the following language: "A letter report from Commissioner of Public Works Allan to the City Council, dated October 24, 1934, recommending acceptance of the McCarty offer, says nothing about appellant retaining any dumping rights, but suggests that the city secure a deed or release from appellant 'concurring in this transaction,' and states that 'This would give the City complete jurisdiction of the pit of approximately 400 feet wide, including the present Right of Way owned by the City, *and the sole right to fill the pit* * * *'" (Italics added.)"

Reference to the so called Commissioner Allan report mentioned in that part of the last-quoted portion of the opinion, and which report appears in the city clerk's file, lends support to appellant's claim that the intent of the city was to obtain rights to the 90-foot strip and slopes, but as appellant urges in its motion, "a substantial portion of the Blue Diamond Pit, but not all of it, because the filling of the 90-foot strip and slopes would fill less than one-half of the then total space known as the Blue Diamond Pit". We think it may fairly be said that, whether purposely or inadvertently, the court was led astray so as to decide the cause under a misapprehension of the true facts, viz., that the city council by its resolution of acceptance and the offer which prompted such acceptance, never intended that the city's rights should extend to more than the right to fill the 90-foot strip and slopes necessary for the extension of Washington Boulevard, and not to the entire Blue Diamond pit in which appellant had possessory rights. That appellant surrendered rights only to the extent provided for in the heretofore called McCarty offer and the council resolution of acceptance thereof.

In the opinion of this court it is stated: "A quitclaim deed containing no reserva-

tions or exceptions and covering the 12.09 acres contemplated by the amended escrow instructions, was presented to appellant in April, 1935, signed by Southwestern on September 23, 1935, and deposited in escrow on October 29, 1935."

However, in truth and in fact it appears (Exhibits 1 and A) that the deed in question did not cover "the 12.09 acres" above referred to but did cover 15.962 acres. This it appears was not what the city council called for from appellant in order to carry out the aforesaid McCarty offer.

[8] The trial court's finding II reads: "That on the 22nd day of November, 1929, defendant City of Los Angeles acquired * * * all possessory rights of whatsoever nature to a strip of property ninety feet in width over, under, along and through the premises described in plaintiff's said second amended complaint—generally known as the 'Blue Diamond Pit'—by grant deed from Henry G. Weyse * * *".

It now appears that the right of possession of the Blue Diamond pit by appellant for the purpose of filling the same was obtained by appellant under an agreement between the owner, Henry G. Weyse, and appellant dated May 13, 1927, and that the city council was so advised by the city attorney. Manifestly, as heretofore pointed out, appellant could not be divested of those possessory rights obtained in May, 1927, by a deed from the owner, Weyse, to the city executed some two years later. Consequently, the rule that all intendments and inferences favor the judgment, as set forth in the opinion, can have no application where the documentary evidence shows without conflict that the finding is in direct contravention thereof. *Stoll v. Selander*, 81 Cal.App.2d 294, 296, 183 P.2d 940. It might here be noted that findings III, IV and V are more or less based upon and inseparably tied to the aforesaid finding II.

Whatever may be said regarding the modifications and changes in the transaction made by various city administrative officials, it does appear that the only proposal accepted by the city council was the here-

inbefore referred to McCarty offer, and that the intention of the parties was that when the council acted it accepted appellant's instrument as being a release concurring in the McCarty offer, that is, being a quitclaim deed transferring to the city the right to fill the 90-foot strip and necessary slopes for the extension of Washington Boulevard across the Blue Diamond pit. Law and good morals should be one and inseparable. That such may not have been the case in the instant proceeding is evidenced by the remarks of two superior court judges during various phases of this litigation, and which remarks are hereinbefore set forth.

We cannot agree with respondent city that in the attempt to have the remittitur herein recalled "What petitioner is really seeking is a reconsideration of this case upon the theory that the City of Los Angeles and its officials perpetrated an outrageous fraud upon plaintiff and viewing the evidence from that standpoint reinterpreting it on the assumption that the cause of action sounds in fraud." We fail to perceive wherein appellant seeks to alter the basic theory of its cause of action which is "to impress with a trust for its benefit all space in the Blue Diamond Pit not required for the support of right of way for Washington Boulevard across said pit, notwithstanding the grant contained in its deed to the City of Los Angeles."

[9] Respondent city also urges that it is a fundamental rule that a motion to recall a remittitur must be promptly made. While it is true that unexplained delay is itself sufficient to deny the relief, *Ellenberger v. City of Oakland*, 76 Cal.App.2d 828, 836, 174 P.2d 461, appellant in the cause now engaging our attention, through its president, C. C. Bigelow, has filed an affidavit in explanation of the lapse of time ensuing between the date the petition for hearing in the Supreme Court was denied and the presentation of the present motion. Said affidavit is lengthy but may be epitomized by saying that it is therein averred that "In the forepart of the year 1946, and a few days after the Supreme Court of this State had declined to review the decision

of the District Court of Appeal in this action, Southwestern's then attorneys, Messrs. James R. Jaffray and Don Lake, told me that they were through acting as our attorneys. Thus, the Southwestern was left without legal advice, for it was totally without funds, or assets of any kind, and, therefore, could not retain other counsel". Appellant's president then sets forth that because of lack of funds to engage attorneys he decided to appeal to the city council of Los Angeles to redress the claimed wrong done the corporation of which he was president. To that end he proceeded to obtain statements from the eleven living members of the council as it existed at the time of the transaction in question. This consumed approximately five months. These statements, with other information, were presented to the city council, but it is averred that body was advised by the city attorney that the council was without jurisdiction under the charter to grant the relief prayed for. Affiant then avers that "possibly the thing to do, would be to ask the state legislature to pass an enabling act" so that the council might be empowered to act upon appellant's petition for redress of the claimed wrong. Affiant then consulted a member of the legislature, as a result of which the question framed by affiant was submitted to the legislative counsel for an opinion. The answer to this inquiry was that such legislation "probably would be held unconstitutional". Affiant then avers that in the letter from the legislative counsel "there were three paragraphs in the letter which made it plain that the Los Angeles electors could, if they wanted to do so, amend the City Charter so that the City Council could redress such wrongs as this one perpetrated upon the Southwestern, because the letter stated that the courts have held that 'the freeholders' charter is the supreme law of a city on its municipal affairs.'

"To set the stage for requesting the City Council to submit to the electors an enabling amendment to the City Charter, I prepared and sent out hundreds of pieces of mail matter to numerous Los Angeles organizations of many kinds, and to a good

many individual citizens. This mailing was finished in February, 1949. On March 15, 1949, I filed with the City Clerk a Proposed Enabling Charter Amendment. On March 29, 1949, I was in the Council chamber when our request came before the City Council, but it refused even to let the electors vote on our proposal, although it was purely enabling * * *, thus our expectation of relief through the City Council was ended".

Affiant then avers that he was referred to an attorney who agreed to confer with him. Such conferences, according to affiant resulted in advice to "make a motion for the recall of the remittitur". Affiant then avers that he was advised to prepare a full history of the case which he presented to the attorney in April of 1950. Finally, however, affiant avers that the business of the attorney was such that he found himself unable to undertake the task of preparing a motion to recall the remittitur. Affiant then wrote letters to the Los Angeles Bar Association and the Lawyers Club of Los Angeles, "asking them to name three to five of their members who have had the experience of making a motion for the recall of a remittitur, or are familiar with such a procedure". Replies to these letters indicated that the respective organizations "had no committee to which this matter could be appropriately referred", or had "no way of finding out which attorneys have had that experience". According to his affidavit, affiant continued to prepare "some supplementary notes to my more elaborate notes", and on August 28, 1950, "I was able to obtain Southwestern's present attorney". In view of the foregoing, which is but an epitome of the activities of appellant through its president, we are not impressed that the delay in filing the instant motion can be characterized as unexplained.

[10] Having in mind the rule that a remittitur will not be recalled unless the matters relied upon by the moving party would have compelled a different result had they

been considered by the reviewing court, *In re McGee*, supra, 37 Cal.2d at page 9, 229 P.2d at page 782, upon an examination of the matters contained in the motion to recall the remittitur herein and which matters were not before us on the appeal, we find considerable in them to shake our confidence in both the correctness and justice of our former ruling.

[11,12] We wish here to emphasize that cases are rare when the remedy of recalling the remittitur is available. The few cases on the subject attest to the fact that it is an extraordinary remedy, never to be utilized to obtain a review by appellate tribunals of their own judgments. As heretofore stated, this court has no appellate jurisdiction of its own judgments. It is only in those isolated cases where the judgment of an appellate court and the consequent sending down of the remittitur has been accomplished "by fraud or imposition, or where the court has been led astray so as to decide the case under a misapprehension as to the true facts", *Isenberg v. Sherman*, supra, 214 Cal. at page 725, 7 P.2d 1006, 1007, that a motion to recall the remittitur will be considered, such consideration being predicated solely upon the theory that under the circumstances just referred to, the court has never lost jurisdiction.

The remittitur is recalled and the cause placed on calendar for argument and hearing November 27, 1951, as to why, pursuant to section 956a of the Code of Civil Procedure, this court should not make findings of fact contrary to and in addition to those made by the trial court, such findings to provide that respondent city is holding in trust for appellant the right to fill the space in the Blue Diamond Pit outside of the slopes of the fill for the extension of Washington Boulevard in the City of Los Angeles, and that respondent city must return such right to appellant, or in lieu thereof, pay to appellant the value thereof.

DORAN and DRAPEAU, JJ., concur.

106 Cal.App.2d 518

NOBLE v. CAVALIER RESTAURANT et al.

Civ. 14753.

District Court of Appeal, First District,
Division 1, California.

Sept. 14, 1951.

Action by Ruth Noble against Cavalier Restaurant and others for injuries sustained by plaintiff when she slipped and fell on garbage lying on sidewalk behind restaurant. The Superior Court for the City and County of San Francisco, George W. Schonfeld, J., entered judgment on a verdict in favor of plaintiff and against defendant American Hog Company, a copartnership, and the individual partners, and such defendants appealed. The District Court of Appeal, Bray, J., held that the evidence warranted inference that the substance on which plaintiff slipped was spilled on sidewalk by appellants' employees in removing garbage from restaurant and was sufficient to support verdict and judgment for plaintiff.

Judgment affirmed.

1. Municipal corporations ⇨819(4)

Evidence warranted inference that the material lying on sidewalk behind restaurant on which pedestrian slipped and fell must have been spilled by defendants' employees while removing garbage from restaurant a few hours before accident and was sufficient to support verdict and judgment against such defendants for injuries sustained by pedestrian.

2. Trial ⇨109

A motion for nonsuit on an opening statement should not be granted unless it appears that plaintiff cannot prove a cause of action.

3. Appeal and error ⇨1061(2)

Where plaintiff's opening statement, though meagre was sufficient to show generally what the case was about and did not show that plaintiff could not prove a cause of action and plaintiff did in fact prove a case, any error in denying defendants' motion for nonsuit at close of opening statement was not prejudicial.

4. Municipal corporations ⇨821(3)

Where evidence was sufficient to make out a cause of action for injuries sustained by pedestrian when she slipped and fell on garbage spilled on sidewalk by defendants' employees, denial of defendants' motions for nonsuit and directed verdict for failure to prove allegations of complaint was not error.

5. Municipal corporations ⇨819(4)

In action for injuries sustained by pedestrian when she slipped and fell on garbage lying on sidewalk, evidence was sufficient to show that such garbage had been spilled by defendants' employees.

6. Municipal corporations ⇨822(5)

Refusal to give proposed instructions on subject of unavoidable accident in action for injuries sustained by pedestrian when she slipped and fell on garbage lying on sidewalk was not error, since the injury was caused by substance on sidewalk which could only have been there through the negligence of some one, and hence accident could not have been unavoidable.

7. Trial ⇨255(11), 260(8)

Failure to instruct that plaintiff could have been injured because of an accident for which none of defendants was liable was not error, in absence of request for such instruction and in view of the instructions given.

8. Trial ⇨203(1)

While an instruction setting forth the charging allegations of complaint and defendant's denials thereof is proper, it is not necessarily essential.

9. Trial ⇨260(2)

Where instructions fully informed jury of the issues in case, failure to give proposed instruction setting forth the charging allegations of complaint and defendants' denials thereof was not error.

10. Trial ⇨260(3)

Refusal to give proposed instruction setting forth in detail plaintiff's burden of proof as regards particular defendants was not error, where the subject of burden of proof as to all defendants was fully covered in the instructions given.

11. Municipal corporations Ⓒ631(1)

In provision of city police code making it unlawful to throw any banana peel, orange peel or other "rubbish" on sidewalk, quoted word could be construed as including vegetable refuse.

See publication Words and Phrases, for other judicial constructions and definitions of "Rubbish".

12. Municipal corporations Ⓒ631(1)

Under provisions of city police code making it unlawful to sweep, throw or brush any rubbish, etc., onto sidewalk, the deposit of rubbish on sidewalk must be an intentional act.

13. Appeal and error Ⓒ1170(9)

Under the facts disclosed in action for injuries sustained by pedestrian when she slipped and fell on garbage lying on sidewalk behind restaurant, the dropping of such garbage by defendants in removing it from restaurant could only have been negligently done, and hence any error in giving instruction to the effect that a violation of city police code making it unlawful to sweep, throw or brush any rubbish onto sidewalk would constitute negligence as a matter of law was not prejudicial. Const. art. 6, § 4½.

Hadsell, Murman & Bishop, San Francisco, for appellants.

Sullivan, Roche, Johnson & Farraher, San Francisco, for respondent.

BRAY, Justice.

Insufficiency of the evidence to support the verdict and judgment is the principal contention on this appeal by defendant American Hog Company, a copartnership, and the individual partners, from a judgment in favor of plaintiff in the sum of \$4,000.

Record.

Plaintiff sued said defendants, the Cavalier Restaurant and the Scavengers' Protective Association, a corporation, for damages for injuries claimed to have been received when she slipped and fell on garbage lying on the sidewalk in the rear of said restaurant. At the end of plaintiff's open-

ing statement all defendants moved for a nonsuit, which was denied. They again moved for a nonsuit at the end of plaintiff's case, and for a directed verdict. Defendant Cavalier Restaurant's motion was granted. The others were denied. The jury found in favor of defendant Scavengers' Protective Association and awarded plaintiff \$4,000 damages against the American Hog Company and its owners.

Evidence.

Defendants contend that there is no evidence connecting them with the material upon which plaintiff slipped. There are two doors, one large, the other narrow, at the rear of the Cavalier Restaurant, which open on the sidewalk on Eddy Street. The accident happened about twenty minutes to nine on the morning of January 6, 1948. Plaintiff testified that while walking on the sidewalk in front of the narrow door she slipped and fell, experiencing "terrible pain." She immediately asked that the manager be called. He was. When she got up her shoes, coat, dress and purse were full of "garbage." It was of the consistency "of mashed cabbage, spinach or lettuce, it was something leafy." She looked at the sidewalk at the point where she fell and on it "was a kind of squashed area of leafy stuff, mashed down, where you could see I slipped in it." "It was * * * a dark greenish color, with some, apparently, lettuce leaves in it, too." "It could be any leafy material," "not dry." "I would call like cabbage after it was cooked a long time, with grease and mashed up." She was certain the material was greasy. The material was grayish green, "ground up and greasy," "matted with grease." It had "a greasy odor," "stale smelling." There was a "skiddy" looking place where she had slipped.

Miss Huppner, who was with plaintiff, testified that she examined the pavement after the fall. "There were some green leaves there, some greasy stuff like, you know, just regular garbage." It gave the appearance of having been cooked. It looked like "fresh garbage." "It was grease and some greens on there, kind of a mixture." "It looked like plain garbage

you would throw away in a garbage can." She located the spot where plaintiff fell as being in front of the large door, not the narrow door. The garbage area was about 12 inches in diameter. The material was dark green, flat, "more of a liquid" substance. "* * * there were small pieces there, and green leaves amongst them," "dirty like," and "a greasy type of liquid." The garbage was marred by only "one streak" where plaintiff had slipped.

Miss Brown, who also was with plaintiff, testified that when she started to pick plaintiff up she saw "all the grease." She placed the fall as occurring "When we passed just about the door there," referring to the larger door. She described the material as being "soft and green," "not runny." When asked what caused plaintiff to fall she replied "that grease on the ground * * *." She stated that the grease was not black, although two weeks after the accident she had signed a statement that it was "black and appeared hard."

Defendant Lomori, one of the partners in the American Hog Company, testified under section 2055 of the Code of Civil Procedure that the company purchased the garbage of the restaurant. On the day in question he and one Bernardini removed the garbage, also referred to as "swill," at approximately 3:30 a. m. They removed one can of swill and one of greens. They took them out the narrow door across the sidewalk to the truck, which was directly in front of the door. The swill was in a 28 gallon can, which was about 18 inches wide and filled to about 3 inches from the top. The can of greens was about half full. While he did not examine the sidewalk to see whether they had dropped anything, he remembered distinctly that they did not drop any garbage; "we couldn't drop anything." At the time he was working as relief for one Baccilli, who was sick. He worked two or three days; "I don't remember exactly." He learned about the case a couple of months after the accident. He then checked the records and found that Baccilli was sick that day, that no man had been paid in his place. Bernardini could not go by himself, so the witness must have gone on the truck. In the swill

can was "mostly bread, potatoes, stuff of that kind, meat," no "liquid visible" or "any grease"; no "cooked cabbage, lettuce, spinach, anything of that nature." No grease was ever taken out of the restaurant, just "light swill."

A. Farrari, who worked on the truck of defendant Scavengers' Protective Association, testified, under section 2055 of the Code of Civil Procedure, that Scavengers pick up only dry garbage from the restaurant—paper cartons, paper, wood and tin cans, coffee grounds. They bundle this material in a piece of burlap. If they find something else in their garbage they put it in the wet garbage can. Scavengers' men never took from the restaurant any vegetables, cabbage or lettuce that had been cooked with grease, nor swill nor wet garbage.

A. H. Dingman, general manager of the company owning the Cavalier Restaurant, testified that he is responsible for the operation of that restaurant. Three different concerns took out the restaurant "refuse." Defendant Hog company took garbage, "swill." Scavengers' took out "trash." South San Francisco Tallow Works took out "grease." Most of the hog swill came from plate leavings which were washed off by hot water in a device called a salvagor. Its function was to collect the swill in a perforated basket through which hot water constantly ran. At intervals this basket was dumped into the swill can which the Hog company picked up. Fats went into the container for the Tallow Works. Trimmings from the vegetables—for instance making salads, peelings from the tomatoes, lettuce leaves, romaine lettuce, things of that kind, would be segregated and put into cans. Trim from the outer side of meats was thrown in the same place where the material from the salvagor went, as well as remnants of food prepared but not served. If cabbage or any similar type of food remained, it went into the garbage can into which the salvagor was emptied. "* * * greasy vegetable matter that appears to be ground up that contained grease of a greenish color" was taken away by the Hog company. In washing dishes the solid materials go into the salvagor and any grease is caught by the grease trap and

goes into the Tallow Works container. It is more accurate to refer to the wet garbage as "damp" garbage. The restaurant never served any cooked lettuce or cabbage or spinach, or cold slaw, or celery. They did serve lettuce and onions.

The evidence showed that the only place from which foodstuffs or garbage could have come that morning was the Cavalier Restaurant.

It is unnecessary to discuss the testimony as to plaintiff's injuries, as no attack is made on the adequacy of the verdict.

Evidence Sufficient.

[1] The evidence substantially shows that the material carried out by defendant Hog company included scrapings of foodstuffs from the plates (although washed by the salvager in hot water it did not necessarily eliminate all the grease), trimmings from vegetables in making salads, fat which was trimmed from the outer part of meat, and foods remaining from the kitchen. Defendants insist that the testimony of Lomori proves that no material was spilled from the cans that morning. However, there is substantial evidence from which the jury might (and evidently did) find that plaintiff stepped on a leafy greasy substance which reasonably could have come only from those cans.

Defendants contend that the evidence shows (1) that the material carried out by defendant Hog company was greaseless, and (2) that none of it was spilled. The testimony of Dingman shows that while grease, as grease, was removed as much as possible and went to the Tallow Works, nevertheless, enough grease was left in the Hog company material to give it a greasy appearance. He testified, among other things, that greasy vegetable matter as described by plaintiff was included in the garbage that the Hog company took away. Further, the jury was not bound to believe Lomori's testimony, particularly in view of the fact that material of the type Dingman said was taken by the Hog company was found on the sidewalk and there appeared no reasonable explanation of how it got there other

than that it came from the cans defendants had carried across the sidewalk about five hours earlier. This is not, as defendants contend, a situation where merely because plaintiff fell on garbage the Hog company is held liable. Rather it is one where, under all the circumstances, the only reasonable inference is that the material was spilled by defendants.

Defendants claim an analogy between the facts here and in the case of McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950, where defendants' motion for judgment notwithstanding the verdict was upheld. There the charge was that defendants negligently permitted an oily substance to remain on the lobby floor. Plaintiff slipped on this substance and was injured. The plaintiff relied upon the mere fact that there was oily substance on the lobby floor. There was no proof that defendants' janitor had carried anything of an oily nature out in the garbage. In holding that plaintiff had failed to meet the required burden of proof the court pointed out, 68 Cal.App.2d at page 489, 156 P.2d at page 952: "* * * it is no more speculative to presume that the oily substance was dropped by another than it is to speculate that the janitor dropped it." The main distinction between the two cases is that here it was shown that on that very morning defendants carried the substance which caused the injury over the place of injury, and in all reasonable probability, it could not have been on the sidewalk unless dropped by defendants. It is not a case of speculation. Rather it is one of reasonable inferences from strong circumstantial evidence.

Other Contentions

1. Opening Statement.

[2, 3] Defendants contend that their motion for nonsuit at the end of plaintiff's opening statement should have been granted. Plaintiff's statement left considerable to be desired as to completeness. However, plaintiff did state generally that she would prove that defendants early that morning carried out of the restaurant substances which were food from the

restaurant and remains of patrons' food washed off their plates, referred to as "edible swill"; that plaintiff slipped upon some substance on the sidewalk near the restaurant door; that it was of a grayish green, slightly greasy appearance; it did not appear to be fresh vegetables, but was mashed up and not distinguishable as to a single leaf. It is true that plaintiff did not state she would prove the allegations of the complaint to the effect that defendants so negligently removed garbage from the restaurant as to leave portions of it lying on the sidewalk. However, it was obvious from the statement that plaintiff intended to connect up the fact that defendants removed swill that morning with the "grayish green, slightly greasy appearing substance" upon which she slipped. While the statement was not full and complete, it was sufficient to show generally what the case was about. It did not purport to be a complete summary of the evidence. A motion for nonsuit on an opening statement should not be granted unless it appears that plaintiff cannot prove a cause of action. The statement of plaintiff, although rather meagre, was not in this category. As said in *Paul v. Layne & Bowler Corp.*, 9 Cal.2d 561, page 566, 71 P.2d 817, 820, cited by defendants: "* * * it may fairly be said that plaintiff's counsel did not purport to set forth all that he expected to prove." Moreover, plaintiff did prove a case. The error, if any, was not prejudicial.

2. Failure to Prove the Allegations of the Complaint.

[4] Defendants contend that their motions for nonsuit and directed verdict should have been granted for failure of plaintiff to prove the allegations of the complaint. As hereinbefore discussed, plaintiff did prove her case, so there was no error in the denials of these motions.

3. Verdict Contrary to Law.

[5] Defendants rely on *Larson v. St. Francis Hotel*, 83 Cal.App.2d 210, 188 P.2d 513, where a pedestrian on the sidewalk outside that hotel was struck by a heavy chair which must have come from an up-

stairs window. The granting of a motion for nonsuit was upheld for the reason that plaintiff merely proved the happening of the accident. There was no evidence, either direct or indirect, that the chair was thrown out by a hotel employee. The court pointed out that a hotel does not have exclusive control, either actual or potential, of its furniture, and that "the mishap would quite as likely be due to the fault of a guest or other person as to that of" the hotel employees. 83 Cal. App.2d at page 212, 188 P.2d at page 515. Here the defendants' employees were shown to have been in a position to cause the accident, and the probability that anyone else could have caused it was extremely remote.

Instructions.

[6, 7] Defendants complain of the failure to give certain instructions. They admit that the court properly instructed upon the requirement that the jury must find in favor of defendants if the evidence failed to show they were responsible for the presence of the garbage on the sidewalk. Defendants' proposed instructions 8 and 9 were on the subject of unavoidable accident. They fail, however, to point out what facts would have justified a finding of unavoidable accident. Here the injury was caused by a substance on the sidewalk which could only have been there through the negligence of someone. Hence the accident could not have been an unavoidable one. Defendants argue that the court should have instructed the jury that plaintiff could have been injured because of an accident for which none of the defendants was liable. The unavoidable accident instructions did not discuss this subject. Defendants did not offer any instruction which did. Moreover, the court did instruct that the mere happening of the accident or the sustaining of injuries raised no presumption of negligence. It also instructed fully upon the subject of negligence including an instruction to the effect that if the jury found defendants not guilty of negligence which proximately contributed to the accident, their verdict must be for defendants.

[8, 9] Defendants' proposed instruction 2 set forth the charging allegations of plaintiff's complaint and defendants' denials thereof. While such an instruction is proper it is not necessarily essential. The statement in *Cody v. Market St. Railway Co.*, 148 Cal. 90, 94, 82 P. 666, 668, applies here. "It may be conceded that *it is always entirely proper* for the trial court to state to the jury the issues to be determined by them, and it may be that in some cases, by reason of peculiar circumstances existing, such a statement would be necessary in order that the jury might clearly understand the particular questions to be decided; but we see nothing in the record of this case to indicate that such a statement by the court was at all necessary. The issues made by the pleadings were exceedingly simple, there was apparently no dispute between the parties as to what they were and presumably, in the absence of anything to the contrary in the record, they had been correctly stated to the jury by counsel. Code Civ.Proc., § 607." (Emphasis added.) The court in its instructions fully informed the jury of the issues in our case and therefore it was unnecessary to discuss the pleadings.

[10] Defendants' proposed instruction 3 sets forth in detail plaintiff's burden of proof as regards defendants. The subject of plaintiff's burden of proof as to all defendants was fully covered in the instructions given, one of which was defendants' instruction 7. There was no error in refusing any of the foregoing instructions.

[11-13] A more serious situation arises with reference to the instructions given to the effect that a violation of sections 6 or 33 of the San Francisco Police Code constitutes negligence as a matter of law. It is doubtful if these sections are applica-

ble to the situation here. Section 6 provides: "It shall be unlawful for any person to throw any banana peel or orange peel or other rubbish on any sidewalk * * *." Section 33 provides: "It shall be unlawful for any person or persons to sweep, throw or brush onto any sidewalk any rubbish, paper, sweepings or dirt, or to brush, sweep or throw any rubbish, papers, sweepings or dirt into any street, alley, gutterway or passage." In these sections the only word which might apply here is "rubbish." "* * * banana peel or orange peel or other rubbish" in section 6 could very well include vegetable refuse. Funk & Wagnall's New College Standard Dictionary, 1947 edition, includes in its definitions of "rubbish": "waste, refuse." These sections apparently require that the deposit of rubbish on a sidewalk be an intentional act as they make it unlawful only "to sweep, throw or brush." Assuming that the reading of these sections was error, it was error without prejudice. Under the facts of this case the dropping of the material in question by defendants in removing it from the restaurant could only have been negligently done. Hence, once the jury found that it was dropped when the cans were carried out, a finding of negligence must necessarily follow, and the court's intimation that it might be a violation of the ordinance and hence negligence as a matter of law was not prejudicial. Under section 4½ of article VI of the Constitution, the reading of these sections could not have been prejudicial as undoubtedly the verdict would have been the same had they not been read.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

106 Cal.App.2d 528

PEOPLE v. FRANKLIN.

Cr. 751.

District Court of Appeal, Fourth District,
California.

Sept. 14, 1951.

Joe Butler Franklin was convicted in the Superior Court, San Diego County, L. N. Turrentine, J., of burglary in the second degree and he appealed. The District Court of Appeal, Mussell, J., held that the evidence sustained the finding that defendant's entry of house was with intent to commit theft.

Affirmed.

1. Criminal Law § 1144(13)

In determining whether evidence is sufficient to support judgment, appellate court is required to assume truth of facts found and all inferences fairly to be drawn from evidence.

2. Burglary § 41(3)

Criminal Law § 1159(2)

While it is necessary for prosecution to show that defendant charged with burglary entered premises with intent to commit theft therein, such intent may be inferred from all facts and circumstances disclosed by evidence and where evidence is sufficient to justify reasonable inference that such intent existed verdict may not be disturbed.

3. Burglary § 41(3)

In prosecution for burglary, evidence sustained finding of jury that defendant's entry of house was with intent to commit theft.

Montgomery & Smith, San Diego, for appellant.

Edmund G. Brown, Attorney General, and Elizabeth Miller, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Defendant was charged with the burglary of a dwelling in the city of San Diego, owned and occupied by Dr. and Mrs. C. W. Kennedy. A jury returned a verdict of guilty of burglary in the

second degree and defendant, having admitted a previous conviction for burglary, also charged in the information, was committed to the state prison.

The sole question here presented is whether the evidence is sufficient to support the verdict and judgment.

On August 27, 1950, defendant, who was admittedly without funds, called at the Kennedy home and asked for work. Mrs. Kennedy informed him, as he stood outside on the sidewalk in front of the house, that she did not have any work; that she was in a hurry and was going to church. She left the house immediately with her children. She returned in a few minutes and observed that the front door, which she had left closed, was partially open. She pushed the door open, entered, and upon reaching the top of the stairway leading down to the bedrooms of the house, which was built on a hillside, saw the defendant standing in the hallway separating the bedrooms. Mrs. Kennedy went outside and told her gardener about the man in the house. The gardener watched while she called the police. Defendant came around the retaining wall of the house and the gardener told him to stop. The defendant, however, started to run, pursued by the gardener who was shouting "Police. Police." A city fire chief, who lived about three or four blocks away heard the shouts, joined the chase in his car, and within a short distance apprehended the defendant. The fire chief noticed that the defendant threw something into the shrubbery when he ran. A later search resulted in finding a small paper bag in the bushes, which bag contained some costume jewelry. When questioned by the police, defendant first denied having thrown anything in the bushes but later admitted that he had thrown the jewelry away and that he had stolen it from a drug store that morning before going to the Kennedy home. He stated that he had never been in the Kennedy home and that he did not enter it that day. While there was evidence that the defendant worked for the Kennedys on two occasions, once to clean a car and

again in 1949 to wash windows inside and outside of the house, no one gave him permission to enter it on August 27, 1950.

At the trial defendant testified that he went to the Kennedy place directly from his home on the morning of August 27; that he asked Mrs. Kennedy about washing and waxing her car and that she said she did not have time but that he should come back later when she had more time; that he left and returned later; that the gardener pursued him with a knife. He denied that he had stolen the costume jewelry and denied having thrown anything into the shrubbery.

[1, 2] Appellant argues that the evidence did not show that he entered the Kennedy home with intent to commit grand or petit theft or any other felony and in this connection points out that nothing was taken from the premises. This contention is without merit. In determining whether the evidence is legally sufficient to support the judgment, we are required to assume the truth of the facts found and all inferences fairly to be drawn from the evidence. *People v. Thomas*, 82 Cal.App.2d 702, 707, 186 P.2d 721. While it was necessary for the prosecution to show that the appellant entered the premises with the intent to commit a theft therein, such intent may be inferred from all the facts and circumstances disclosed by the evidence and where the evidence is sufficient to justify a reasonable inference that such intent existed the verdict may not be disturbed. *People v. Smith*, 84 Cal.App.2d 509, 512, 190 P.2d 941.

As was said in *People v. Swenson*, 28 Cal.App.2d 636, 639-640, 83 P.2d 70, 72: "Upon a charge of burglary the intention with which an accused person enters the room of another individual without permission at an unusual hour of the night must be determined by the jury. But where the circumstances of a particular case and the conduct of the accused person reasonably indicate that his purpose in doing so is to commit larceny, a verdict of guilty of the crime of burglary will not be disturbed on appeal. *People v. Soto*, 53 Cal.

415; *People v. Winters*, 93 Cal. 277, 28 P. 946; 4 Cal.Jur. 745, § 27; *Vickery v. State*, [62 Tex.Cr.R. 311, 137 S.W. 687,] Ann.Cas.1913C, note, page 519."

[3] The testimony shows that the appellant entered the Kennedy home without permission, knowing that it was unoccupied at the time; that when Mrs. Kennedy returned, appellant was in the lower part of the house; that he left immediately without explanation of his actions; that when approached by the gardener, he fled; that in his flight he disposed of costume jewelry which he had stolen that day. His conduct and inconsistent statements made to police officers support the finding of the jury that his entry of the house was with intent to commit theft.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.



106 Cal.App.2d 585

SCHNEIDER et al. v. WHITTLEY et al.

Civ. 18117.

District Court of Appeal, Second District,
Division 3, California.

Sept. 20, 1951.

Action by Eugene S. Schneider and another against Jack Toy Whittley and another for damages resulting from an automobile collision at an intersection. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment for the plaintiffs and the defendants appealed. The District Court of Appeal, Wood, J., held that the evidence was sufficient to support the findings that the defendant driver was negligent, and that the plaintiff driver was not guilty of any negligence proximately contributing to the accident.

Judgment affirmed.

Automobiles ☞244(11, 58)

In action by plaintiff, who was driving south, against defendant, who was driving

east, for damages resulting from automobile collision when crossing intersection, evidence was sufficient to support findings that defendant was negligent, and that plaintiff was not guilty of any negligence proximately contributing to accident.

Crider, Runkle & Tilson, Los Angeles, for appellants.

Benjamin J. Goodman, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action for damages resulting from an automobile collision. In a trial without a jury, judgment was for plaintiffs. Defendants appeal. Appellants contend that plaintiff Schneider was negligent as a matter of law; that he was an agent of plaintiff Mrs. Traub, who was riding with him, and his negligence must be imputed to her.

On January 12, 1949, about 9 a. m., plaintiff Schneider was driving a Ford automobile in a southerly direction on Bonnie Brae Street in Los Angeles, and defendant Whittley was driving a Pontiac automobile in an easterly direction on Court Street. The automobiles collided within the intersection of those streets. There was no stop sign at the intersection. Bonnie Brae Street is about 42 feet wide and is level. Court Street is about 40 feet wide and is level at the intersection and west of the intersection for a distance of approximately 150 feet. At said point west of the intersection, Court Street extends downhill to Westlake Avenue which is the next street west of Bonnie Brae. A driver approaching said intersection (Bonnie Brae and Court) either from the north or west did not have, during the last 100 feet of such approach, an unobstructed view of traffic upon Court Street or Bonnie Brae Street for a distance of 100 feet. There was evidence that at a point on Bonnie Brae Street 100 feet north from the center of the intersection there was an unobstructed view west on Court Street for a distance of 41 feet; and that at a point on Court Street 100 feet west of the center of the intersection there was

an unobstructed view north on Bonnie Brae Street for a distance of 44 feet.

Plaintiff Schneider testified that he had stopped his automobile at the intersection of Temple Street and Bonnie Brae Street, which is the first intersection north of the intersection of Bonnie Brae and Court; after he left the intersection of Temple and Bonnie Brae, the maximum speed he attained was between 20 and 25 miles an hour; he decreased the speed from the center of the block to the intersection; he entered the intersection of Bonnie Brae and Court between 10 and 15 miles an hour; when the front of his automobile was about 8 feet north of the intersection, he looked to the west on Court Street for traffic, and he did not see any vehicle coming from the west; at that time (when he looked to the west) he was traveling about 15 or 17 miles an hour, was still slowing down, and he could see west on Court Street about 30 or 40 feet; just prior to entering the intersection, he applied the brakes and slowed down; when the front of his (Schneider's) automobile was about 2 or 3 feet south of the center of Court Street, he first saw the Pontiac automobile (driven by defendant Whittley), and at that time the Pontiac was going due east on Court Street and was about 10 feet to the right from Schneider's Ford automobile; he did not form an opinion as to the speed of the Pontiac; the front of the Pontiac hit the Ford approximately in the middle of the right side and pushed it southeasterly until it came to rest against a telegraph pole on the southeast corner of Bonnie Brae Street—"South of the intersection"; when the Pontiac came to rest, it was "embedded" in the plaintiff's Ford; the left rear fender and the rear of the left side of the Ford were "embedded around the pole"; within a minute or two after the impact the defendant went to plaintiff Schneider and said to him: "I am sorry. I didn't see you."

Mr. Britt, called as a witness by plaintiffs, testified that he saw the accident; he was standing on the northwest corner of Bonnie Brae Street and Court Street; he

first saw the Pontiac automobile (driven by defendant Whittley) when it was about 80 feet west of the intersection, and he continued to observe it as it approached the intersection; in his opinion it was traveling at a speed of approximately 30 miles an hour; the driver of the Pontiac was looking to the right and did not look to his left; he (witness) first saw the Ford automobile (driven by plaintiff Schneider) when it was about 20 feet north of the intersection; the Ford was traveling at a very slow speed and when the accident happened it was traveling approximately 15 miles an hour; he did not see any change in the speed of either automobile; both automobiles kept going straight ahead and did not turn at all before they collided; after they collided they went over toward the southeast corner; neither Schneider nor Whittley blew a horn; the Ford entered the intersection first; the collision occurred about 6 feet south of the centerline of Court Street; the Ford was struck in the center, approximately, of its right side.

Mr. Woody, called as a witness by plaintiffs, testified that while he was driving his automobile northerly on Bonnie Brae, at a point about 100 feet south of the intersection of Bonnie Brae and Court, he saw the Ford automobile which was about 45 per cent across the intersection; at that time the Ford was traveling between 15 and 20 miles an hour; the Ford entered the intersection first and was almost at the curb when it was struck; the Ford had reached the center of the street when the Pontiac entered the intersection; he (witness) saw the Pontiac travel from approximately 50 feet back of Bonnie Brae Street to the center of the intersection and it was traveling about 30 miles an hour.

A police officer, called as a witness by plaintiffs, testified that he arrived at the scene of the accident at 9:10 a. m.; he did not find any automobile skid marks there; defendant Whittley told him that he was traveling approximately 30 miles an hour.

Plaintiff Mrs. Traub, who was riding with plaintiff Schneider, testified that she

did not see the accident and she knew nothing about it.

Defendant Whittley testified that he did not see the Ford at any time before the accident; when he first looked to the left or north, he was just entering the intersection and he did not see any vehicle approaching from the north; no vehicle was approaching from the south; the automobiles came together about the center of the intersection; the front of the Pontiac collided with the right front door of the Ford; he (Whittley) did not apply his brakes before the collision; he was taking Veoma McCamon (daughter of defendant Ellen McCamon) to school, and he knew that she was late for school; after he made the right turn from Westlake Avenue onto Court Street and proceeded east, he went uphill in second gear and did not shift gears before the collision occurred.

Appellants argue, in support of their contention that plaintiff Schneider was negligent as a matter of law, that the evidence indicates: (1) that plaintiff Schneider did not look to his right before he entered the intersection—for if he had so looked he would have seen the Pontiac and would have stopped his Ford; or (2) it indicates that he saw the Pontiac and thought he could beat it across the intersection. It cannot be determined as a matter of law that plaintiff Schneider was negligent. The evidence was amply sufficient to support the findings of the trial court to the effect that defendant Whittley was negligent, and that plaintiff Schneider was not guilty of any negligence proximately contributing to the accident.

Plaintiff Mrs. Traub is the mother-in-law of plaintiff Schneider, and he was taking her to a school for adults where she was studying the English language and taking a course preparatory to becoming a citizen. Appellants argue that plaintiff Schneider was her agent. Respondents assert that there was no definite arrangement regarding the matter of taking her to school; that the school was on the way to his place of employment and he did not take her every day. By reason of the above conclusion to the

effect that the evidence supports the finding that plaintiff Schneider was not contributively negligent, it is not necessary to discuss further the contention of appellants that plaintiff Schneider was the agent of plaintiff Mrs. Traub and that his negligence must be imputed to her.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



106 Cal.App.2d 597

PEOPLE v. PRESCOTT.

Cr. 4660.

District Court of Appeal, Second District,
Division 3, California.

Sept. 21, 1951.

Jeff Robert Prescott was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., of assault with a deadly weapon, and he appealed from judgment of conviction and from order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that evidence supported conviction.

Judgment and order affirmed.

Assault and Battery ☞92

Evidence was sufficient to support conviction of assault with a deadly weapon.

John R. Barta and Shelby Lee Chambers, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant, charged with assault with a deadly weapon and kidnapping, appeals from a judgment of conviction of the former offense, in a nonjury trial, for which he was sentenced to 180 days in the county jail, and also from an order denying his

motion for new trial. He claims insufficiency of the evidence to support the judgment.

There was evidence of the following facts: Defendant owned a factory building at 2208 East Eighth Street, in Los Angeles; Mr. Hammond operated a machine shop on the ground floor and defendant lived in a room on the second floor. Prior to the date of the assault charge Jess W. Bumgarner, a deputy sheriff, had left with Hammond his card with a message that Prescott get in touch with him; his purpose was to serve civil process. On September 29, 1950, Bumgarner, not in uniform, returned to defendant's address for the same purpose; he parked his car in the lot adjoining the building and observing defendant, who was standing outside, called to him that he wished to speak with him; defendant entered the building, ascended the stairs, proceeded to a room which he used as an office and bedroom, entered a toilet off the room and fastened the door; Bumgarner ascended the stairs, entered the room and finding no one there descended the stairs and talked with Mr. Hammond; he returned to defendant's room and observing the other door called out, identifying himself, stated his purpose and tried the door which finally opened; defendant emerged, stated that no officer was going to serve process on him, ordered Bumgarner off the premises, picked up a bottle, threatened to hit Bumgarner if he did not leave and as the latter turned to leave hit him on the head with the bottle causing a scalp wound; a struggle ensued in which defendant took Bumgarner's gun and with it marched Bumgarner down the stairs; at the foot of the stairs Bumgarner turned his head but defendant shoved him on and hit him on the head with the gun, causing another laceration; defendant followed Bumgarner to his car which he entered and drove away; defendant returned to the building, gave the gun to Hammond and asked him to call the police.

The evidence at the trial consisted of the transcript of the preliminary hearing at which defendant testified in his own behalf.

There was ample evidence to justify the trial court in concluding that defendant understood that Bumgarner was an officer who had come to make service of civil process, that he attacked the officer in order to prevent the service of the process, that he did not order Bumgarner to leave the premises and afford him an opportunity to do so, but undertook to eject him from the premises by force, and in so doing employed a degree of force that was wholly unnecessary to accomplish that purpose. Even under defendant's version of the affair, we think no justification whatever was shown for his striking Bumgarner on the head with the gun as the latter was leaving the premises without resisting. As described by Bumgarner, this was a vicious act wholly inconsistent with the claim of defendant that he was endeavoring only to lawfully eject an intruder from his home. There is no merit in the appeal.

The judgment and order are affirmed.

WOOD and VALLÉE, JJ., concur.



106 Cal.App.2d 604

L. B. WILLIAMS ORGANIZATION, Inc.
v. **WINTER.**
Civ. 18148.

District Court of Appeal, Second District,
Division 1, California.
Sept. 24, 1951.

Action by L. B. Williams Organization, Inc., against Carl W. Winter to recover real estate broker's commission on sale of realty. The Superior Court of Los Angeles County, Paul Nourse, J., entered judgment for the defendant and an order denying plaintiff's motion for new trial and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem., held that parol evidence was inadmissible, in absence of fraud, to show that a fully executed contract for sale of realty was to be delivered by broker to purchaser

only on condition that purchaser should agree to a specific substantial change in terms of contract as to the amount of the down payment.

Judgment reversed and appeal from order denying a new trial dismissed.

1. Evidence ⇨444(2)

Parol evidence is admissible to show that a written contract fully executed and delivered is not to be effective unless and until some condition, extraneous to the terms of contract, has been complied with, but the parol condition may not be shown if it is contrary to the terms of the written executed contract.

2. Evidence ⇨444(4)

Parol evidence was inadmissible in absence of fraud, to show that a fully executed written contract for sale of realty was to be delivered by broker to purchaser only on condition that purchaser should agree to a specific substantial change in terms of contract as to the amount of down payment.

3. Brokers ⇨60

Where vendor by written contract of approval attached to executed written contract for sale of realty agreed to pay broker, out of deposit to be made by purchaser, a commission in specified amount for making the sale according to terms of written executed contract and vendor thereafter agreed with purchaser to a mutual cancellation of the contract of sale, vendor was nevertheless liable to broker for commission.

E. T. McGann, Los Angeles, for appellant.

Wm. A. Wittman and Charles S. Buck, South Gate, for respondent.

HANSON, Justice pro tem.

In this case the only question, which it is necessary for us to decide, is whether parol evidence is admissible to show that a fully executed contract for the sale of realty was to be delivered by the broker to the buyer, *only on condition*, that the buyer should agree to a specific amendment of one of the vital terms of the contract.

The defendant, below, who is the respondent on this appeal, owned a motel which he desired to sell on certain terms, among others, a cash down payment somewhat less, but not more than 29% of the purchase price, in order that he might avoid the higher income tax brackets. The plaintiff below, appellant here, in its capacity as a real estate broker found a buyer who was willing to meet the seller's terms, except as to the initial cash payment. The broker, in the hope that the seller would accept the buyer's proposal, prepared a contract of purchase and sale, which was signed by the buyer and likewise by the real estate broker in behalf of the seller, subject however to the latter's written approval. When the broker tendered this document to the seller the latter, according to his testimony, demurred to its terms, and at the trial was permitted to testify, he declined to sign it until he was assured by the broker that the latter would procure the consent of the buyer to an amendment of the cash terms of the contract to accord with his demands. This assurance, according to the testimony of the seller, having been given by the broker, respondent not only appended his signature of approval to the contract, but undertook, in a separate paragraph reciting his approval, to pay the broker a real estate commission of \$5,000. Apparently the prospective buyer met the seller the very next day and advised him not only that he would not amend the contract to accord with the seller's desires, but, what is more, expressed his concern as to being able to carry out the contract as it was written. As a consequence the seller and the buyer mutually agreed they would not proceed to a purchase and sale of the property and thereupon the broker, after due demand on the seller, instituted the instant action below to recover its commission.

[1-3] The trial court admitted the testimony of the seller on the theory that it tended to prove a conditional delivery by him of the contract. In so ruling, the trial court inadvertently failed to differentiate between a fully executed contract which

was to take effect by its own terms upon the fulfillment of an entirely extraneous condition to any of its terms and one where the condition named was of a character contrary to the terms expressed in the contract. While the rule is well established that parol evidence is admissible to show that a contract fully executed and delivered is not to be effective, unless and until, some condition, extraneous to the terms of the contract, has been complied with, such, for instance, as where it is not to be effective unless additional persons sign it or some future specified event transpires, the rule is equally well established that the parol condition may not be shown if it is contrary to the terms of the written executed contract. *Severance v. Knight-Counihan Co.*, 29 Cal. 2d 561, 177 P.2d 4; *Travers-Newton Chau-tauqua System v. Naab*, 196 Iowa 1313, 196 N.W. 36, 32 A.L.R. 780; *United Engineering & Contracting Co. v. Broadnax*, 2 Cir., 136 F. 351; *Liberty Trust Co. v. Price*, 259 Mass. 596, 156 N.E. 749; *Rest., Contracts*, sec. 241; 3 *Williston on Contracts*, Rev.Ed., sec. 634, notes 9 and 11. In the case before us the parol evidence was offered merely to show that the contract was not to be effective unless a material change in one of its terms was agreed to by the buyer. This could not be shown in the absence of fraud which the court specifically found had not been shown. Accordingly, as the defendant had agreed in his separate written contract of approval, appended to the executed written contract, to pay appellant, out of a deposit to be made by the buyer, a commission of \$5,000 for making the sale according to the terms of the written executed contract, the seller became liable to the broker when he agreed to a mutual cancellation of that contract. In failing to so rule, and in holding that the evidence was admissible and that it alone disclosed a contract ineffective because conditionally delivered, the trial court erred.

The judgment is reversed. The appeal from the order denying the motion for new trial is dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

106 Cal.App.2d 556

EGGEMAN v. BINFORD.

Civ. 18252.

District Court of Appeal, Second District,
Division 3, California.

Sept. 18, 1951.

Action by Howard Eggeman against Alfred E. Binford to quiet title to two race horses and to require him to account for money advanced to him as plaintiff's agent. The defendant filed a cross-complaint, claiming a partnership interest in the horses and seeking reimbursement for money paid out for the use and benefit of the plaintiff. The Superior Court, Joseph I. Call, J., assigned, entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Shinn, P. J., held that the trial court had made findings and entered judgment without giving the defendant an opportunity to introduce evidence on the accounting issue.

Affirmed in part; reversed in part.

Judgment ¶210

Where trial court, with consent of parties, took evidence upon issue of ownership, with understanding that additional evidence would be taken on accounting issue after ownership issue had been decided, but court gave judgment quieting plaintiff's title without receiving additional evidence, and on motion for new trial allowed defendant offsets, judgment was improperly rendered before trial was completed and without defendant having a chance to introduce evidence as to money expended on plaintiff's behalf.

J. G. Richardson and Burke Mathes, Los Angeles, for appellant.

Arthur E. T. Chapman and Thomas P. Cruce, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff brought this action to quiet title to two race horses and to require defendant to account for money advanced to him as plaintiff's agent. Defendant answered and filed a cross-complaint, claiming a partnership interest in the horses and seeking reimbursement for \$4,226.41 paid out for the use and benefit of plaintiff in keeping and racing the horses. Plaintiff had judg-

ment quieting his title and for the sum of \$1,374. Defendant appeals. Plaintiff has not filed a brief. Although we were not required to examine into the merits of the appeal, *Berry v. Ryan*, 97 Cal.App.2d 492, 217 P.2d 1015, we have done so, since it has required no more than a casual inspection of the record.

The sole ground of the appeal is that the court made findings and entered judgment before the trial had been concluded and without giving defendant an opportunity to introduce evidence as to the sums he had expended on plaintiff's behalf.

With the consent of the parties the court took evidence upon the issue of ownership, which involved the claim of defendant that he was a partner of plaintiff in ownership of the horses. This issue was submitted and taken under advisement with the understanding that additional evidence would be taken on the accounting issue after the ownership issue had been decided. This understanding was made clear, not only by the statements of the court and counsel but also by the exclusion of evidence of expenditures by the parties upon the ground that the sole issue being tried was that of ownership. Some six weeks after the submission the court made findings that no partnership existed and that defendant was indebted to plaintiff and gave judgment quieting plaintiff's title to one horse and to the amount deposited with a Turf Club when the other horse was claimed and awarding plaintiff \$2,500. Defendant moved for a new trial upon several grounds, among them the ground that he had been deprived of an opportunity to fully present his case. He submitted an affidavit listing expenditures which exceeded in a substantial amount the sums which he had received from plaintiff. The motion was argued and submitted. Several days thereafter, without receiving further evidence, or affording defendant an opportunity to present any, the court made an order that defendant was allowed offsets in the sum of \$1,126 "as per argument on motion for new trial," and directing that revised and supplemental findings be prepared by counsel for plaintiff. The new finding was: "The Court finds that

after statement of counsel for plaintiff, and statement of counsel for defendant, that the plaintiff is entitled to Judgment in the sum of \$1,374 for moneys that defendant, Alfred E. Bindord, has failed and neglected to account to the plaintiff for on plaintiff's Second Cause of Action." The motion for new trial was denied. The judgment was altered by striking out \$2,500 and inserting \$1,374.

We have no record as to the statements of counsel on the argument of the motion but it is clear from the entire record that there was no agreement that any sum was due plaintiff. Whatever the argument may have been, it appears that plaintiff's counsel won it.

The judgment was rendered before the trial had been finished. Defendant did not have his day in court. Inasmuch as plaintiff filed no brief we assume that his counsel were of the opinion, and advised him that the procedural errors are fatal to the judgment.

Again we make comment on the matter of findings. There were the following issues in the case: (1) Ownership of the horses, whether in plaintiff or a partnership composed of the parties; (2) the amount advanced by plaintiff to defendant for plaintiff's use and benefit; (3) the amount expended by defendant for the use and benefit of plaintiff; (4) the amount, if any, due from one party to the other. The court made 37 findings, of which 33 were wholly unnecessary. They merely encumber the record and represent a waste of time and effort. In the decision of the issues in the case it was immaterial whether the parties were residents of Los Angeles County, whether "Remember Mama" is a bay gelding five years old or three years old or "Court Toubo" a black gelding six years old or whether "Court Toubo" did not run at Del Mar September 9, 1949, or whether "Remember Mama" ran once and was out of the money, as to all of which facts, as well as many others, equally irrelevant, there were specific findings. The findings covering 12 of the 13 pages were upon mere matters of evidence having no material bearing upon the ultimate issues.

* Subsequent opinion 239 P.2d 46.

The preparation of findings in proper form is a branch of the practice that appears to be given far too little consideration.

The judgment is affirmed as it quiets plaintiff's title to the horses and reversed as to the award of money and for a retrial of the respective demands of the parties; appellant to recover costs of appeal.

WOOD and VALLÉE, JJ., concur.



106 Cal.App.2d 554

KRUG v. MEEHAN.

Civ. 18248.

District Court of Appeal, Second District,
Division 3, California.

Sept. 18, 1951.*

Milton A. Krug, as Special Administrator of the Estate of James Cleary, deceased, brought action against Rose A. Meehan to set aside conveyance of realty, and defendant filed a cross-complaint to quiet title to the realty in her. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order dismissing the complaint and plaintiff appealed. The District Court of Appeal, Vallée, J., held that the order was not appealable, since action was still pending and final judgment could not be entered until issues raised by cross-complaint were determined.

Appeal dismissed.

1. Appeal and Error ⇨105

Order dismissing complaint is appealable, if no cross-complaint has been filed. Code Civ.Proc. § 581d.

2. Pleading ⇨360(4)

A cross-complaint does not fall with dismissal of the complaint.

3. Appeal and Error ⇨80(6)

Where parties to complaint and cross-complaint were identical, order dismissing complaint was not appealable, since action was still pending and final judgment could

not be entered until issues raised by cross-complaint were determined. Code Civ.Proc. §§ 581, subd. 3, 581d.

4. Appeal and Error ⇨872

Where cross-complaint is filed and complaint is dismissed, plaintiff may assert sufficiency of complaint on appeal from final judgment determining issues raised by cross-complaint.

Gilford & Mendelson and Roy M. Good, Los Angeles, for appellant.

Arthur G. Baker, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff brought this action seeking a decree setting aside a conveyance of realty on the ground it had been procured by undue influence. A demurrer of defendant Rose A. Meehan was sustained to the complaint and to an amended complaint. With her demurrer to the complaint defendant Rose A. Meehan filed a cross-complaint seeking a decree quieting title to the realty in her. Plaintiff answered the cross-complaint. The demurrer of Rose A. Meehan was also sustained to a second amended complaint with leave to amend. Plaintiff did not amend within the time allowed and, on motion of Rose A. Meehan, a minute order¹ was made dismissing the complaint as to her pursuant to the provisions of section 581 (3) of the Code of Civil Procedure. Plaintiff appealed from the latter order.

The second amended complaint alleges that James Cleary, then 78 years of age, now deceased, purchased two parcels of realty and that title was taken in his name and that of defendant Rose A. Meehan, as joint tenants, and that the purchase money was Cleary's. Facts are alleged to the effect that a confidential relation existed

between Cleary and Meehan and that the latter procured title to be taken in their joint names by the exercise of undue influence on him. The cross-complaint seeks to have the title of Rose A. Meehan quieted to the same two parcels of realty described in the complaint.

The court, at the oral argument, suggested that there was a question whether the appeal was premature. Counsel requested and were given leave to brief the question. Appellant has filed a memorandum in which he concedes, correctly, that the appeal is premature. See *Sjoberg v. Hasstorf*, 33 Cal.2d 116, 199 P.2d 668; *Nicholson v. Henderson*, 25 Cal.2d 375, 153 P.2d 945.

[1-3] The controversy in the present action is between only two parties: the administrator of the estate of Cleary and Rose A. Meehan. The parties to the complaint and the answer thereto and to the cross-complaint and the answer thereto are identical. There is now an order of dismissal, which, if a cross-complaint had not been filed, would have been an appealable order, Code Civ.Proc., sec. 581d; *Gwinn v. Ryan*, 33 Cal.2d 436, 202 P.2d 51, but because of the cross-complaint and answer thereto the action is still pending; a final judgment has not been entered therein. The cross-complaint did not fall with dismissal of the complaint. *Tomales Bay, etc., Corp. v. Superior Court*, 35 Cal. 2d 389, 394, 217 P.2d 968. A final judgment may not be entered until the issues made by the cross-complaint and the answer thereto have been determined. Plaintiff-appellant may assert that the complaint states facts sufficient to constitute a cause of action on the appeal from the final judgment.

Appeal dismissed.

SHINN, P. J., and WOOD, J., concur.

1. "It appearing to the court from the affidavit of Arthur G. Baker that this complaint should be dismissed under the provisions of Section 581 Code of Civil Procedure, Subdivision 3, as to defendant Rose A. Meehan, now, therefore, upon a motion of said defendant, the above en-

titled complaint is hereby dismissed as to the said defendant Rose A. Meehan and the said defendant is given judgment against the plaintiff for her costs, in the sum of \$——. Let execution issue hereon."

NICHOLS v. MCCOY.

Civ. 18141.

District Court of Appeal, Second District,
Division 3, California.

Sept. 19, 1951.

Hearing Granted Nov. 15, 1951.*

Action by James Wilson Nichols against Roy Gilbert McCoy for damages for the wrongful death of William Allen Nichols, a pedestrian, resulting from the alleged negligence of defendant in operating an automobile. The Superior Court, Los Angeles County, J. A. Smith, J. assigned, entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Wood, J., held that the court erred prejudicially in receiving the testimony as to the alcoholic content of a blood specimen.

Judgment reversed and purported appeal from order denying motion for new trial dismissed.

Evidence ☞ 150

In action against motorist for wrongful death of pedestrian, in absence of any evidence as to when or how or by whom specimen of blood involved was taken from mortuary to coroner's office and as to appearance or condition of bottle or label at time specimen was taken from mortuary or at time it was received at coroner's office, blood specimen which was analyzed by chemist and head toxicologist for coroner was not identified as blood of deceased pedestrian, and court erred prejudicially in receiving testimony as to alcoholic content of blood specimen. Code Civ. Proc. § 1920.

Royal M. Galvin and Daniel Schnabel, Beverly Hills, for appellant.

Bauder, Gilbert, Thompson, Kelly & Veatch and Henry F. Walker, Los Angeles, for respondent.

WOOD, Justice.

Action for damages for the wrongful death of William Allen Nichols, a pedestrian, resulting from the alleged negligence of defendant in operating an automobile. Plaintiff is the son and only heir of the

deceased. In a trial by jury the verdict was for defendant, and the judgment was entered in accordance with the verdict. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

Appellant contends that the trial court erred in receiving the testimony of R. J. Abernathy concerning the alcoholic content of a blood specimen. Appellant asserts that the specimen of blood was not properly identified as the blood of the deceased.

The accident occurred about 7 p.m., on December 25, 1948, on San Fernando Road near the intersection of Arvilla Street which is outside a business or a residential district; San Fernando Road is a paved highway which extends in a northerly and southerly direction; San Fernando Road, at and near the scene of the accident, is approximately 51 feet wide, and has four marked traffic lanes—two for northbound traffic and two for southbound traffic; a pedestrian crosswalk extends across San Fernando Road near and north of that intersection; the crosswalk is 17 feet wide and is marked by white lines about 12 inches wide. There were no traffic control signals at the intersection to regulate traffic on San Fernando Road, and the intersection was "poorly lighted."

On the night of the accident defendant was driving a 1936 Buick automobile in a northly direction on San Fernando Road. After he had passed the above-mentioned intersection, the automobile he was driving struck Mr. William Allen Nichols, a pedestrian 68 years of age, who was proceeding across San Fernando Road. Mr. Nichols was taken by ambulance to the Van Nuys Receiving Hospital, and he died as a result of being struck by the automobile.

Defendant testified that he was driving about 30 miles an hour; his automobile was in the lane next to the center of the highway; traffic proceeding in the opposite direction on the highway was quite heavy and some of the lights were bright; the headlights of his automobile were in good working order and they were burning; he believes he could see clearly for a distance of 50 feet ahead; it was dusk—a

* Subsequent opinion 240 P.2d 569.

time "when lights didn't show up very good"; he first saw the deceased just before he struck him, at which time deceased was about a foot from his automobile; he (deceased) was moving toward the west; from the glimpse he got of deceased, it appeared that he was running; defendant turned his automobile to the left away from the deceased and applied the brakes, but the right front fender of the automobile struck the deceased; his automobile came to a stop about 35 feet from the point of impact; defendant got out of the automobile and saw the deceased lying on the highway "towards the back end" of the automobile and about 12 feet east of it; defendant saw the crosswalk before his automobile struck deceased; when his automobile struck deceased, the deceased was about 8 feet north of the north line of the crosswalk; at the time of the accident the deceased was wearing dark clothes. He also testified that the intersection "wasn't lit up enough so that you could see anything with respect to this crosswalk that is painted across there."

A police officer, who investigated the accident, testified that he arrived at the scene of the accident about 7 p. m. and took measurements; the deceased was lying in the "northbound curb lane," 50 feet north of the north line of the crosswalk; there were solid skid marks for a distance of 48 feet, which skid marks extended from a point 3 feet "within the crosswalk" to the rear wheels of the automobile.

Plaintiff's wife testified that when she arrived at the scene of the accident the deceased was lying on his side and "kind of crumpled up," and his shoes were off; that he was wearing blue and white striped overalls, a khaki shirt and a black hat; his body was removed from the receiving hospital to the Paschall Mortuary.

Mr. Hilburn testified that he is a licensed embalmer; in December, 1948, he was employed as a contract embalmer by the Paschall Mortuary; he had with him (at the trial) a copy of the Vital Statistics Record; he faintly recalled doing some work on the body of the deceased; he took a sample of decedent's blood for chemical analysis, as he was required to do by the

coroner's office; it is a routine procedure, and when they take a blood sample they "put the name of the deceased, the date, and usually the time that the blood sample was drawn"—the sample is then turned over to the pathologist, or autopsy surgeon. He testified further that his (witness') apprentice was with him when he removed the blood from the body of the deceased; he removed the blood on the night of December 25, 1948, before the body was embalmed; he (witness) put the blood in a bottle; he inquired for the name of the deceased, and he then put his (deceased's) name on the bottle that night by writing it with a pencil on the label which was on the bottle; he left the bottle on a shelf in the preparation room at the mortuary for the pathologist; there was no other bottle there; there was no other body in the mortuary at that time; he had not known the deceased in his lifetime, but the owner of the mortuary, Mr. Morgan, had told him the body was that of William Nichols; he had no independent recollection that Mr. Morgan had told him the body was that of William Nichols; the following day Mr. Morgan presented a certificate to the witness for him to sign as embalmer, and that "is the case" which he (witness) embalmed; the night before, Mr. Morgan had not identified anything to him. He also testified that after embalming is completed, the bottle is placed on the embalming table with the deceased, but he did not recall doing that in this case; he may have handed the bottle to his apprentice; he did not see the bottle the next day.

Dr. Krieger testified that he was the pathologist for the county coroner in December, 1948; on December 27, 1948, he performed an autopsy on the deceased at the mortuary; and that he had notes of the autopsy. He testified further, over the objection of plaintiff, that a sample of the blood of the deceased was turned over to him (witness)—that according to his records he received a blood specimen of the deceased. He testified further that the "blood samples are placed in a box and picked up by Mr. Dillard" of the coroner's office and taken to the coroner's office for analysis; the bottle in which a sample is

contained has the identification of the deceased, and the result of the examination becomes a part of the official public record of the death. On cross-examination he testified that he had no recollection of this particular autopsy; that he must have picked up a blood sample or he would not have stated "on the specimen" submitted—"Blood for alcohol"; according to his notes there was a specimen; he (witness) did not make any test of the blood itself, and he took no blood specimen from the body.

R. J. Abernathy, called as a witness on behalf of defendant, testified that he is the chemist and head toxicologist for the Coroner of Los Angeles County; he occupied that position in December, 1948; in compliance with a subpoena served on him, he brought the official county records concerning the deceased to court with him; those records are the original records of the coroner's office; the records concerning the chemical work which is done are kept under his direction and supervision. The witness was then asked the following question: "Now, do you have the records concerning your chemical analysis of the blood test of William Allen Nichols who met his death on Christmas Day in 1948?" He answered, "I do." Counsel for plaintiff then said, "Objected to as a conclusion of the witness, that it was the blood of William Allen Nichols." The court overruled the objection. The witness was then asked whether, under his supervision, a chemical analysis of the blood of the deceased was made. He replied, "Yes." He was then asked if that analysis revealed the content, if any, of alcohol in the deceased's blood stream. He replied, "It did." He was then asked what percentage of alcohol was present on examination. He replied, "0.11 per cent." He testified further that the percentage of ethanol level in the blood required to produce intoxication in the average person is from .10 to .15 per cent.

There was also testimony by Dr. Krieger that .15 "milligrams per cent" of alcohol in the blood is presumed to be a level at which a great many individuals are considered intoxicated.

The evidence shows that the analysis of the blood was made under the supervision of the witness Abernathy. It does not appear that he personally made the analysis or that he was present when it was made. The person who made the analysis under his supervision did not testify and the name of that person was not disclosed. Mr. Abernathy's testimony as to the alcoholic content of the specimen was based upon a record made in the coroner's office. The person who allegedly brought the specimen from the Paschall Mortuary to the coroner's office did not testify and his name was not disclosed. The autopsy was performed at the mortuary two days after the accident occurred. The pathologist, who performed the autopsy, testified that "blood samples are placed in a box and picked up by Mr. Dillard" and taken to the coroner's office. It seems that said testimony was a statement pertaining to blood samples generally and the customary procedure of the coroner's office in obtaining the samples, rather than a statement referring particularly to the sample involved herein. Mr. Dillard, referred to in that statement, was in the courtroom but he did not testify. Although the pathologist also testified on direct examination that a sample of the blood of the deceased was turned over to him, it appears from the cross-examination that he had no recollection of this particular autopsy, that he did not take a specimen from the body of the deceased, and he concluded that he "must have picked up a blood sample" because, according to his notes, there was a specimen. The embalmer, who had only a faint recollection of having done some work on the body of deceased, testified as to the "routine procedure" in taking a blood sample. He also testified that on the night of December 25th, he put the blood in a bottle, inquired for the name of the deceased, put the name of deceased on a label on the bottle, and left the bottle on a shelf in the preparation room for the pathologist; and no other bottle was there. It is to be noted that he also testified that after embalming is completed the bottle containing the sample is placed on the embalming table with the deceased, but he

did not recall doing that in this case; that he may have handed the bottle to his apprentice. It thus appears that he did not remember whether he put the bottle on a shelf or on the embalming table, or whether he handed it to his apprentice. He also testified that no other body was in the mortuary at that time. It does not appear, however, that other bodies were not there later that night or at some time during the next two days which elapsed before the pathologist arrived and performed the autopsy. No bottle or label purporting to be the bottle or label referred to herein was produced in court. There was no evidence as to when or how or by whom the specimen of blood involved here was taken from the mortuary to the coroner's office; and there was no evidence as to the appearance or condition of the bottle or label at the time the specimen was taken from the mortuary or at the time it was received at the coroner's office. It thus appears that the various steps in the keeping and the transportation of the specimen of Mr. Nichols' blood, from the time the specimen was taken from his body to the time it was analyzed by Mr. Abernathy, were not traced or shown by the evidence. The blood specimen which was analyzed, and concerning which Mr. Abernathy testified, was not identified as the blood of Mr. Nichols.

Respondent asserts that it must be presumed that official duty was performed properly and that the public records of the coroner's office are correct. In the case of *McGowan v. City of Los Angeles*, 100 Cal. App.2d 386, 223 P.2d 862, 863, a toxicologist, employed in the coroner's office in charge of the examination of blood of deceased persons, testified that a paper entitled "Blood alcohol determination" was made by his department in the regular course of business; that the death of Charles Cox was recorded; that the record indicated that the blood that was examined came in a bottle from a certain mortuary; that on the bottle there was the name of Charles Cox and the name of the mortuary; and that the analysis was noted on the paper. An assistant toxicologist, employed in the coroner's office, testified therein that she received the bottle,

examined the blood and prepared the said paper. Defendant therein contended that the court erred in refusing to admit the paper in evidence, and relied upon the provisions of section 1920 of the Code of Civil Procedure. Section 1920 provides: "Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein." In that case the court said, 100 Cal.App.2d at page 389, 223 P.2d at page 864: "If it had been proved that the blood analyzed by the county coroner's office had been taken from the body of Cox before any extraneous matter had been injected into his body, the coroner's record of the analysis would have been admissible and prima facie evidence of the facts therein stated." It was also said therein, 100 Cal.App.2d at page 390, 223 P.2d at page 864: "* * * the record of the analysis of blood in the present case without tracing the blood to the body of Cox was not admissible." It was also stated therein, 100 Cal.App.2d at page 392, 223 P.2d at page 866: "The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an *admissible* 'act, condition or event'. * * * In the absence of proof that the blood analyzed was the blood of Cox, taken from his body prior to the injection of any fluid therein, oral testimony of the result of the analysis would not be admissible." It was also said therein on the same page: "There was no evidence that any blood was ever taken from the body of Cox, or, if any was taken, the identity of the person who took it, or when it was taken—* * * how, when, and the identity of the person by whom the container was labeled, or who delivered the bottle to the coroner's office, or that the blood analyzed was that of Cox. Neither the label nor the bottle was identified, offered or received in evidence. No excuse, explanation or justification was given for failure to lay the necessary foundation. The court did not err in refusing to admit

the paper in evidence." In the present case, since the specimen of blood was not identified as the blood of Mr. Nichols, the court erred prejudicially in receiving the testimony as to the analysis of the specimen.

The judgment is reversed. The purported appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.



106 Cal.App.2d 559

SIPE v. McKENNA.

Civ. 18265.

District Court of Appeal, Second District,
Division 3, California.

Sept. 18, 1951.

Frank R. Sipe sued Catherine A. McKenna to quiet title to a vacant parcel of realty. From a judgment of the Superior Court of Los Angeles County, Otto J. Emme, J., for plaintiff, defendant appealed. The District Court of Appeal, Vallee, J., held that the county treasurer's deeds, conveying the property to plaintiff, in the absence of redemption thereof from its sale to plaintiff on foreclosure of the lien thereon of a bond issued under the County Improvement Act, were not void because of inclusion of the statutory penalty in the amount for which the certificate of sale, issued to plaintiff, recited that the property was sold, and that the second deed, issued by the treasurer on plaintiff's request because of a doubt as to the validity of the first deed, was not void because of inclusion of the amount of current and delinquent taxes paid by plaintiff in the notice to redeem served on defendant.

Judgment affirmed.

1. Counties ☞22

A county treasurer's deed, conveying realty to purchaser thereof at treasurer's sale on foreclosure of lien of bond issued under County Improvement Act, was not

void on ground that no notice of application for deed was served on former owner of realty, where there was no evidence of such omission and deed stated that affidavit, showing the giving to such owner of written notice to redeem and of purchaser's intention to apply for deed, was filed with treasurer. Streets and Highways Code, § 6550.

2. Counties ☞22

Invalidity of county treasurer's deed, conveying land to purchaser thereof at treasurer's sale on foreclosure of lien of bond issued under County Improvement Act, would present no obstacle to issuance of valid second deed by treasurer, pursuant to his statutory duty, on compliance with statutory requirements. Streets and Highways Code, § 6554.

3. Counties ☞22

A county treasurer's deeds, conveying land to purchaser thereof at treasurer's sale on foreclosure of lien of bond issued under County Improvement Act, were not void because of inclusion of statutory penalty in amount for which certificate of sale, issued to grantee, recited that property was sold. Streets and Highways Code, §§ 6504, 6508.

4. Counties ☞22

A county treasurer's deed, conveying land to purchaser thereof at treasurer's sale on foreclosure of lien of bonds issued under County Improvement Act, as requested by such purchaser because of doubt as to validity of treasurer's previous deed to purchaser, was not void because of inclusion of amount of current and delinquent taxes paid by purchaser in notice to redeem served on former owner of land. Streets and Highways Code, §§ 6513, 6515, 6516.

5. Counties ☞22

Since county treasurer's deed, conveying land to purchaser thereof at treasurer's sale on foreclosure of lien of bond issued under County Improvement Act, is primary evidence of regularity of all previous proceedings under statute, whoever made demand on treasurer for sale of property

described in bond is presumed to have been holder thereof. Streets and Highways Code, §§ 6500, 6555.

6. Counties ⇐22

The filing of action in superior court to foreclose lien of bond, issued under County Improvement Act, on certain land, did not deprive county treasurer of jurisdiction to foreclose such lien after acquisition of title to land by another than defendant in such action, which was not tried, in absence of evidence that plaintiff therein owned bond. Streets and Highways Code, § 6610.

7. Counties ⇐22

Presentation of bond issued under County Improvement Act, properly endorsed by payee, with written demand for foreclosure of lien thereof on certain land, constituted written consent of owner of bond for county treasurer to foreclose lien within statutory provision prohibiting treasurer from receiving money on account of bond, cancelling entries thereon in his register, or giving discharge of bond, without owner's written consent, after filing of written notice of pendency of action on bond until rendition of judgment in, or dismissal of, such action. Streets and Highways Code, § 6619.

8. Counties ⇐22

An action to foreclose lien of bond issued under County Improvement Act on certain land was not barred by statute authorizing county treasurer to sell property subject to lien within four years after due date of bond, last installment thereof or last principal coupon, or before January 1, 1947, nor by statute providing that lien of bonds issued to represent public improvement assessment shall be presumed to have been extinguished at expiration of such time or on such date, where land involved was sold by treasurer on foreclosure of lien on November 4, 1946. Code Civ. Proc. § 330; Civ.Code, § 2911.

9. Counties ⇐22

A county treasurer's deed, conveying land to purchaser thereof at sale on foreclosure of lien of bond issued under County Improvement Act, was not void because

of its issuance, pursuant to notice to redeem, on day following date of application made for deed after date on which notice stated that application would be made, as such delay extended former owner's time to redeem until date of application and she suffered no prejudice.

Catherine A. McKenna, in pro. per.

Robert E. Rosskopf, Beverly Hills, for respondent.

VALLÉE, Justice.

Plaintiff brought this suit to quiet title to a vacant parcel of realty.

On January 11, 1927, a bond was issued under the County Improvement Act of 1921, Stats. 1921, p. 1658, which was a lien on the parcel involved. The County Improvement Act of 1921 adopted, as a part thereof, the Improvement Act of 1911, which is now sections 5000-6794 of the Streets and Highways Code. Defendant acquired title to the property on January 5, 1940. On November 4, 1946, the county treasurer, for the purpose of foreclosing the lien of the bond, sold the property to plaintiff for \$551.40, and a certificate of sale was issued and recorded. On December 30, 1947, no redemption having been made, the treasurer issued a deed to plaintiff. On January 15, 1948, plaintiff paid the 1947 county taxes in the amount of \$16.63, and on January 16, 1948, redeemed all delinquent county taxes for the years 1932-1945, both inclusive, in the amount of \$248.60. This suit was commenced February 3, 1948.

Doubt arose as to the validity of the treasurer's deed of December 18, 1947, because of the wording of the affidavit of posting filed with the county treasurer. On January 20, 1949, plaintiff, in writing, notified the county treasurer of such doubt; advised that he desired to reserve and post notice to redeem, and have a new deed issued; requested the treasurer to endorse on the certificate of sale the dates and amounts of the taxes he had paid; and authorized him to accept redemption at any time prior to application for deed

on February 23, 1949. Notice to redeem was served on defendant personally on January 21, 1949, and was posted on the property on January 23, 1949. The notice said that the property could be redeemed "at any time prior to due and proper application for a deed, and that unless sooner redeemed according to law, the undersigned, the said purchaser, will on the 23rd day of February, 1949, apply to the Treasurer of the County of Los Angeles, for a deed to said property." No redemption having been made, a new deed was issued to plaintiff by the county treasurer on May 12, 1949. By leave of court a supplemental complaint was filed setting up the matters which occurred after the filing of the original complaint. The answer denied all the allegations of the complaint and supplemental complaint, alleged ownership in fee simple, adverse possession, and plead numerous statutes of limitation. Judgment was for plaintiff from which defendant appeals.

[1,2] Defendant contends that the first deed of December 30, 1947, was void for the reason that "no notice of the application for that deed was ever served" on her as required by section 6550 of the Streets and Highways Code. We have not found any evidence in the record to the effect that notice of such application was not served on defendant. The reference to the reporter's transcript which she gives does not support her statement to that effect. The deed says that the affidavit "has been filed with me [the county treasurer] showing the giving of written notice to redeem and of intention to apply for a deed on this date." Section 6555 of the Streets and Highways Code provides: "The deed of the treasurer, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for State, county and municipal taxes." If we should assume that the first deed was invalid, it presented no obstacle to the issuance of valid second deed. It was the duty of

the treasurer to issue a valid deed. Sts. & Hy. Code, § 6554. If the first deed was void, it was his duty, on compliance with the statutory requirements, to issue a valid second deed. *Barrett v. Brown*, 26 Cal.2d 328, 332, 158 P.2d 567; *Schainman v. All Persons*, 96 Cal.App. 753, 759, 275 P. 225, 276 P. 113.

[3] The certificate of sale recited that the sum of \$551.40, for which the property was sold by the treasurer, included "Penalty.....\$208.57." Defendant next contends that the first and second deeds were void because of the inclusion of this item in the certificate of sale. The point is without merit. The statutes expressly require the inclusion of penalties in the amount for which the property may be redeemed. Sts. & Hy. Code, §§ 6504, 6508.

[4] When plaintiff requested the treasurer to endorse on the certificate of sale the 1947 taxes of \$16.63, and the delinquent taxes of \$248.60, which he (plaintiff) had paid, the treasurer did so. The record is not clear as to the fact, but apparently the amount of these taxes was included in the notice to redeem, served on defendant on January 21, 1949, and posted on January 23, 1949. Defendant contends that the second deed was void because of the inclusion of the amount of these taxes in the notice to redeem. There is no merit in the point. At any time after delivery of the certificate of sale, the legal holder thereof may pay any taxes upon the property described in the certificate which may be prior to his lien, or he may redeem the property from any sale made in the collection or enforcement of such taxes. Sts. & Hy. Code, § 6515. It is the duty of the treasurer to indorse on the certificate of sale the fact that receipts have been produced for amounts so paid, the nature of the taxes paid, the amounts thereof, and to collect the same on redemption. Sts. & Hy. Code, §§ 6513, 6516.

[5] The bond in question was originally issued to "The Elliott-Horne Co." Defendant apparently contends that title to the bond did not pass from The Elliott-Horne Co. We are not referred to any evidence to that effect nor have we found

any. As we have said, the deed of the treasurer is primary evidence of the regularity of all proceedings theretofore had. Sts. & Hy. Code, § 6555. It is presumed, therefore, that whoever made demand on the treasurer for the sale of the property described in the bond was the holder thereof. Sts. & Hy. Code, § 6500.

[6,7] On March 21, 1940, an action was filed in the Superior Court of the County of Los Angeles by Pacific States Properties, Inc., for foreclosure of the bond. This was prior to the time defendant acquired title to the property. Defendant's predecessor in interest was named as a party defendant but was not served. The action was not tried and no judgment entered insofar as the action applied to the bond in suit here. Defendant contends the court and the treasurer had concurrent jurisdiction to foreclose the bond, that the court first acquired jurisdiction to do so, and that the "tribunal in which the jurisdiction first attaches has exclusive jurisdiction"; that, therefore, the treasurer had no "jurisdiction" to foreclose. The point is not tenable. There is no evidence that the plaintiff in the action to foreclose ever owned the bond. An action to foreclose a bond lien is "a separate, distinct and cumulative remedy." Sts. & Hy. Code, § 6610. "A written notice of the pendency of any action for recovery on a bond shall be filed with the treasurer. After the filing of such notice the treasurer shall not receive any money on account of the bond and he shall have no authority to cancel the entries on the bond in his register or give a discharge of the bond without the written consent of the owner thereof until judgment has been rendered in the action or until it has been dismissed." Sts. & Hy. Code, § 6619. Presentation of the bond, properly indorsed by the payee, with written demand for foreclosure, as was done in the present case, constitutes "written consent of the owner" for the treasurer to proceed.

[8] Defendant next contends that the action was barred by the provisions of

sections 329 and 330 of the Code of Civil Procedure and section 2911 of the Civil Code. Section 329 applies to an action for foreclosure of a bond lien and is not applicable. Section 330 provides that if the act or law establishing the power of the treasurer to sell property subject to a bond lien fails to prescribe the time within which the treasurer may act, "said official may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to January 1, 1947, whichever is later, but not thereafter." Civil Code section 2911 provides that in the event bonds were issued to represent a public improvement assessment "the lien shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later." Under Code of Civil Procedure section 330 and Civil Code section 2911, the lien is not extinguished until January 1, 1947. In the present case the property was sold by the treasurer on November 4, 1946, before extinguishment of the lien of the bond by operation of these statutes. It is obvious that the action is not barred and that the time within which the treasurer could sell had not expired at the time the sale was made.

[9] Defendant urges that since the notice to redeem stated that application for a deed would be made on February 23, 1949, and application was not, in fact, made until May 11, 1949, the deed issued on May 12, 1949, pursuant to the notice, was void. The delay extended defendant's time to redeem until May 11, 1949. Sts. & Hy. Code, § 6551. Defendant suffered no prejudice. Further, insofar as appears, defendant has not at any time offered to redeem.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

106 Cal.App.2d 593

**KENT v. SUPERIOR COURT OF STATE,
IN AND FOR CITY AND COUNTY OF
SAN FRANCISCO.**

Civ. 14960.

District Court of Appeal, First District,
Division 1, California.

Sept. 21, 1951.

Hearing Denied Nov. 19, 1951.

Proceeding by Mildred Donahue Kent for a writ of prohibition commanding the Superior Court of the State of California, in and for the City and County of San Francisco, to desist from any further proceedings upon an order to show cause. The District Court of Appeal, Wood, J., held that where property settlement agreement which provided that wife was to receive certain sum per month from husband's estate and that husband shall not alienate assets for purpose of defeating rights of wife was incorporated by reference into divorce decree, decree did not order husband not to alienate his assets and trial court was without jurisdiction to entertain proceeding in divorce action after decree had become final against husband's second wife on order to show cause why second wife should not be ordered to restore to husband certain property and to account to first wife for all profits received from property.

Writ granted.

Divorce ⇨ 254, 261

Although property settlement agreement which provided that husband shall not alienate assets for purpose of defeating rights of wife was incorporated by reference into divorce decree, decree did not order husband not to alienate his assets and trial court was without jurisdiction to entertain proceeding in divorce action upon an order to show cause why second wife should not restore to husband certain property and to account to first wife for all profits received from property. Code Civ. Proc. §§ 128, subd. 4, 177, subd. 2, 187, 1209, subd. 5.

FRED B. WOOD, Justice.

Petitioner seeks a writ of prohibition commanding the respondent court to desist from any further proceeding, insofar as petitioner is affected, upon an order to show cause why petitioner should not be ordered to restore to Marion H. Kent certain property given by him to her, and to account to Doris Kohn, plaintiff in the action, for all interest, dividends, rents and profits received by the petitioner from said property. The order to show cause includes an order restraining petitioner, pending the hearing and further order by respondent, from transferring to any person other than Marion, any of the property mentioned.

The order was made March 10, 1951, upon the application of Doris Kohn in a divorce action between her, as plaintiff, and Marion H. Kohn, now Marion H. Kent, defendant, and long after the final decree therein had become a final judgment. Petitioner herein was not a party to said action prior to the entry of the final decree and there has been no order authorizing or directing that she be made a party. Petitioner appeared specially therein and moved to quash, as to her, the order to show cause and temporary restraining order. Respondent denied that motion and continued to a date certain the hearing of the order to show cause and temporary restraining order.

The main question is whether or not there is a judgment or an order of court which may be enforced against this petitioner in such a proceeding as that which has been initiated by the order to show cause.

The affidavit for the order to show cause shows that the parties to the divorce action entered into a property settlement agreement, whereby Doris was to receive 30 per cent of the annual net income of Marion during his lifetime, and after his death the sum of \$250 a month from his estate should he predecease her; that the agreement provides that he shall not alienate his assets for the purpose of defeating her rights in and to his estate; and alleges that subsequent to the final decree Marion gave his present wife, petitioner herein, certain

Mullin & Cost, San Mateo, for petitioner.

Robert J. Drewes, San Francisco, for respondent.

property in derogation of the rights of Doris under the agreement; that at the time of the gifts petitioner herein knew of that agreement; and that the agreement was made a part of the interlocutory and final decrees.

Paragraph 8 of the agreement consists of two sentences, the first of which declares that the estate of Marion shall be liable for and shall pay to Doris the sum of \$250 each month for the balance of her natural life, beginning immediately following the death of Marion. The second sentence reads as follows: "Second party [Marion] shall not alienate his assets for the purpose of defeating the rights of first party in and to his estate as provided in this paragraph."

Has this contractual obligation of Marion not to so alienate his assets been so incorporated in the interlocutory and final decrees as to have been merged therein as an order of the court, and thus be enforceable in the divorce action as an order of court made in that action? Every court has power "To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein". Code Civ. Proc. § 128, subd. 4. Every judicial officer has power "To compel obedience to his lawful orders", as provided in the Code of Civil Procedure, § 177, subd. 2. One method of enforcement is the contempt proceeding, Code Civ. Proc. § 1209, subd. 5, but a court or judge is not necessarily limited to that method. Section 187 of the Code of Civil Procedure recognizes the power of a court or judge in the exercise of jurisdiction conferred, when the course of proceeding is not specifically pointed out by statute, to adopt any suitable process or mode of proceeding that may appear most conformable to the spirit of the code.

In the search for an order for the enforcement of which the superior court might have jurisdiction to entertain the proceeding in the divorce action which was initiated by the questioned order to show cause, we turn to the interlocutory and final decrees in that action. The following clauses of the interlocutory decree are the only portions thereof which we find pertinent: "It is Hereby Further Ordered, Adjudged and Decreed that that certain

agreement for the settlement of the property rights of the parties hereto, a copy of which is attached hereto and marked Exhibit 'A' and by such reference made a part hereof with the same force and effect as if set out at length within the body of this decree, be and the same is hereby ratified, approved and confirmed; and It is Hereby Further Ordered, Adjudged and Decreed that in pursuance of the aforementioned agreement the plaintiff do have and recover from the defendant the sums of money in said agreement mentioned and that the payment thereof to plaintiff be made by the defendant at the time, in the manner and as in said last mentioned agreement set forth; * * *" The final decree is, in words and phrases, substantially the same as the interlocutory.

The first clause quoted contains no order imposing an obligation upon any one. It merely incorporates by reference and approves the agreement.

The second clause quoted, whatever might be said of it as ordering Marion to pay certain sums of money to Doris during his lifetime or as ordering his estate to pay certain sums to her after his death (which latter it does not literally do), does not order Marion not to alienate his assets, whether for the purpose of defeating Doris' rights or for any other purpose.

Hence, in neither clause is there an order that Marion shall not alienate his assets. There being no such order, these decrees, insofar as such an obligation is concerned, are precisely like the decrees involved in *Shogren v. Superior Court*, 93 Cal.App.2d 356, 209 P.2d 108, and *Young v. Superior Court*, 105 Cal.App.2d 65, 233 P.2d 39. The conclusion is inescapable that the trial court is without jurisdiction to entertain the proceeding against this petitioner initiated by the questioned order to show cause.

Let a peremptory writ of prohibition issue, commanding respondent to desist from any further proceeding against petitioner upon the order to show cause and to dissolve, as to her, the temporary restraining order.

PETERS, P. J., and BRAY, J., concur.
Hearing denied; TRAYNOR, J., dissenting.

106 Cal.App.2d 589

PAULUS v. BAUDER et al.

Civ. 4258.

District Court of Appeal, Fourth District,
California.

Sept. 20, 1951.

Action by Frances Paulus against Roy Adelbert Bauder and others for injuries sustained when automobile driven by named defendant collided with automobile driven by defendant Frank Alfred Paulus in which plaintiff was riding. The Superior Court of San Diego County, William A. Glen, J., entered judgment on motion against plaintiff and in favor of defendant Frank Alfred Paulus and plaintiff appealed. The District Court of Appeal, Griffin, Acting P. J., held that plaintiff could not maintain action against former husband for tort committed after entry of interlocutory decree but before entry of final decree of divorce, though final decree had been entered at time of trial of tort action.

Judgment affirmed.

1. Divorce ☞156

Marital bonds are not severed by interlocutory decree of divorce and the parties continue to occupy the relationship of husband and wife until the final decree is entered. Civ.Code, § 131.

2. Divorce ☞156

Former wife could not maintain action against divorced husband for injuries sustained after entry of interlocutory decree in divorce suit but before entry of final decree allegedly as a result of husband's negligent operation of automobile, though final decree of divorce had been entered before trial of tort action. Civ.Code, § 131.

3. Appeal and Error ☞843(2)

Decision that former wife could not sue divorced husband for injuries sustained before entry of final decree of divorce allegedly as a result of his negligent operation of automobile rendered question of whether she was a passenger or guest in husband's automobile at time of accident academic, since enactment of automobile guest statute did not change the

rule as to tort liability of one spouse to the other.

Stephen C. Johnson and Hubert L. Rose, San Diego, for appellant.

Gray, Cary, Ames & Driscoll and Ward W. Waddell, Jr., San Diego, for respondent.

Griffin, Acting Presiding Justice.

Plaintiff and appellant sought damages for injuries received while riding as a guest or passenger in an automobile driven by defendant and respondent Frank A. Paulus, which automobile collided with another car driven by defendant Roy A. Bauder.

Judgment, on motion, was entered against appellant plaintiff and in favor of respondent defendant Frank A. Paulus, upon the theory that no cause of action exists in favor of one spouse against the other upon a claim arising out of a tort action. The Pauluses, after some years of married life, separated on August 27, 1949, and lived separate and apart. On October 3, 1949, appellant filed a complaint for divorce. On October 28, she secured an interlocutory decree. Neither alimony nor support money was sought. A final decree of divorce was entered on October 3, 1950, prior to the trial of this action. On February 13, 1950, after the entry of the interlocutory decree, respondent Paulus was operating his automobile, in which appellant was riding at the instance of respondent as a guest or passenger, on a road in San Diego County, and it collided with a car owned or driven by defendant Bauder. Appellant sustained injuries and damages alleged to be due to the negligence of both defendants.

Only two questions are presented on this appeal: (1) Can a wife maintain an action against the husband for a tort occurring after the entry of the interlocutory decree but before the entry of the final decree where the interlocutory decree settles their property rights and at the time of the trial they are single persons? (2) Can

one spouse be a guest or passenger in the automobile of the other during the period after the interlocutory decree and before the final decree?

Appellant contends that these are first impression questions in California. Respondent argues that they are settled by the decisions in *Peters v. Peters*, 156 Cal. 32, 103 P. 219, 220, 23 L.R.A.,N.S., 699; and *Cubbison v. Cubbison*, 73 Cal.App.2d 437, 166 P.2d 387, and appellant maintains they are not applicable. The *Peters* case involved an action by the husband against the wife for injuries inflicted upon him when the defendant wife shot him in the leg for no particular reason. They were living together at the time. There it was definitely held that "an action cannot be maintained by one spouse against the other for a battery committed *during the continuance of the marriage relation.*" (Italics ours.) And the court said: "The question is entirely new in this state, and such cases are rare in other jurisdictions; but there is no case in favor of the right to maintain such an action. * * * By the common law the husband and wife were deemed to be one person, and no suit at law of any character could be maintained by one against the other. (Citing cases.) * * * it has been uniformly decided, in the few states where the question has arisen, that neither can sue the other, even after a divorce, for personal wrongs inflicted upon one by the other during the marriage." (Citing cases.) The court then concluded with the statement: "It would be a forced interpretation to attempt to discern * * * in any of the provisions of the Civil Code, an intent to make a departure from the common law so radical, and so opposed to its general policy, as the authorization of a suit by the husband or wife against the other for injuries to the person or character." The court there cites the language of *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, wherein it is said that the relation of marriage, while it continues, "so to speak, acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other."

The *Cubbison* case involved a suit by one spouse against the other arising out of an automobile accident. The husband and wife were separated at the time of the filing of the complaint. It was there held, citing the *Peters* case and the general rule, that one spouse may not sue the other for damages for tort.

Plaintiff argues that the entry of the interlocutory decree, which judgment was not appealed, determined the property rights of the parties and was a final judicial determination of the existence of the marital relation insofar as these rights were concerned, and that only the final dissolution of the marriage is suspended for a full year thereafter; that accordingly, appellant could maintain this action against her former husband since the entry of the interlocutory decree established a new property status between them, citing *Borg v. Borg*, 25 Cal.App.2d 25, 29, 76 P.2d 218; *London Guarantee & Accident Co. v. Industrial Accident Comm.*, 181 Cal. 460, 465, 184 P. 864; and *Leupe v. Leupe*, 21 Cal.2d. 145, 148, 130 P.2d 697.

[1,2] The cases cited by appellant do not base the rule upon the existence or nonexistence of property rights or contractual relationship between the parties, but on the existence of the *marital relationship*. Concededly, the parties did occupy the relationship of husband and wife until the final decree was entered. The interlocutory decree did not sever the marital bonds. *Olson v. Superior Court*, 175 Cal. 250, 165 P. 706, 1 A.L.R. 1589; *Brown v. Brown*, 170 Cal. 1, 147 P. 1168; Civ.Code sec. 131; *Remley v. Remley*, 49 Cal.App. 489, 193 P. 604. Reconciliation and, accordingly, a destruction of the effect of the interlocutory decree before entry of the final decree is not uncommon. *Rickards v. Noonan*, 40 Cal.App.2d 266, 104 P.2d 839. Many reasons could be advanced why one spouse should not be allowed to recover from the other for a tort committed prior to the final determination of the marital relationship.

It was said in the *Cubbison* case: "more than thirty-six years ago the Supreme

Court of this state held that if a spouse should be permitted by the laws of this state to sue the other spouse in a tort action, such change in our law should be made by the Legislature and not by the courts. No such legislation has ever been passed since that time nor has the decision in the case of *Peters v. Peters*, supra, ever been distinguished or criticized by the appellate courts of this state." [73 Cal. App.2d 437, 166 P.2d 387.] We see no reason to interfere with the judgment of the trial court in the instant case.

[3] Under this conclusion the question whether plaintiff was a passenger or a guest at the time is purely academic. The enactment of the guest statute did not have the effect of changing the rule above announced.

Judgment affirmed.

MUSSELL, J., concurs.



106 Cal.App.2d 531

PEOPLE v. GRIFFIN.

Cr. 835.

District Court of Appeal, Fourth District,
California.

Sept. 14, 1951.

As Modified Sept. 19, 1951.

Gene Griffin was convicted in the Superior Court of Tulare County, Glenn L. Moran, J., of an attempt to commit rape, and from the judgment and orders denying motions to set aside the information, strike certain affidavits and for a new trial, defendant appealed. The District Court of Appeal, Mussell, J., held that where defendant presented affidavits setting forth the opinions of certain persons as to testimony taken at the preliminary hearing, the prosecution could submit counter affidavits in opposition thereto.

Judgment and order denying new trial affirmed and the attempted appeal from orders denying motions to strike and to set aside counts of the information dismissed.

1. Criminal law ⇨236

Indictment and Information ⇨122(2)

Under statute providing that information may charge the offense named in the order of commitment or any offense shown by evidence taken before magistrate to have been committed, accused was properly held to answer for an offense shown by evidence taken at preliminary examination, even though not charged in complaint or designated in order of commitment, and it was not necessary to have proceedings at preliminary hearing taken down in shorthand and transcribed. Pen.Code, §§ 809, 869.

2. Indictment and Information ⇨140(2)

Where accused presented affidavits setting forth opinions of certain persons as to testimony taken at preliminary hearing, prosecution could submit counter-affidavits in opposition thereto.

3. Criminal law ⇨822(1)

Where accused shared criminal intent of associates, and several instructions were given at trial relative to aiding and abetting in which the law was correctly stated, giving of instruction that for any man to stand by in presence of an act of rape by his associate is itself proof of his co-operation with the criminal act and he aids and abets by his actual presence and is a principal in the crime, was not reversible error.

4. Criminal law ⇨1023(3, 8)

Orders denying motions to strike affidavits and set aside counts of information were not appealable. Pen.Code, § 1237.

Burum, Young & Woolridge, Bakersfield, for appellant.

Edmund G. Brown, Attorney General, and William E. James, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Appellant was found guilty by a jury of an attempt to commit rape in that on December 26, 1950, he aided and abetted one Richard Chaney in the commission of an assault with intent to commit rape upon the person of one Erma Kennedy. A ver-

dict of not guilty was returned as to counts one and two of the information, which charged rape by force and violence. A motion for a new trial was made and denied, and after the denial of his application for probation, appellant was committed to the California Youth Authority.

No issue is raised as to the sufficiency of the evidence to sustain the conviction. However, a brief statement of the pertinent facts is necessary in view of the other questions presented.

On the evening of December 25, 1950, the prosecutrix, Erma Lee Kennedy, aged 16, attended a dance in Tulare county with her friend Edna Rowland. The girls had planned to stay at Edna's house after the dance. Leon McPhettridge and Richard Chaney, young men named in the information with appellant Gene Griffin, also attended the dance. Griffin danced with the prosecutrix and attempted to take her home in his car. She succeeded in eluding him and went to Edna's home with one Audie Joe Bell. Bell left and a short time later Edna came into the house and told Erma that the boys wanted to see her. Erma went outside and saw McPhettridge, Chaney and Griffin. Griffin told the prosecutrix that he would like to talk to her and she got in his car. Appellant then drove away and stopped in a grape vineyard about a mile from Edna's home. The prosecutrix testified that appellant started to "get fresh" and in a few moments McPhettridge and Chaney drove up in Chaney's car; that at McPhettridge's request all of the parties then sat in Chaney's car. McPhettridge and Chaney were in front and appellant and Erma in the back. She further testified that appellant again "got fresh" with her and tried to pull her down on the back seat; that she started to pull his hair and fight him off; that she asked Richard Chaney to help her and Chaney replied that he could do nothing for her; that appellant then attempted to have sexual intercourse with her and she got out of the car and started to run toward the camp; that she fell and hurt her knee; that appellant ran after her, took hold of her arms and said "There is no use pulling away";

that he pulled her arms and pushed her back to the car; that she asked Richard to take her home and he laughed and said he couldn't do anything because defendant was "his friend"; that Richard then asked appellant to let him in the car with Erma for a while; that she and Richard were in the car for approximately an hour, during which time Richard attempted to accomplish an act of sexual intercourse with her; that during this time appellant came up to the car and told Richard to hurry up as it was cold outside; that he was going to "get in there"; that Richard got out of the car and Leon McPhettridge then got in the back seat and accomplished an act of sexual intercourse with her; that she then asked appellant if he was satisfied and if he would take her home and he said "Hell, no. It is my time now"; that appellant then got hold of her arm, pushed her back in the car and accomplished an act of sexual intercourse with her; that she struggled and pulled his hair but that this did not stop him; that McPhettridge and Chaney then got back in the car and appellant left. On the following day the prosecutrix was examined by a physician and his testimony was that the prosecutrix had been forcibly raped.

Appellant made statements to the district attorney in which he admitted having attempted to have intercourse with the prosecutrix and in which he corroborated many of the statements made by the prosecuting witness. Richard Chaney admitted at the trial that he had attempted an act of sexual intercourse with the prosecutrix.

Prior to the entry of his plea, appellant moved to set aside the second and third counts of the information on the grounds that no testimony had been taken at the preliminary hearing on the question of aiding and abetting and that no testimony had been taken at said hearing which would indicate that the crimes charged in the second and third counts of the information had been committed. In support of this motion appellant filed a number of affidavits in each of which it was stated generally that there was no testimony taken at the pre-

liminary which indicated that the defendant Gene Griffin aided and abetted McPhettridge and Chaney in any of the acts committed. In opposition, the district attorney filed affidavits of the clerk of the justice court and the justice of the peace, in both of which it was stated that the complaining witness testified at the preliminary substantially as set forth in the statement of facts herein. It appears that at the time of the preliminary examination a shorthand reporter was not available and the district attorney and counsel for the defendant agreed to proceed with the hearing in the absence of a reporter. At the conclusion of the preliminary hearing the defendant was bound over to the superior court on the charge of "rape".

[1] Appellant claims that it was prejudicial error for the trial court to refuse to strike the second and third counts of the information and argues that when there is no record taken at the preliminary examination the power to charge any crime disclosed by the testimony at the hearing is restricted to that set forth in the order of commitment. This contention is without merit. Section 809 of the Penal Code, as amended in 1927, provides that the information may charge the offense, or offenses, named in the order of commitment, or any offense, or offenses shown by the evidence taken before the magistrate to have been committed. A defendant may be held to answer for an offense shown by the evidence taken at the preliminary examination, even though not charged in the complaint or designated in the order of commitment. *People v. Bird*, 212 Cal. 632, 636-645, 300 P. 23. The courts have permitted the inclusion in the information of an offense for which the magistrate had declined to hold the defendant to answer, *People v. Shutler*, 15 Cal.App.2d 704, 705-706, 59 P.2d 1050; *People v. Sturman*, 56 Cal.App.2d 173, 177-179, 132 P.2d 504, and it has been held that where the defendant was legally held to answer and committed for an offense triable in the superior court, a motion to set aside the information would not lie on the ground that the information charged an offense other than that named in the commitment, where

the evidence taken at the preliminary examination showed the commission of the offense charged. *People v. Barnett*, 99 Cal. App. 409, 411-413, 278 P. 885.

In *People v. McGee*, 31 Cal.2d 229, at pages 232, 233, 187 P.2d 706, at page 708, the court said: "Defendant was bound over by the committing magistrate to answer to a charge of manslaughter only. He contends that the evidence before the magistrate failed to show that the crime of murder had been committed; that therefore the district attorney was without authority to file an information accusing defendant of murder and the trial court erred in denying defendant's various motions to set aside the information and to compel a trial on the charge of manslaughter only. The district attorney is empowered by section 809 of the Penal Code to 'charge the offense * * * named in the order of commitment, or any offense * * * shown by the evidence taken before the magistrate to have been committed.' Under this section the district attorney can charge murder, if the evidence at the preliminary hearing shows such offense, although defendant has been held to answer for the offense of manslaughter. (*People v. Bird*, (1931), 212 Cal. 632, 300 P. 23)"

It was not necessary to have the proceedings at the preliminary hearing taken down in shorthand and transcribed by a court reporter. *People v. Brooks*, 72 Cal. App.2d 657, 660, 165 P.2d 51; Penal Code section 869.

[2] Appellant argues that while he could present affidavits setting forth the opinions of certain persons as to the testimony taken at the preliminary that the district attorney could not file counter affidavits in opposition thereto. We see no reason to hold that the district attorney was precluded from submitting affidavits in opposition to those offered by appellant. 1 Cal.Jur., Affidavits, § 23, pp. 680-682. Furthermore, the prosecution produced witnesses to testify at the hearing on the motion to set aside the second and third counts of the information and the trial court deemed it unnecessary to take their testimony in view of the affidavits filed. We

see no abuse of the trial court's discretion and no error was committed in permitting the proof of testimony taken at the preliminary hearing either by affidavit or oral testimony.

[3] It is next claimed that the court committed prejudicial error in its instructions to the jury as to the law relative to aiding and abetting. Several instructions were given on this subject in which the law was correctly stated. However, appellant claims that the court committed error in giving the following instruction: "Under the law, for any man to stand by serenely and sympathetically in the presence of an act of rape by his associate is itself proof of his approval and cooperation with the criminal act. That the victim should in her anguish, make an outcry to such associate and thereby attempt to claim his protection is not necessary to render him guilty of aiding and abetting the criminal act. He aids and abets by his actual presence. By standing by, without resentment toward his acting confederate, and without concern for the girl permitted the outrage, he exemplified a united and single purpose which would brook no interference. Therefore, under the rules of law just stated to you, he is a principal in such a crime."

This instruction apparently was taken from the case of *People v. Mummert*, 57 Cal.App.2d 849, 855, 135 P.2d 665, and was proper under the particular facts of that case. The facts in the instant case are somewhat similar to those in the *Mummert* case and, as in the *Mummert* case, the defendant herein was an associate and a confederate in the admitted assault with intent to commit the crime of rape upon the person of the prosecutrix. The evidence shows that the appellant acted in concert with his associates within the rule in *People v. Hill*, 77 Cal.App.2d 287, 293, 175 P.2d 45. He shared the criminal intent of his associates in the commission of the assault and acted with knowledge of the wrongful purpose of his associates. *People v. Le-Grant*, 76 Cal.App.2d 148, 153, 172 P.2d 554. Under the circumstances presented by the record we conclude that no reversible

error was committed in the giving of the questioned instruction.

[4] The judgment and order denying a new trial are affirmed. The orders denying the motions to strike and to set aside the second and third counts of the information are not appealable, Penal Code section 1237, and the attempted appeal therefrom is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.



106 Cal.App.2d 549

ETCHART v. PYLES.

Civ. 4338.

District Court of Appeal, Fourth District,
California,
Sept. 17, 1951.

Action by Marie Etchart against A. B. Pyles for damages, injunctive relief and specific performance of a lease agreement. The Superior Court of Kern County, R. B. Lambert, J., granted specific performance and the defendant appealed. The District Court of Appeal, Mussell, J., held that under the rule that equity regards as done that which ought to have been done, the court properly ordered the defendant to comply with the terms of an agreement in the lease that he would apply to the license board for the transfer of a liquor license back to the plaintiff at the determination of the lease.

Judgment affirmed.

I. Intoxicating Liquors — 103

Under statute providing that each liquor license issued is separate and distinct and shall be transferable from one person to another upon approval of board after investigation of proposed transferee, agreement in 1943 lease of cafe business that liquor license held by lessor would be transferred to lessee and that on determination of lease lessee would transfer it back to

lessor, and that during term of lease license should be transferred to no other person, was not illegal, void, or contrary to public policy. Gen.Laws, Act 3796, §§ 1 et seq., 21.1.

2. Intoxicating Liquors Ⓒ99, 103

A liquor license issued pursuant to statute is a valuable property right, owned privately as property is owned although subject to appropriate regulatory provisions in the exercise of police power and is transferable for a cash consideration, and therefore has an ascertainable valuation. Gen.Laws, Act 3796, § 1 et seq.

3. Intoxicating Liquors Ⓒ45

Statute providing that no licensee shall enter into any agreement where he pledges a transfer of his liquor license as security for a loan, or as security for fulfillment of any agreement, which became effective October 1, 1949, and was not retroactive, was not applicable to lease dated December 28, 1943 which provided that liquor license held by lessor should be transferred to lessee. Gen.Laws, Act 3796, §§ 1 et seq., 7.3.

4. Specific Performance Ⓒ121(8)

In action by lessor against lessee for damages, injunctive relief and specific performance of lease agreement providing for transfer back to lessor of liquor license after determination of lease, evidence was insufficient to establish fraud on part of lessor against license board and public. Gen.Laws, Act 3796, §§ 1 et seq., 21.1.

5. Specific Performance Ⓒ121(3)

In action by lessor against lessee for damages, injunctive relief and specific performance of lease agreement providing for transfer back to lessor of liquor license after determination of lease, evidence sustained finding that lessor received no consideration for transfer of license to lessee other than covenants and conditions to be performed by lessee under lease and lessee's agreement to transfer license back to lessor without consideration at termination of lease. Gen.Laws, Act 3796, §§ 1 et seq., 21.1.

6. Equity Ⓒ57

Under rule that equity regards as done that which ought to have been done, court

properly ordered lessee to comply with terms of agreement in lease that lessee make application to license board for transfer of liquor license back to lessor at determination of lease. Gen.Laws, Act 3796, §§ 1 et seq., 21.1.

7. Equity Ⓒ65(2)

Specific Performance Ⓒ121(8)

In action by lessor against lessee for damages, injunctive relief and specific performance of lease agreement providing for transfer back to lessor of liquor license after determination of lease, evidence was insufficient to establish willful concealment by lessor of any interest in liquor license transferred to lessee, or that lessor came into equity with unclean hands. Gen.Laws, Act 3796, §§ 1 et seq., 21.1.

J. O. Reavis, Delano, and Gordon A. Drescher, Wasco, for appellant.

West, Vizzard, Howden & Baker and James Vizzard, Bakersfield, for respondent.

MUSSELL, Justice.

Defendant appeals from a judgment requiring him to make application to the California State Board of Equalization for the transfer to plaintiff of an on-sale liquor license. On December 28, 1943, plaintiff leased a place of business known as the "Tivoli Cafe", near Bakersfield, to defendant for a period of three years at a monthly rental of \$75. The lease, which was in writing, provided, among other things, that the liquor license then held by the lessor should be transferred to the defendant; that upon the expiration of the lease, or any sooner "determination" thereof, defendant would transfer said liquor license back to lessor or her order and that during the term of the lease the license should be transferred to no other person. Plaintiff presented an application to the Board of Equalization for the transfer of the license to the defendant and the Board caused it to be transferred to him. Defendant then took possession of the cafe and operated it until July, 1949, when he abandoned the premises.

At the time of the transfer, defendant gave plaintiff a check for \$325 to guarantee that "he would renew the license before it was too late." The license renewal fee of \$325 was procured by defendant and plaintiff returned the check to him. No cash consideration was paid by defendant for the transfer of the license in question. After defendant abandoned the premises in 1949 he refused to make application for the transfer of the liquor license back to plaintiff. The instant action was then filed, in which plaintiff asked for damages, injunctive relief and specific performance of the lease agreement.

The trial court found that it was difficult to ascertain the amount of damage and that the facts justified a decree of specific performance. The decree ordered defendant to make application to the California State Board of Equalization for the transfer to plaintiff by defendant of the liquor license and provided that in the event the Board failed to approve and carry out the said transfer, the liquor license should revert to the defendant as his sole and individual property and without further prejudice under and by reason of the decree.

Appellant first argues that the provision in the lease for the transfer of the liquor license back to the lessor is illegal and void; that the liquor license confers only a personal privilege and not a property right and that no legal agreement can be entered into to transfer a liquor license as a chose action or as personal property. These contentions are without merit.

[1] The Alcoholic Beverage Control Act, Act 3796, Deering's General Laws, provides, among other matters that "Each license issued under this act is separate and distinct, shall be transferable from one person to another upon approval by the board * * *." Section 21.1 provides for investigation of the proposed transferee. There is nothing in the statute which suggests that an agreement such as is contained in the lease before us is void or contrary to public policy, provided, of course, that such transfer is made in the method prescribed by the statute and subject to approval of the Board.

[2] As was said by Mr. Justice Shenk in *Roehm v. County of Orange*, 32 Cal.2d 280, 291, 196 P.2d 550, 557: "a liquor license issued pursuant to the Alcoholic Beverage Control Act is a valuable property right, owned privately as property is owned although subject to appropriate regulatory provisions in the exercise of the police power, is transferable for a cash consideration and therefore has an ascertainable valuation, * * *"

In *Leboire v. Black*, 84 Cal.App.2d 260, 262, 190 P.2d 634, 635, a real estate broker procured a binding contract between the seller and the buyer "subject to seller obtaining a liquor license for buyer" in connection with the sale of a hotel. The court there said: "We are satisfied that the agreement with regard to transfer of a liquor license should be construed in connection with sec. 7 of the Alcoholic Beverage Control Act [Statutes 1935, p. 1123; 2] Deering's Gen.L.1944, Act 3796, as intended to be subject to the approval of the Board of Equalization as therein provided. So construed the agreement is a legal one."

In *Fong v. Rossi*, 87 Cal.App.2d 20, 195 P.2d 854, 856, a lease contained the following provisions: "No liquor license now used in connection with the operation of the business upon said premises shall be transferred to any other location, and then at the end of the term of this lease, or the sooner termination thereof, the lessee agrees promptly to have said, or any renewed liquor licenses aforesaid, re-transferred to the lessor, his heirs, executors, administrators or assigns."

The court there said, 87 Cal.App.2d at page 22, 195 P.2d at page 856: "Appellants argue that these provisions of the lease contain no promise to transfer the liquor licenses. We are satisfied that while no express promise to transfer the licenses is contained therein the plain tenor of the whole agreement is that the liquor licenses are to be transferred. It is agreed that the 'principal income * * * will be obtained * * * under the liquor licenses now possessed by the lessor * * *.' Unless the transfer of the licenses was in-

tended by the parties this agreement would be illegal. *Teachout v. Bogy*, 175 Cal. 481, 166 P. 319. Under section 7 of the Alcoholic Beverage Control Act, Statutes 1935, p. 1123, 2 Deering's Gen.L.1944, Act 3796, a liquor license may be transferred with the approval of the Board of Equalization. Since a contract must be construed so as to give it a legal effect if possible (Civ.Code, sec. 1643) this lease must be construed to provide for the transfer of the licenses in the manner authorized by law. *Leboire v. Black*, 84 Cal.App.2d 260, 262, 190 P.2d 634."

As was said in *Saso v. Furtado*, 104 Cal. App.2d 759, 769, 232 P.2d 583, 589, in considering an agreement similar to that before us: "As the agreement to retransfer as between the parties is not prohibited by the act, and as such agreements must be viewed in the light of the act which makes the transfer of all licenses subject to the discretion of the board, there is nothing illegal in such an agreement; nor is it in any way contrary to public policy."

[3,4] Defendant directs our attention to section 7.3 of the Alcoholic Beverage Control Act, added by Statutes of 1949, Chapter 1348, which provides that no licensee shall enter into any agreement where he pledges a transfer of his license as security for a loan, or as security for the fulfillment of any agreement. This section did not become effective until October 1, 1949. It is not retroactive, *Campbell v. Bauer*, 104 Cal.App.2d 740, 743, 232 P.2d 590, and is not applicable here. It is argued that the failure of plaintiff to inform the Board of the existence of the agreement at the time of application for a transfer amounted to a fraud both on the officers of the Board and the public. We find no provision in the Beverage Control Act requiring plaintiff to inform the Board of the existence of the provision of the lease involved. There is no indication in the record that plaintiff withheld informa-

tion requested by the Board and no evidence which would support a finding of fraud.

[5] The trial court found that plaintiff received no consideration for the transfer of the license other than the covenants and conditions to be performed by defendant under the lease and his agreement to transfer the license to plaintiff without consideration at its termination. This finding is supported by the evidence.

[6] Defendant argues that the judgment ordering specific performance is improper in that the court could not make a single effective decree and could not enforce it when made where the consent of a third party was necessary to the carrying out of the decree. As noted, the decree ordered defendant to make application to the Board for a transfer of the license and does not purport to control or direct the action of the state officers. Under the rule that equity regards as done that which ought to have been done, the court properly ordered the defendant to comply with the terms of his agreement. *Campbell v. Bauer*, supra, 104 Cal.App.2d 740, 232 P.2d 590.

[7] Defendant's contentions that plaintiff is estopped to assert any claim to the license in question and has not come into a court of equity with clean hands are apparently based on the theory that plaintiff wilfully concealed her interest in the license and affirmatively claimed that she retained no interest in it when the transfer was made to defendant. There is no evidence in the record of such claimed wilful concealment, and while plaintiff made application "to surrender all her interest in the license", she had no interest in the operation of the business under lease and received no profits from the license. Under these circumstances the contentions of defendant cannot be sustained.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

106 Cal.App.2d 599

**WILSON et al. v. PACIFIC COAST TITLE
INS. CO.
Civ. 4257.**

District Court of Appeal, Fourth District,
California.

Sept. 21, 1951.

Action by Schuyler S. Wilson and others against Pacific Coast Title Insurance Co. to recover damages for alleged failure of title to realty insured by defendant. The Superior Court of San Diego County, C. M. Monroe, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Mussell, J., held that the record supported implied finding that the unmarketability of title to realty insured by defendant had not been established.

Judgment affirmed.

1. Appeal and Error ⇨1010(1)

Trial court's findings of fact supported by substantial evidence could not be disturbed on appeal.

2. Acknowledgment ⇨10

Mortgages ⇨230

Written assignment of beneficial interest in deed of trust was a valid transfer of title, at time of issuance of policy of title insurance to assignees, though assignment was not acknowledged or recorded until later.

3. Mortgages ⇨346

Where deed of trust to realty substantially complied with requirement that address of trustor be placed in such deed and there was no request for notice of default as contemplated in statute, publication of notice of default was not required. Civ.Code, § 2924b.

4. Mortgages ⇨342

Where all parties concerned in the substitution of trustee at time of assignment of beneficial interest in deed of trust to realty joined in execution of substitution or had actual knowledge thereof, assignees' title was not defective on ground that substitution of trustee contained neither the acknowledgment nor the affidavit of service required by statute. Civ.Code, § 2934a.

5. Appeal and Error ⇨991

In action to recover damages for alleged failure of title to realty insured by defendant, whether such title was defective or unmarketable was a question of fact for trial court.

6. Vendor and Purchaser ⇨130(2)

A "marketable title" means one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in exercise of prudence ordinarily exercised by business men, be willing and ought to accept.

See publication Words and Phrases, for other judicial constructions and definitions of "Marketable Title".

7. Insurance ⇨665(4)

In action for damages for alleged failure of title to realty insured by defendant, record supported implied findings that the unmarketability of such title had not been established.

Ruel Liggett, Roy M. Cleator and E. C. Davis, San Diego, for appellants.

Cannon & Callister, Los Angeles, for respondents.

MUSSELL, Justice.

This is an action for damages alleged to have been suffered by plaintiffs as a result of a failure of title to real property, which title had been insured by the defendant.

Plaintiffs acquired a trust deed and note by written assignment dated August 15, 1946, and on the same date, the "San Diego Pacific Title Company" was substituted as trustee under the deed in place of the original trustee named therein. This substitution, together with a notice of default and election to sell was recorded August 30, 1946. Following the recordation of these documents, the trustee executed its notice of trustee's sale, posted the necessary notice and on December 27, 1946, sold the property involved to the plaintiffs herein. After receiving the trustee's deed, plaintiffs listed the property for sale with Mr. Riggoli, a real estate

broker, and on March 30, 1948, entered into a contract and escrow to sell it to Mr. and Mrs. Petereit for the sum of \$9,500.

The escrow agent, La Mesa-El Cajon Corporation, with the consent of plaintiffs, endeavored to obtain a policy of title insurance from the Southern Title and Trust Company of San Diego. This company, however, declined to insure the title of the plaintiffs and its reasons for such refusal were set forth in a written report. Plaintiffs procured an extension of the pending escrow to August 15, 1948. They then took the report of the Southern Title Company to their attorneys who, on April 13, 1948, informed the defendant, by letter, of the foregoing facts and stated that under the conditions then existing it would be necessary to initiate proceedings over again in order to secure a "merchantable" title. It was also stated in the letter that the Wilsons expected to hold the defendant responsible for any damage that might result to them, including the necessary expenses of resale.

Plaintiffs did not procure a policy of title insurance within the extended period of the escrow and the Petereits withdrew their purchase money therefrom. Plaintiffs again foreclosed their trust deed and on January 19, 1949, sold the property to Mr. and Mrs. Robertson for the sum of \$8,000, which was the best price then obtainable. The real estate broker filed a suit against the plaintiffs for his commission in the Petereit transaction and recovered judgment of \$475, plus \$20.50 costs.

Plaintiffs' attorneys then, on February 28, 1949, wrote to the defendant advising it of the situation and stating that the plaintiffs held defendant responsible for the damages resulting to them through these transactions. Demand was made for a settlement and following correspondence between the attorneys for the parties, this action was filed on August 31, 1949.

It was alleged in the complaint, among other matters, that on March 26, 1947, the defendant issued its policy of title insurance insuring the plaintiffs "against loss or damage * * * which they might sustain by reason of title of the

* * * land being vested otherwise than in them, or by reason of the unmarketability of the title of any of them;" that "the purchasers refused to complete their contract of purchase for the reason that the title to said land was vested otherwise than in plaintiffs and that title thereto was unmarketable;" and that thereafter plaintiffs proceeded to perfect said title and in order to do so it was necessary to foreclose the deed of trust and to expend certain sums for the foreclosure and escrow fees. Plaintiffs claimed damages in the sum of \$198.80 costs of foreclosure; \$22 escrow fees; \$495.50 paid to the real estate broker; and \$1,500, the difference between the price received at the second sale of the property and the amount offered therefor by the Petereits.

[1] The trial court found inter alia as follows: "It is true that the said Petereits refused to complete the purchase of said property but it is not true that the title to said land was vested otherwise than in the plaintiffs; that "It is not true that the title to said land was unmarketable;" that "It is untrue that the plaintiffs proceeded to perfect the title to said land and it is untrue that for that purpose it was necessary for the plaintiffs to foreclose a certain deed of trust and spend the sum of \$198.80, or any other sum whatever;" that "It is untrue that by reason of any of the matters or things set out in said complaint or otherwise or at all that the plaintiffs have been damaged in the sum of \$2,216.30, or in any other amount whatever by reason of any action or inaction of the defendant." These findings are supported by substantial evidence and cannot be here disturbed.

The reasons given by the Southern Title Company for its refusal to insure plaintiffs' title were that there was no assignment then of record from the original beneficiary to the new beneficiaries; that the substitution of trustee contained neither the acknowledgment nor the affidavit of service required by Civil Code section 2934a and that the trustee's deed indicated that the notice of default was never published or personally served as required by Civil Code section 2924b.

[2] The assignment of beneficial interest of the deed of trust is in writing and dated August 15, 1946. While it was not acknowledged until April 15, 1948, or recorded until April 29, 1948, it was apparently actually in existence at the time of the issuance of the policy of title insurance in question, and was a valid transfer of title.

[3,4] It appears from the record that all parties concerned in the substitution for trustee at the time of the assignment joined in its execution or had actual knowledge of such substitution. The trust deed contains a provision that "the recitals, in any such deed, or any facts or matters affecting the regularity or validity of such sale, shall be conclusive proof of the truthfulness of such recitals, and such deed shall be conclusive against all persons as to all matters recited therein." The trust deed also recites that it is made between "Margaret J. MacVaugh, 359 Emerald Avenue, El Cajon, California, party of the first part, hereinafter called the trustor and William E. Crane of San Diego, * * * trustee. There was a substantial compliance with the requirement that the address of the trustor be placed in the trust deed and since there was no request for notice of default as contemplated in the section, publication of the notice of default was not required.

[5] Plaintiffs argue that their title under the trust deed and the foreclosure proceedings was defective. However, the refusal of the Southern Title Company to insure plaintiffs' title for its stated reasons is merely an expression of the opinion of the title company. Plaintiffs acquired title to the property involved by foreclosure proceedings and the trustee's deed issued thereafter. There is no substantial evidence in the record upon which the trial court could have found that the title to the land involved was vested otherwise than in plaintiffs. Whether such title was defective was a question of fact for the determination of the trial court, as was the question whether such title was "unmarketable".

[6] In *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625, 628, it is

said: "'A marketable title, to which the vendee in a contract for the sale of land is entitled, means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept.'"

[7] In the instant case the trial court found that "It is not true that the title to said land was unmarketable." The evidence shows that Mr. Petereit asked to withdraw his money when the escrow time expired. Whether such withdrawal was because of the condition of the title, or for other reasons, was for the trial court's determination. The trial court's implied findings that plaintiffs failed to establish the unmarketability of title is supported by the record.

The policy of title insurance issued by defendant herein contains the following provisions: "A statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within sixty days after such loss or damage shall have been ascertained. No action or proceeding for the recovery of any such loss or damage shall be instituted or maintained until after full compliance by the Insured with all the conditions imposed on the Insured by this Policy;" that "In case knowledge shall come to any Insured of any claim of title or interest adverse to the title as insured, or which might cause loss or damage for which the Company is or may be liable * * * such Insured shall at once notify the company thereof in writing;" that "In all cases where this Policy permits or requires the Company to prosecute or defend any action or proceeding, the Insured shall secure to it the right to so prosecute or defend such action or proceeding, and all appeals therein;" and that "The Company reserves the option to pay, settle or compromise any claim insured against." In this connection, the trial court found that the plaintiffs did not comply with the terms of the agreement contained in the policy relative to the furnishing of the required

statement in writing within the time specified in the policy.

In view of what we have here said relative to the trial court's findings as to the condition of plaintiffs' title, it is unnecessary to pass upon the question of the sufficiency of the evidence to support the findings relative to the nonperformance by plaintiffs of the terms and conditions of the policy of title insurance issued by the defendant.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.



106 Cal.App.2d 565

**SOUTHERN CALIFORNIA COLLECTION
CO., INC., OF LOS ANGELES v.
NAPKIE.**

**SOUTHERN CALIFORNIA COLLECTION
CO., INC., OF LOS ANGELES v. MELODY
FARMS DAIRY PRODUCTS CO.**

Civ. 18281.

District Court of Appeal, Second District,
Division 3, California.

Sept. 18, 1951.

The Southern California Collection Company, Inc., of Los Angeles, brought a proceeding against Sadek H. Napkie to determine title to an automobile levied on as defendant's property under a writ of execution. The Melody Farms Dairy Products Company filed a third-party claim of title to the automobile. From a judgment of the Superior Court of Los Angeles County, Arthur Coats, Judge assigned, for third-party claimant, plaintiff appealed. The District Court of Appeal, Vallée, J., held that the undisputed evidence failed to show that the automobile ever passed from defendant's possession to that of third-party claimant, so that defendant's transfer thereof to such claimant was void.

Judgment reversed.

1. Appeal and Error ⇨1008(1)

Where there is no conflict in evidence and no conflicting inferences can be drawn therefrom on an issue, trial court's finding on such issue amounts to conclusion of law and is not binding on reviewing court.

2. Fraudulent Conveyances ⇨308(5)

Whether undisputed facts show actual and continued change of possession of personal property, as required by statute to render transfer thereof valid as against transferor's creditors, is law question for trial court to determine. Civ.Code, § 3440.

3. Fraudulent Conveyances ⇨137(1)

The statute providing that transfer of personal property, not accompanied by immediate delivery to transferee and followed by actual and continued change of possession thereof, is conclusively presumed to be fraudulent and hence void against transferor's creditors while he remains in possession of property, applies to transfer of motor vehicle. Civ.Code, § 3440.

4. Fraudulent Conveyances ⇨147(1)

To validate transfer of personal property as against transferor's creditors under statute, delivery of property to transferee must be immediate, actual, visible, apparent, and not constructive, transferee's possession must be continued and so open and unequivocal as to carry usual marks and indications of ownership, and change of possession must be open, visible, and manifested by such outward signs as render it evident that transferor's possession has wholly ceased, and no writings pertaining to transfer can be substituted for actual and continued change of possession. Civ.Code, § 3440.

5. Fraudulent Conveyances ⇨151

To render transfer of personal property valid as against transferor's creditors under statute, change of possession thereof must at least sufficiently change apparent custody of property to put one dealing with seller respecting it on inquiry or suggest change in ownership. Civ.Code, § 3440.

6. Fraudulent Conveyances ⇨151

To validate transfer of personal property as against transferor's creditors under

statute, transferee's conduct in relation to property must be such as to give notice to public of change in ownership and possession. Civ.Code, § 3440.

7. Fraudulent Conveyances ⇨147(1)

Where transferor of personal property, such as automobile, continues to have use and control thereof, after delivery of bill of sale, in same manner and to like extent as before, there is no delivery required by statute to validate transfer as against transferor's creditors. Civ.Code, § 3440.

8. Fraudulent Conveyances ⇨145

The fact that transferor and transferee of automobile were employee and employer furnishes no reason why statute providing that transfer of personal property, without immediate delivery and actual and continued change of possession thereof, is conclusively presumed to be fraudulent and hence void against transferor's creditors, should be more liberally construed than in cases of transfers between strangers. Civ. Code, § 3440.

9. Fraudulent Conveyances ⇨138

Good faith in, and adequate consideration for, transfer of personal property are immaterial and constitute no defense to proceeding by transferor's creditor to determine title to property, where facts bring case within statute creating conclusive presumption that transfer of property, without immediate delivery and actual and continued change of possession thereof, is fraudulent, and hence void as against transferor's creditors. Civ.Code, § 3440.

10. Fraudulent Conveyances ⇨147(2)

Symbolic delivery of personal property by transferor to transferee thereof is sufficient compliance with statutory requirement of immediate delivery of property to validate transfer as against transferor's creditors only where character and situation of property are such that actual physical delivery thereof cannot be had, and symbolic delivery is insufficient when nature of property and parties' situation are such as to render actual delivery practicable, as in case of automobile in transferor's possession. Civ.Code, § 3440.

11. Fraudulent Conveyances ⇨150

There is no actual change of possession of personal property, as required by statute to validate transfer thereof as against transferor's creditors, where transferor continues to exercise same control and dominion over property as before transfer and does nothing to indicate intention to pass such control and possession to transferee. Civ.Code, § 3440.

12. Fraudulent Conveyances ⇨147(3)

To validate transfer of personal property from seller to buyer thereof as against seller's creditors, buyer must have such possession of property as places him in relation thereto which owners usually are to like kind of property. Civ.Code, § 3440.

13. Fraudulent Conveyances ⇨147(3)

The statute providing that transfer of personal property, without immediate delivery and actual and continued change of possession thereof, is conclusively presumed to be fraudulent and hence void as against transferor's creditors, requires that transferee immediately take and continuously hold possession of property and perform such plain and unmistakable acts of possession, control and ownership as prudent bona fide purchaser would in exercise of his rights over property, so that all persons may have notice of his ownership and possession thereof. Civ.Code, § 3440.

14. Fraudulent Conveyances ⇨299(9)

In proceeding to determine title to automobile, claimed by corporation which purchased it from plaintiff's debtor, undisputed evidence failed to show that automobile ever passed from debtor's possession to that of claimant, so that transfer was void under statute. Civ.Code, § 3440.

15. Fraudulent Conveyances ⇨242(1)

Hardship to corporation purchasing automobile in good faith furnishes no reason for disregarding statute making validity of seller's transfer of personal property to buyer as against seller's creditors dependent on immediate delivery of property, followed by actual and continued change of possession thereof. Civ.Code, § 3440.

16. Appeal and Error ⇐1138

A judgment for third-party claimant of automobile, levied on pursuant to writ of execution as property of one from whom claimant purchased it by repaying bank loan thereon and paying seller in cash small amount of difference between value of automobile and amount paid bank, should not be affirmed, notwithstanding invalidity of transfer under statute as defrauding seller's creditor, on grounds that seller's interest in automobile was only amount of such cash payment and that maxim de minimis applies; question being whether ownership of automobile is in claimant or seller. Civ.Code, § 3440.

17. Appeal and Error ⇐1138

The maxim de minimis does not warrant affirmance of erroneous judgment, where judgment carries costs and a question of right is involved.

18. Appeal and Error ⇐1138**Execution** ⇐203

In proceeding to determine third party's claim to property seized on execution, judgment carries costs as matter of course, so as to preclude affirmance of erroneous judgment under maxim de minimis. Code Civ.Proc. § 689.

Stephens, Jones & La Fever, Louis Lee Abbott, Los Angeles, for appellant.

Donald A. Rosen, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for the third party claimant in a proceeding to determine title to an automobile.

On August 2, 1950, the Marshal of the Municipal Court of Los Angeles levied on the automobile as the property of Sadek H. Napkie, pursuant to a writ of execution in this action. The sole question is whether an alleged transfer of the automobile from Sadek H. Napkie to respondent Melody Farms Dairy Products Co. (referred to as claimant) was accompanied by an immediate delivery and followed by an actual and continued change of possession.

On May 2, 1950, claimant, through its president Shimon, purchased the automobile from Napkie by paying a loan which a bank "had on the car," and received the "pink slip." Napkie handed the keys of the automobile to Shimon. Apparently Shimon immediately handed them back to Napkie, as will appear from his testimony. On May 16, 1950, at the request of claimant, the Department of Motor Vehicles issued a certificate of ownership showing legal title to the automobile in claimant. Napkie had been and was at the time of the alleged transfer an employee of claimant and had been using the automobile in claimant's business.

Shimon testified with respect to what was done at the time of and after the alleged transfer, as follows:

"Q. What was done with the automobile that night? A. He has been using it all the time.

"Q. Mr. Napkie has been using this car ever since? A. Ever since I bought it; and I let him use it. * * *

"Q. * * * Am I to understand your testimony to be that Mr. Napkie has been continuously in possession of this car from the first day of May, 1950, until the second day of August, 1950? A. He has been using the car for the purpose of Melody Farms as long as he has been working for us.

"Q. Does he take the car home at night? A. Yes, sir.

"Q. Does he take it home on week ends? A. Yes, sir.

"Q. Does he use it for pleasure? A. That I don't know, what he uses it for. It is for his use.

"Q. He is free to use the car for any purpose he sees fit? A. Yes, sir."

Napkie testified that: he kept the automobile in his garage at his home the night of the alleged transfer and that he used it from May 2d, the day of the levy, for pleasure "all the time"; he did not ask Shimon for permission to use it for pleasure; Shimon knew he was keeping it in his (Napkie's) garage and using it for

pleasure; Shimon did not at any time tell him he could not use it for his "own purposes."

There was no other evidence with respect to delivery of the automobile or change of possession. There was no evidence that claimant took possession of the automobile itself.

Civil Code section 3440 provides: "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession * * *."

[1,2] There is no conflict in the evidence and no conflicting inferences can be drawn therefrom. Where there is no conflict in the evidence and no conflicting inferences which can be drawn therefrom on an issue, the finding of the trial court on that issue amounts to a conclusion of law, and the finding is not binding on a reviewing court. *Export Leaf Tobacco Co. v. County of Los Angeles*, 89 Cal.App. 2d 909, 916, 202 P.2d 622. "Where the facts are undisputed, as in this case, it is the duty of the Court to determine, as a question of law, whether such facts constitute an 'actual and continued change of possession,' within the statute." *Weil v. Paul*, 22 Cal. 492, 495-496.

[3-6] Section 3440 applies to the transfer of a motor vehicle. *Washington Lumber, etc., Co. v. McGuire*, 213 Cal. 13, 16-19, 1 P.2d 437. The rules for testing the sufficiency of the evidence on a claim of this character are stated in *Hepner v. Hepner*, 32 Cal.App.2d 582, 584, 90 P.2d 321, 322, where the court quoted with approval from 12 California Jurisprudence, 996, as follows: "The delivery must be immediate, actual, visible, apparent and not constructive; possession of the transferee must be continued, and so open and unequivocal as to carry with it the usual marks and indications of ownership. The change of possession must be an open,

visible change, manifested by such outward signs as render it evident that the transferor's possession has wholly ceased. No writings pertaining to the transfer, regardless of number or character, can be substituted for actual and continued change of possession. So the indorsement of a stock certificate is not in itself sufficient. Any change of possession must at least sufficiently change the apparent custody of the property so as to put one dealing with the vendor with respect to it upon inquiry, or which might suggest a change in the ownership.'" The transferee's conduct in relation to the property must be such as to give notice to the public that a change in the ownership and possession has taken place. *McKee Stair Bldg. Co. v. Martin*, 126 Cal. 557, 559, 58 P. 1044.

[7,8] "Where the transferor, subsequent to the delivery of a bill of sale of personal property, such as an automobile, continues to have the use and control thereof in the same manner and to a like extent as before, there is no such delivery as the law contemplates as requisite to constitute a valid transfer. *Tennant v. Cline*, 47 Cal.App. 461, 190 P. 1065. The fact that the transferor and transferee were husband and wife furnishes no reason why the provision of the statute should receive a construction different or more liberal than in cases of such transfer between strangers. *Blaney v. Cline*, 53 Cal.App. 686, 200 P. 751." *Pfunder v. Goodwin*, 83 Cal.App. 551, 554-555, 257 P. 119, 120. So it may be said here the fact that the transferor and transferee were employee and employer furnishes no reason why the statute should receive a more liberal construction than in cases of such transfers between strangers.

[9] The question of good faith and adequate consideration for a transfer is wholly immaterial and is no defense where the facts bring the case within section 3440 of the Civil Code and there has been no immediate and continued change of possession. *Hepner v. Hepner*, 32 Cal.App. 2d 582, 585, 90 P.2d 321.

[10] The delivery of the keys to the automobile to claimant is of no signifi-

cance. They were immediately returned to Napkie. Symbolic delivery is sufficient only where the character and situation of the property delivered is such that actual physical delivery cannot be had. Symbolic delivery is insufficient whenever the nature of the property and the situation of the parties are such as to render it practicable, as was the case here, to make actual delivery. *Guthrie v. Carney*, 19 Cal.App. 144, 150, 124 P. 1045.

[11-13] It has never been held in this State that an actual change of possession has taken place where the transferor, after the transfer, continues to exercise the same control and dominion over the property as before, and has done nothing to indicate any intention of passing that control and possession from himself to his transferee. The purchaser must have that possession which places him in the relation to the property which owners usually are to the like kind of property. The statute requires that the transferee shall immediately take and continuously hold the possession of the property purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent, *bona fide* purchaser would in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property.

[14] Testing the undisputed evidence by the rules stated, we are satisfied it fails to show that the automobile ever passed from the possession of Napkie to that of claimant. It is difficult to see how there could have been any further or more certain retention by the transferor. We think it apparent that the transfer was void under the provisions of section 3440.

[15] Claimant urges that it purchased in good faith. So assuming, the hardship of a particular case furnishes no reason for disregarding the statute which makes

the validity of the transfer dependent upon immediate delivery followed by actual and continued change of possession.

[16-18] Claimant argues that even if the transfer was void under section 3440, the judgment must be affirmed because, so it is said, appellant was only entitled to levy on the actual interest which Napkie, the judgment debtor, had in the automobile at the time of the levy, and that such interest was only \$6.88. At the time of the transfer Napkie received from claimant a cashier's check for \$593.12, payable to the bank which had the loan on the automobile, and \$6.88 in cash. He gave the cashier's check to the bank and retained the \$6.88. Shimon testified that the value of the automobile was \$600. The argument is that the interest Napkie had in the automobile was \$6.88 and that the maxim *de minimis* applies. The contention is untenable. Appellant is entitled to levy upon and sell whatever title and interest Napkie has in the automobile. That title and interest cannot now be determined. Neither can the amount which will be received for the automobile on execution sale be determined at this time. The sole question here is whether ownership is in claimant or Napkie, or, in other words, whether the latter has an interest subject to sale under execution. Further, the maxim *de minimis* does not apply where the judgment will carry costs and a question of right is involved. *Ballin v. Los Angeles County Fair*, 43 Cal.App.Supp.2d 884, 887, 111 P. 2d 753. In a proceeding under section 689 of the Code of Civil Procedure to determine a third party's claim to property seized on execution, the judgment carries costs as a matter of course. *Exchange Nat. Bank v. Ransom*, 52 Cal.App.2d 544, 546, 126 P.2d 620.

Reversed.

SHINN, P. J., and WOOD, J., concur.

106 Cal.App.2d 537

CLARK v. BRADLEY.
Civ. 14693.

District Court of Appeal, First District,
Division 1, California.

Sept. 17, 1951.

Rehearing Denied Oct. 17, 1951.

Hearing Denied Nov. 15, 1951.

Action by Anna Mae Clark against Oscar A. Bradley, to require defendant, as a putative father, to help support and educate a child. The Superior Court in and for the County of Santa Clara, John D. Foley, J., granted the defendant's motion for a new trial and the plaintiff appealed. The District Court of Appeal, Bray, J., held that where certain inadmissible evidence went to the jury through the inadvertence of both parties and the trial judge, and the trial judge determined that such evidence was prejudicial to the defendant, the trial judge properly granted a new trial, even though the defendant failed to object to the testimony at time of its admission.

Order appealed from affirmed.

1. Witnesses ⚡338

The credibility of a witness cannot be attacked by an employer's estimate of his character, conduct, temperateness or desirability for re-employment.

2. Trial ⚡105(1)

Generally, where a party fails to object to evidence which is partially admissible, he is deemed to have waived his right to object.

3. Appeal and Error ⚡231(1)

Where a general objection is overruled by a trial court, party against whom ruling is made cannot be permitted for first time to urge in appellate court the particular objection which might have been easily cured if it had been openly urged at trial court at time of ruling complained of.

4. Trial ⚡48

If several facts are included in an offer of proof, some admissible and others inadmissible, the whole, if properly objected to, is inadmissible, since it is for the proponent to sever good from bad part of offer.

5. Bastards ⚡65

In action by a mother to require a putative father to help support and educate a child, evidence sustained finding of jury that defendant was father of child. Civ. Code, § 196a.

6. Bastards ⚡73

In action by a mother against a putative father to help support and educate a child, where plaintiff offered in evidence certain payroll records of defendant for purpose of determining when defendant was at work, and through inadvertence of both parties and the trial judge the back portion of one of the payroll records contained certain inadmissible evidence concerning employer's reason for discharge of defendant, trial judge was justified in granting a new trial, even though defendant failed to object to testimony at time of its admission. Civ.Code, § 196a.

7. Appeal and Error ⚡977(1)

New Trial ⚡6

A motion for a new trial is to a large extent addressed to legal discretion of trial court and its action is conclusive and will not be disturbed in absence of a clear and affirmative showing of a gross, manifest, or unmistakable abuse of such discretion.

8. New Trial ⚡142

Affidavits of jurors may not be used to contradict, impeach or defeat the verdict, however affidavits are permissible to substantiate the verdict.

9. New Trial ⚡143(5)

On motion for a new trial, juror's affidavit showing that her verdict was based primarily on certain objectionable evidence was in impeachment of her verdict and not properly admissible.

10. Appeal and Error ⚡1072

New Trial ⚡143(5)

On motion for a new trial, where the trial judge came to conclusion that admission of certain inadmissible evidence was prejudicial and influenced verdict, admission of an affidavit of a juror substantiating conclusion of trial judge, while error,

because it was in impeachment of verdict, was not prejudicial and not sufficient to reverse order granting new trial.

11. Appeal and Error — 106

An order refusing to strike the affidavit of a juror, which was otherwise reviewable, was not appealable and a purported appeal therefrom would be dismissed.

David H. Adams, San Jose, for appellant.

Jensen, Cassin, Overson, Zavlaris & Rendler, San Jose, for respondent.

BRAY, Justice.

After a judgment in favor of plaintiff, defendant moved for a new trial, filing certain affidavits. Plaintiff purports to appeal from an order denying her motion to strike one of those affidavits. The court granted the motion for new trial. Plaintiff appeals.

Question Presented.

(1) Was the admission in evidence without objection of the back portion of a certain card error which justified the court in granting a new trial? (2) Was the affidavit of the trial juror to impeach her verdict or to support it?

Record.

Pursuant to section 196a of the Civil Code, plaintiff, mother of a minor illegitimate child, brought this action to require defendant, the putative father, to help support and educate the child. Defendant denied paternity. A jury found defendant to be the father. A judgment for its support was entered against defendant. Thereafter defendant moved for a new trial on all statutory grounds. Plaintiff moved to strike from the record the affidavit of certain trial jurors. The court struck out the affidavits of two of the jurors but refused to strike that of juror Leone, on the ground that it was not in impeachment, but in support, of her verdict. It granted the new trial solely on the ground of error in the admission in evidence of certain material on the back of a certain card.

1. Was there Error in the Admission of Evidence?

Evidence.

A brief statement of the evidence is necessary as background for consideration of the claimed error. Plaintiff's testimony follows. She, an unmarried woman, became acquainted with defendant in 1936. In 1939 she was employed as housekeeper in the home of defendant, his wife and small children. A part of her duties was to take care of the daughter, Marjorie. She lived in the Bradley home in a room which had an outside entrance. In the early part of 1941 she and Bradley commenced having intimate relations, which continued for several years. In May, 1942, she went to work for the draft board, left the Bradley home and took a room in a house for college girls. Defendant proposed marriage to her in June, 1942. He gave her a key to his place of business and she gave him a key to her boarding house. He visited her at her room there. In September, 1943, she went to Los Angeles, returning to San Jose on October 4th. The week she returned she had intercourse with defendant on Monday, Wednesday, Thursday and Friday. During the months prior to her trip to Los Angeles she had frequent intercourse with defendant. In the latter part of October or early part of November she discovered that she was pregnant. She told defendant about it. He told her not to do anything, that he would marry her and take her away. She now saw him more often than before. On April 15, 1944, she left San Jose for her home in Missouri. Defendant packed her bags and took her to the station. He said he would come to see her. The child was born June 26, 1944. Plaintiff, the child and defendant stood together before the jury for its observation of them. Plaintiff testified that for Christmas, 1942, defendant gave her a bracelet and heart with the initial "B" engraved on the heart and that the following Valentine's Day he gave her a second heart for it. Defendant's wife and son testified that these were gifts given by Mrs. Bradley at Marjorie's suggestion and that there was no "B" on the heart when given.

Plaintiff offered in evidence certain letters which she claimed were sent her by de-

fendant. They were rather sticky love letters and definitely indicate intimacy between the parties. Defendant denied that he had written them. Plaintiff's handwriting expert testified they were in defendant's handwriting, while defendant's expert said they were not. Plaintiff testified that while she was in Missouri she wrote defendant a letter. Defendant admits receiving a letter from her. They disagree as to its contents. Defendant said it had been destroyed. Plaintiff testified it started out "Hello Honey" and that it contained an inquiry as to whether he was waiting until his wife finished school before coming to her. "I know that we both have done wrong, but the only right thing now for us to do is to take care of our child. I have been to the doctor and he states that the baby will be born either the 4th or the 7th of July." Defendant testified that the letter was addressed "Dear Bradley" and stated: "I am writing you this hoping that you will help me with my responsibilities. I have been in the hospital with kidney stones." It then stated that her folks could not work because of age and that plaintiff was not asking money as a gift but only as a loan and that she would pay it back as soon as she got on her feet. A card which defendant admitted writing and sending in answer to the letter he claimed he received was admitted in evidence. This reads in part: "I should think you would realize that you have caused enough trouble in our house—especially the last time you were here. Any responsibility I have is to my family—Ruth, Jerry and Margaret, whom I love and will do everything to protect and keep. I have no other interest but in them. Your unwelcome letter has done nothing but upset this entire house and we are not interested in your outcome. Your difficulties are not my responsibilities. I am interested only in my own family—have been and always will be."

Defendant denied any acts of sexual intercourse with plaintiff. A Mrs. Rutherford, who ran the boarding house where plaintiff stayed, testified that on one occasion she asked defendant, "Well, what about that key you have to the house?" and that laughingly he said, "That key

like that won't fit anything." Defendant denied that he ever had such a key. A Mrs. Gardner testified that she lived near the boarding house and that in the early part of 1943 and during that summer she saw defendant and plaintiff together near the boarding house between 7:40 and 7:45 a. m. . Defendant denied that he ever was with plaintiff at such time or place. Plaintiff testified that defendant would come to her room early in the morning. The court appointed a pathologist to make blood tests of defendant and the child. After making them, the doctor testified that they were inconclusive but they did not entirely rule out the possibility that defendant is the father of the child. Defendant's wife testified that she never left the house overnight without defendant during the time when plaintiff testified that defendant came to her room while Mrs. Bradley was staying overnight in San Francisco; that defendant worked for the Food Machinery Corporation every night from 5 p. m. to 3 a. m. from February, 1942, to mid-October, 1943. This was to refute plaintiff's claim that defendant was at her room during July and August and particularly the week following October 4th, which was probably the period of conception. However, the records of the Food Machinery Corporation indicate that plaintiff did not work there after October 1. Mrs. Bradley testified that the sex relations between her and her husband were normal during all the time plaintiff claimed to be having intercourse with defendant. Mrs. Bradley contradicted other testimony of plaintiff. One Lucas testified that he worked the 5 p. m. to 3 a. m. shift with defendant and that the latter worked nightly until October 14. He did not know, however, when defendant left work.

It is apparent that there was a direct conflict in the evidence. The jury were polled and were found to be 9 to 3.

The Claimed Error.

This brings us to the situation when the claimed error occurred. Defendant and his wife claimed that on the nights succeeding October 4th when plaintiff testified

defendant was having intercourse with her he actually was at work at the plant of the Food Machinery Corporation. The payroll clerk of that company was on the stand with its records. He produced a "Time-Production-Pay" sheet which he claimed contained defendant's employment record for October. Defendant immediately objected on the ground that the sheet was that of A. A. Bradley and not O. A. Bradley, defendant's name. However, the sheet contained the clock number S. M. 75. Thereupon, to show that the sheet actually was that of defendant and that the A. A. initials were merely a clerical error, the witness testified that each employee had an identifying number and produced a "Tool Check Receipt" signed by defendant and containing the payroll number S. M. 75. He also produced an employment notice in the name of Oscar Arnold Bradley showing the same payroll number and a discharge or removal notice in the name of O. A. Bradley with the same payroll number. Thereupon plaintiff offered the three cards and the sheet in evidence. Defendant's only objection was that the sheet showed the name A. A. Bradley and not O. A. Bradley. The court overruled the objection and admitted the sheet and cards in evidence. It is the discharge or removal notice with which we are particularly concerned, the admission of which the court later held was sufficient error to justify granting a new trial. This card, dated October 11, 1943, shows the name O. A. Bradley and the payroll number S. M. 75. It states, on its face, "been laid off" and "cause for leaving—absent." On the back of the card there are certain boxes to be marked with an "X" to indicate the character of the employee or his work. In the column "competency," "good" is checked. In the column "conduct," "unreliable" is checked. In the column "speed," "medium" is checked. "Temperate?" "yes" is checked. "Do you recommend re-employment," "no" is checked. Under "Remarks" appears "absent."

In granting the motion for new trial the trial judge filed a memorandum in which he set forth, among other things, that the

new trial was granted for "the reason that through inadvertence" there was admitted in evidence the back portion of the "Discharge or Removal Notice" upon which appeared unfavorable statements with regard to defendant's work record, which statements "were clearly inadmissible as being incompetent, irrelevant and immaterial"; that the purpose in admitting this notice as well as the two other cards accompanying the "Time-Production-Pay Sheet" was to show that the sheet was in fact the record of defendant; that in ruling on the admissibility of these records the court considered only what appeared on the face of the document and was not apprised of the matter on the back of the notice card; that the court is convinced that the records were offered by plaintiff in good faith and properly and that all of the records with the exception of the back of the notice card were properly admitted; that the admission of this card was inadvertent and "was error and serious error and one which could have substantially affected the verdict"; that it did so affect the verdict is evidenced by the affidavit of the juror Leone. The court then pointed out that defendant offered in evidence a letter from the same employer containing statements favorable to defendant, which statements were, on objection, deleted from the letter. The records were taken by the jury into the jury room.

Plaintiff's attorney's affidavit used on motion for new trial pointed out that in offering the records including the card in question, no portion of the records was concealed from defendant's attorney, nor was the offer restricted to the face of the sheet or cards, nor was the purpose of the offer limited in any way; moreover, that the reporter's transcript shows that it was the defendant's attorney who apparently handed the records to the judge. The judge stated further: "* * * the evidence, although sufficient to sustain the verdict, as to many material facts is in sharp conflict and under the circumstances the error complained of may well have turned the scale against the defendant since the inadmissible matter considered

by the jury had a direct bearing on his credibility as a witness."

[1-3] There can be no question that, except the word "absent" which also appears on its face, the matter on the back of the card, if objected to, was inadmissible. The credibility of a witness cannot be attacked by an employer's estimate of his character, conduct, temperateness or desirability for re-employment. Generally, where a party fails to object to evidence which, as here, is partly admissible, he is deemed to have waived his right to object. "The party offering evidence is entitled to have the particular portion of the evidence objected to pointed out, and the specific ground of the objection stated, in order that he may obviate the objection or waive the testimony, if he is unwilling to take the risk of error." (2 Cal.Jur. § 82, p. 264.) The rule is well stated in *Bayers v. Barry*, 114 Wash. 252, 194 P. 993, 996, where appellants "made strenuous objection" to the introduction of a certain letter. "Unquestionably, parts of this letter are open to the objections made to it; but other parts of it are entirely proper to have been received in evidence. Had appellants asked the court to keep from the jury such portions of the letter as were objectionable, it would doubtless have been the court's duty to have complied therewith. This request, however, the appellants did not make; they objected to the introduction of the letter as a whole, and since parts of it were properly receivable, the appellants cannot now complain that the entire letter was received." 194 P. at page 996. The rule is stated in another way in *Crocker v. Carpenter*, 98 Cal. 418, 421, 33 P. 271, 272: "When such a general objection is overruled by a trial court the party against whom the ruling is made cannot be permitted for the first time to urge in the appellate court the particular objection which, if it had been openly urged in the trial court at the time of the ruling complained of, might have been easily cured. This is not laying down a merely technical rule. It is one which has its foundation in the proper consideration of what is due to the court and adverse counsel in the trial of a case."

We are not dealing with a situation where a party is raising for the first time, on appeal, a contention that evidence was improperly admitted, but with a situation where, on motion for new trial, the trial court has found that it inadvertently admitted evidence which it would not have admitted had it known its true content, and which the court has found was not objected to through inadvertence. Moreover, it is a fair inference from the court's statement that it found that the plaintiff had offered the objectionable matter also through inadvertence. In the argument on the motion for new trial plaintiff's counsel stated, referring to the offer of the cards: "* * * I was not mindful, I don't know any other way to say it, but I was not mindful. It did not occur to me, I was not considering these matters on the back of these records, or I certainly would have called it to the attention of counsel and Court, although I don't know of any rule which requires that as a duty of counsel to be pointing out parts of evidence that might be objected to to opposing counsel." Thus it appears that neither the attorney for plaintiff, the court, nor the attorney for defendant was considering the material on the back of the cards. We have a situation, then, in which, because of the inadvertence of both parties and the judge, inadmissible matter was given the jury; and, according to the judge who presided at the trial, that matter "may well have turned the scale" as the evidence, "although sufficient to sustain the verdict," was in "sharp conflict" as "to many material facts."

The minds of the parties and the court were concentrated on the question of tying in the time clock numbers on the O. A. Bradley cards with the time sheet of A. A. Bradley. While there was no limitation on the offer of the cards, it is obvious from a reading of the record that all concerned considered them as offered solely for the one purpose.

[4] The rule stated in the *Bayers* case, *supra*, and in the *Crocker* case, to the effect that the burden of calling attention to the objectionable matter is on the party

against whom the evidence is offered, is the general rule. However, there is some authority to the effect that the burden is on the party offering the evidence. "If *several facts* are included in the offer, some admissible and others inadmissible, then the whole (if properly objected to) is inadmissible; in other words, it is for the proponent to sever the good and the bad parts." Wigmore on Evidence, 3rd Ed., vol. 1, sec. 17(b) (2), p. 320.

The Bayers case is distinguishable from our case. There the party against whom the evidence was offered had full knowledge of the alleged prejudicial effect of the inadmissible portions. Likewise in the Crocker case the party against whom the evidence was offered, although fully familiar with the papers offered, failed to make any specific objections.

[5-7] Plaintiff relies on the case of *Bennett v. Nazzaro*, 144 Misc. 450, 258 N. Y.S. 828. In an action for personal injuries plaintiff, to prove ownership of the defendant's car, introduced a certified copy of defendant's application for registration of the car. On the back thereof, unknown to either of the attorneys, appeared information that defendant carried liability insurance and had been involved in a prior automobile accident. It was admitted without objection and taken to the jury room. Defendant moved to set aside a verdict in favor of plaintiff because of the admission in evidence of these statements on the back of the application. The judge, in denying the motion, stated that he did not think that this information influenced the jury. He then stated that even if it did, defendant's failure to object to the introduction of the application barred him from raising the question on motion to set aside the verdict. He stated: "The certified copy application was competent evidence, and the defendant, not having discovered and objected to the information on the back thereof, cannot now be heard to complain that this incompetent evidence was examined and considered by the jury. * * *

"The failure to object to incompetent evidence has been construed as a waiver, and when, as here, the evidence admitted is

competent, the failure to object is fatal, and this is so notwithstanding no objection was made because the objecting party did not know the contents of the exhibit offered. *Crane v. Powell*, 139 N.Y. 379, 34 N.E. 911; *Flora v. Carbean*, 38 N.Y. 111; *Ford v. Snook*, 205 App.Div. 194, 199 N. Y.S. 630." Pages 831-832 of 258 N.Y.S. However, the effect of the judge's statement is minimized by the following statement in his opinion, 258 N.Y.S. page 831: "If the plaintiff's attorneys had known of the statements on the back of the card, it would have been their affirmative duty when offering the card in evidence to call the court's and their adversaries' attention to the back of the card, and then, of course, only the essential fact of White's ownership would have been given to the jury. Inasmuch as the plaintiff's attorneys did not have such knowledge, the mere fact that the card contained some information, which being offered by itself would have been excluded, does not make the receipt of the registration application incompetent." In our case the plaintiff's attorney did know of the objectionable material. Moreover, the trial judge there found that the inadmissible material was not prejudicial, while here, the trial judge found that it was. Secondly, the trial judge there did not find, as did the trial judge here, that the failure to object was excusable. The *Bennett* case and the cases therein cited, while somewhat persuasive, are not determinative of the question here. Under the peculiar circumstances of our case, the rule of those cases should not be followed. It is unfortunate that a case which involved the parenthood of a child and which took several days to try must be tried over again. However, it is important under our judicial system that a case be fairly tried. Certainly it cannot be said that a fair trial was had, where inadmissible evidence which the court found to be prejudicial got before the jury through the inadvertence of both parties and the court. We have read the transcript and agreed with the trial court that the evidence was sufficient to sustain the verdict. The trial judge who heard all the evidence in the case has held that the error was serious and might have affected the

verdict. To upset this finding we would have to hold as a matter of law that the error could not have affected the verdict. This we cannot do. "It is settled that a motion for a new trial is, to a large extent, addressed to the legal discretion of the court to which the application is made, and that its action is conclusive and will not be disturbed, in the absence of a clear and affirmative showing of a gross, manifest, or unmistakable abuse of discretion. 20 Cal.Jur. 27. Such discretion is very wide and every presumption is indulged in support of the action of the court in passing upon the motion. The discretion must be reasonably exercised to the accomplishment of justice, and, where there appears to be a reasonable or even fairly debatable justification therefor, an order granting a new trial will not be set aside, although a contrary order might not be disapproved or the appellate court might be inclined to take a different view. 20 Cal.Jur. 30." *Whitfield v. Debrincat*, 18 Cal.App.2d 730, 733-734, 64 P.2d 960, 961.

2. The Leone Affidavit.

[8-10] On the motion for new trial, the affidavits of three jurors were offered in evidence. Two of these affidavits were denied admission. The third, that of juror Leone, was admitted on the theory that it did not tend to impeach her verdict but to support it. This affidavit should not have been admitted as it did tend to impeach the juror's verdict. The affidavit stated that the juror considered the matter on the back of the card "as impeaching Bradley's testimony because I felt that if his employer could not rely upon him that I could not rely upon his testimony in the case; the fact that Mr. Bradley was not reliable in the opinion of his employer, Food Machinery Corporation, was discussed by me and various other members of the jury during our deliberation in the jury room, and was of such magnitude as to affect my verdict * * *." It is conceded that affidavits of jurors may not be used to contradict, impeach or defeat the verdict. 20 Cal.Jur. § 41, p. 61; 46 Corpus Juris, §

379(h), p. 358, 66 C.J.S., New Trial, § 169; *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 P. 169; *Toomes v. Nunes*, 24 Cal.App.2d 395, 75 P.2d 94. Jurors' affidavits, however, are permissible to substantiate their verdicts. 20 Cal.Jur. § 41, p. 61. The only purpose in offering the Leone affidavit was to show that her verdict was based primarily on the objectionable evidence, and hence it obviously was in impeachment of her verdict. In *Bennett v. Nazzaro*, supra, 144 Misc. 450, 258 N. Y.S. 828, at page 830, it was held: "Jurors' affidavits will sometimes be received to sustain a verdict, but should not be received in a case like this, where it is claimed that the jury was influenced by improper evidence." But the fact that the Leone affidavit was erroneously admitted does not cause a reversal of the court's order granting a new trial. The trial judge had a right to assume that the information on the back of the card had the effect on the jury that ordinarily would be expected. Moreover, the judge's statement shows that he came to his conclusion of the prejudice of the evidence irrespective of the affidavit, for he said: "It is apparent, I believe, that the admission into evidence of the card last referred to, containing the objectionable matter, was error and serious error and one which could have substantially affected the verdict." He then stated: "That it did so affect the verdict is evidenced by" the Leone affidavit. We are satisfied that while the admission of that affidavit was error, it was without prejudice, as the court had concluded without it that the objectionable evidence might reasonably have affected the verdict. It must be remembered in this connection that the verdict was 9 to 3.

[11] The order refusing to strike the affidavit of juror Leone, being otherwise reviewable, is not appealable and the purported appeal therefrom is dismissed. The other order appealed from is affirmed. Each party shall bear his own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

37 Cal.2d 765.

PEOPLE v. SYDE et al.

Cr. 5220.

Supreme Court of California, in Bank.

Sept. 28, 1951.

Milton Syde and Harry Syde were charged by information with violating the Corporate Securities Law by entering into contracts with parents for dramatic training of children of the parents and providing that the children should share in possible profits to be realized from the sale of film or other dramatic production. The Superior Court of Los Angeles County, Stanley N. Barnes, J., granted the motion of the defendants to set aside the information as to all counts except first count, and the people of the State of California appealed. The Supreme Court, Shenk, J., held that contracts were not securities within meaning of the Corporate Securities Act requiring approval of such securities by the Commissioner of Corporations.

Order affirmed.

Prior opinion 229 P.2d 81.

1. Licenses ⇨18½(10)

Whether a particular instrument is to be considered a security within meaning of the Corporate Securities Law requiring approval of securities by the Commissioner of Corporations is a question to be determined in each case, and there is no all-inclusive formula by which to test the facts in every case. Corporations Code, § 25000 et seq.

2. Licenses ⇨18½(3)

The general purpose of the Corporate Securities Act, requiring approval of securities by the Commissioner of Corporations, is to protect the public against the imposition of unsubstantial, unlawful, and fraudulent stock and investment schemes and securities based thereon. Corporations Code, § 25000 et seq.

3. Licenses ⇨18½(11)

An agreement to render personal services for compensation cannot be considered a "security" within meaning of the Corporate Securities Act requiring approval of securities by the Commissioner of Corporations, even though sale of a beneficial interest in such an agreement may

come within the statute. Corporations Code, § 25000 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

4. Licenses ⇨18½(22)

The Corporate Securities Act was not intended to afford supervision and regulation of instruments which constitute agreements with persons who expect to reap a profit from their own services or other active participation in a business venture. Corporations Code, § 25000 et seq.

5. Licenses ⇨18½(11)

Contracts between defendants, who operated theatrical arts training school and production business, and parents, for the training of children of the parents for dramatic production for a stated fee, and providing that the children should share in possible profits to be realized from sale of film or other dramatic production, were not "securities" within meaning of the Corporate Securities Act, requiring approval of such "securities" by the Commissioner of Corporations. Corporations Code, § 25000 et seq.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Frank Richards, Deputy Atty. Gen., William E. Simpson and S. Ernest Roll, Dist. Attys., and H. L. Arterberry, Deputy Dist. Atty., Los Angeles, for appellant.

Garner, Lillie & Bryant and George M. Bryant, Los Angeles, for respondent.

SHENK, Justice.

On March 8, 1950, the district attorney of Los Angeles county filed an information against the defendants Milton and Harry Syde charging them in one count with conspiracy to violate the Corporate Securities Law, section 25000 et seq., Corporations Code, and in fifteen other counts with violations of the law by alleged sales of securities without first having obtained a permit from the Commissioner of Corporations. After a preliminary hearing in the Municipal court the defendants were held to answer on each count. On their ar-

raignment in the Superior Court they moved pursuant to section 995 of the Penal Code to set aside the information as to all counts on the ground that the commitment was without reasonable or probable cause. The motion was granted as to all counts except count 1.¹ The People appealed from the order granting the motion.

The facts are not disputed. Milton Syde Films, Inc., was incorporated in July 1949 for the purpose of engaging in the business of making, producing, buying, selling and dealing in dramatic exhibitions for radio, stage, motion pictures or television and related activities. Milton was president and Harry secretary-treasurer. The corporation thereupon published a certificate of the conduct of a theatrical arts training school and production business on Santa Monica Boulevard in Hollywood under the name of Rossmore Productions.

Some of the complainants received postcards from the "casting dept." of Rossmore Studios addressed to a child in the family whose photograph it is indicated had been seen in a portrait studio or elsewhere. The postcard informed the child that he or she would be considered for a motion picture film and requested a definite appointment. The parent took the child to the studio, where the child was accepted under a contract signed by the parent and one of the defendants. In one type of contract the artist (child) agreed to devote his efforts in the production of a film to be directed by Rossmore with pre-training of a selected cast not in excess of twenty-five members for a minimum of sixteen rehearsals. The contract called for a down payment of \$15 by the parent and payment of the balance at the rate of \$5 per rehearsal until a total of \$98 was paid. Rossmore had the option of rejecting any cast member and refunding the money if the artist did not qualify. It was also provided that upon the sale or other disposition of the film sixty per cent of the gross receipts would be distributed equally among the cast members. Rossmore was to pay all costs and expenses of the production. Another type of contract

provided for participation by the artist in a minimum of one television sound film and called for payment of a total of \$198, with a down payment of \$100 and \$7 for each rehearsal. From the receipts of sale of the television film there was to be deducted the expense of sale. The balance was to be deposited in a "reimbursement fund" from which sixty per cent was to be distributed to the members of the cast but not in excess to any one member of the contract payment of \$198.

Down payments and installment payments at each rehearsal attended were made as required. The parents accompanied the children to the rehearsals but were not permitted in the rehearsal studio. The record does not show whether films were actually made.

The question is whether the contracts constituted securities within the meaning of the Corporate Securities Law.

Section 25008 of the Corporations Code defines "security" in part as "any certificate of interest in a profit-sharing agreement" and "any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings." Section 26104 makes the act of selling securities without compliance with the statutory requirements a punishable offense. Non-compliance by the defendants is not disputed.

If the contracts entered into with the various "artists" are not securities within the foregoing definition, there was not probable cause for holding the defendants to answer and the granting of the motion pursuant to said section 995 was proper. The plaintiff contends that the contracts are securities because they constitute an interest in a profit-sharing agreement, or in profits or earnings.

[1-3] The Corporate Securities Law does not contain an all-inclusive formula by which to test the facts in every case. And the courts have refrained from attempting to formulate such a test. Whether a particular instrument is to be considered a security within the meaning of the statute

1. As to this count the defendants thereupon pleaded "not guilty" and August 21, 1950, was fixed for the trial on that

count. The sufficiency of the showing as to count 1 is not in issue here.

is a question to be determined in each case. In arriving at a determination the courts have been mindful that the general purpose of the law is to protect the public against the imposition of unsubstantial, unlawful and fraudulent stock and investment schemes and the securities based thereon. In *re Hatch*, 10 Cal.2d 147, 151-152, 73 P.2d 885, and cases cited. But likewise the courts have followed the differentiation implicit in the statutory language between an interest in a profit-sharing agreement, or in profits and earnings, and the agreement itself of active participation in an enterprise although some monetary return be expected therefrom. An agreement to render personal services for compensation cannot be considered a security, even though the sale of a beneficial interest in such an agreement may come within the statute.

[4] It is settled that the Corporate Securities Law was not intended to afford supervision and regulation of instruments which constitute agreements with persons who expect to reap a profit from their own services or other active participation in a business venture. Such contracts are clearly distinguished from instruments issued to persons who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise to be conducted by others; and the court will look through form to substance to discover whether in fact the transaction contemplates the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers are to share. *Domestic & Foreign Pet. Co., Ltd. v. Long*, 4 Cal.2d 547, 555, 51 P.2d 73; *People v. Davenport*, 13 Cal.2d 681, 91 P.2d 892; *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 727, 134 P.2d 777; *People v. Steele*, 2 Cal.App.2d 370, 374-375, 36 P.2d 40; *Hollywood State Bk. v. Wilde*, 70 Cal. App.2d 103, 107, 160 P.2d 846; *People v. Hoshor*, 92 Cal.App.2d 250, 253, 206 P.2d 882. Disagreement has not arisen in connection with the foregoing principles, but only with their application in specific cases.

In their essence the agreements here are for the rendition of compensated services

by both parties to the contract. Services in training the artist for dramatic production are to be rendered by the defendants for a stated fee; and services are to be rendered by the artist by participation in the film or other dramatic production in return for a share in possible profits to be realized from the sale thereof. The substance of the transactions is an investment in dramatic training of and participation by the artist as a member of the cast of a film or television drama to be produced and sold. The artist invested in returns from his training and actual participation in the production of a film if profits were realized from a sale thereof. It was not contemplated that he was to play the passive role of an investor only. True the direction in the production and the marketing of the film lay exclusively in the management of the defendants. But the film from which the artist was to profit could not be produced without his actual participation as a member of the cast. In the event he was considered not qualified for participation, his money was to be refunded.

[5] In the light of the foregoing the contracts are neither certificates of interest in a profit-sharing agreement nor transferable shares, investment contracts, or beneficial interests in title to property, profits or earnings as contemplated by the Corporate Securities Law. The expectation of financial return to the artist might have been raised by hopes falsely induced. But since the agreement contemplates actual participation by the artist in the film from which he may realize profit, it cannot be considered as a security within the meaning of the statute; and neither numbers of participants nor possible fraud in its creation may transmute the instrument into a security which in legal effect it is not. If fraud be involved redress must be found elsewhere than in the penal provisions of the Corporate Securities Law. Cf. *People v. Steele*, *supra*, 2 Cal.App.2d at page 375, 36 P.2d at page 40.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

37 Cal.2d 885

PEOPLE v. GOULD et al.

Cr. 5221.

Supreme Court of California, in Bank.

Sept. 28, 1951.

Ruth Gould and S. P. Diamond were convicted in the Superior Court of Los Angeles County, Thomas J. Cunningham, J., of issuing securities without first having obtained a permit pursuant to the provisions of the Corporate Securities Law from the Commissioner of Corporations, and they appealed. The Supreme Court, Shenk, J., held that contracts which defendants entered into with parents of children for training and participation of children in television films for a stated fee in return for which the participants were to receive a specified percentage of profits realized from sale of films, did not constitute "securities".

Judgments reversed.

Prior opinion 229 P.2d 78.

Licenses 18½(11)

Contracts between defendants, who conducted a theatrical school, and parents of children for training and participation of the children in television films for a stated fee in return for which participants were to receive a specified percentage of profits realized from sale of the films, did not constitute "securities" within meaning of the Corporate Securities Law requiring approval of "securities" by the Commissioner of Corporations. Corporations Law, § 25000 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

Cletus J. Hanifin, Los Angeles, for appellants.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Frank Richards, Deputy Atty. Gen., William E. Simpson and S. Ernest Roll, Dist. Attys., and H. L. Arterberry, Deputy Dist. Atty., Los Angeles, for respondent.

SHENK, Justice.

The appeal in this case is from judgments of conviction of the defendants Gould and Diamond on several counts of

issuing securities without first having obtained a permit pursuant to the provisions of the Corporate Securities Law, Corporations Code, sec. 25000 et seq.

The defendant Ruth Gould with the assistance of her brother, S. P. Diamond, conducted a theatrical school. They entered into contracts with parents of children for the training and participation of the children in television films for a stated fee in return for which the participants were to receive a specified percentage of profits realized from the sale of the film. The same type of contract was involved as was considered in the case of *People v. Syde*, Cal.Sup., 235 P.2d 601. Our decision is that case that such contracts are not securities within the meaning of the statute controls the disposition of the appeal herein.

The judgments are reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



37 Cal.2d 758

EVANS et al. v. DABNEY et ux.

L. A. 21940.

Supreme Court of California, in Bank.

Sept. 26, 1951.

Action by Orval N. Evans and others, trustees under declaration of trust, against Clifford R. Dabney, and his wife, trustors and beneficiaries under the inter vivos trust, for declaratory relief. The defendants cross-complained and moved to add other parties as cross-defendants. The Superior Court, Los Angeles County, Clarence M. Hanson, J., denied the motion to add parties and entered an adverse judgment on the cross-complaint and the defendants appealed. The Supreme Court, Schauer, J., held that the order denying the motion to bring in new cross-defendants was not appealable.

Purported appeals dismissed.

1. Appeal and Error ⇐102

An order sustaining a demurrer is not appealable.

2. Appeal and Error ⇐95

An order denying a motion to bring in new cross-defendants, which order was not a final, or any, adjudication in favor of the persons who were not parties, was not appealable.

3. Appeal and Error ⇐80(6)

A cross-complaint is not sufficiently independent to allow a separate final judgment to be entered upon it from which an appeal may lie, unless the judgment or order on the cross-complaint may be considered final as to some of the parties.

C. Paul Du Bois and John E. Sisson, Los Angeles, for appellants.

Dolley, Knight, Woods & Hightower and Roy P. Dolley, all of Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiffs, trustees under an inter vivos trust created March 24, 1930, brought this action for declaratory relief against Clifford R. Dabney and his wife, trustors and beneficiaries under the trust. Defendants answered, cross-complained, and moved to add other parties as cross-defendants. Plaintiffs demurred to the answer and cross-complaint. The trial court by minute order denied the motion to add parties, sustained the demurrer to the cross-complaint without leave to amend, and sustained the demurrer to the answer without leave to amend as to the defense of the statute of limitations. No judgment on the issues raised by the complaint and answer appears to have been entered. Defendants have noticed appeals from (1) the minute order insofar as it denies leave to bring in new parties as cross-defendants and sustains the demurrer to parts of defendants' answer, and (2) an ensuing judgment decreeing solely "that cross-complainants take nothing by this action against cross-defendants and that said cross-defendants recover their costs." We have concluded that the orders and judgment are not appealable

and, therefore, the purported appeals must be dismissed.

[1,2] It is settled that an order sustaining a demurrer is not appealable. (See *People v. Adamson* (1949), 33 Cal.2d 286, 288, 201 P.2d 537, and cases cited in 2 Cal. Jur., Appeal and Error, § 26, p. 156; 1 Cal. Jur., Ten Year Supp., pp. 289 et seq.; and Secondary Pocket Part.) And it has been held that an order denying a motion to bring in new cross-defendants was not appealable where the persons sought to be brought in were not parties, were not served, and did not appear, because the order adjudicated nothing as between defendants-cross-complainants and the persons sought to be brought in. (*Kennedy v. Owen* (1948), 85 Cal.App.2d 517, 520, 193 P.2d 141.) Defendants do not claim that the minute order denying their motion to bring in new cross-defendants is a final, or any, adjudication in favor of these persons who are not parties. Defendants argue that the order denying their motion, and the judgment that they take nothing by their cross-complaint, should be appealable because the controversy as to which plaintiffs seek declaratory relief and the matters which defendants wish tried in their cross-action all concern administration of the same trust and should be tried together. This amounts to nothing more than an argument that when an interlocutory ruling of the trial court is wrong it should be appealable.

[3] The question whether there can be an independent, final, appealable judgment or order on a cross-complaint (which, as noted above, is the only judgment entered here) was considered in *Sjoberg v. Hastorf* (1948), 33 Cal.2d 116, 118, 199 P.2d 668. This court concluded, "Under California procedure there is ordinarily only one final judgment in an action. [Citations.] A cross-complaint is not considered sufficiently independent to allow a separate final judgment to be entered upon it [citations], unless the judgment or order on the cross-complaint may be considered final as to some of the parties. [Citations.]" The judgment here is not a final disposition of the matters which defendants seek to raise

by their cross-complaint. However clearly erroneous some of the rulings complained of may appear to be, the questions which defendants have attempted to present on this appeal can properly be determined only on the appeal from the final judgment. "Thus no greater hardship will result than in any case where a party is forced to stand trial because of an erroneous ruling of the trial court." (Page 119 of 33 Cal. 2d, page 670 of 199 P.2d.)

For the reasons above stated, the purported appeals are dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



37 Cal.2d 884

In re DABNEY'S ESTATE.

DABNEY et al. v. MANN et al.
L. A. 21861.

Supreme Court of California, in Bank.
Sept. 26, 1951.

Proceeding in the matter of the estate of Louise E. Dabney, deceased, wherein Clifford R. Dabney and Alice M. Dabney objected to the petition of Melvin H. Mann for distribution. The Superior Court, Los Angeles County, Newcomb Condee, J., entered order of ratable distribution, and Clifford R. Dabney and Alice M. Dabney appealed. Milton H. Philleo, executor, was also respondent. The Supreme Court, Schauer, J., held that the objectors, as adverse claimants of properties inventoried as estate assets, were not persons interested in the estate within Probate Code, §§ 1010, 1011, authorizing such persons to resist application for ratable distribution and requiring order of ratable distribution, if no injury will result to estate

or any person interested therein, and hence were not entitled to appeal from such order.

Appeal dismissed.

Executors and Administrators §314(12)

Persons, as adverse claimants in separate equitable suit of properties inventoried as estate assets, were not "persons interested in estate" within the Probate Code sections authorizing such persons to resist applications for ratable distribution and requiring orders therefor if no injury will result to estate or any person interested therein, and hence were not entitled to appeal from order of ratable distribution. Probate Code, §§ 1010, 1011.

C. Paul Du Bois and John E. Sisson, Los Angeles, for appellants.

Dolley, Knight, Woods & Hightower, Roy P. Dolley and Franklin L. Knox, Jr., all of Los Angeles for respondents.

SCHAUER, Justice.

The parties and the issues concerned in this appeal are the same as those involved in Estate of Dabney (1951), 37 Cal.2d —, 234 P.2d 962, in which we ordered dismissal of the appeal.

Here, Clifford and Alice Dabney appeal from an order of ratable distribution entered February 6, 1951, in the above entitled estate, to which they had objected in the probate court on the ground that as claimants adversely to the estate in their equitable suit (Los Angeles superior court action No. 569707, which is adequately discussed in the cited opinion) they were "persons interested in the estate" within the meaning of sections 1010 and 1011 of the Probate Code.

For the reasons stated in the cited opinion and on the authority thereof, this appeal is also dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

37 Cal.2d 760

JUNEAU SPRUCE CORP. v. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION et al.

S. F. 18410.

Supreme Court of California, in Bank.

Sept. 28, 1951.

Action by Juneau Spruce Corporation against International Longshoremen's & Warehousemen's Union, and another. The Superior Court of Marin County, Edward I. Butler, J., entered order denying defendant union's motion for change of venue, and International Longshoremen's & Warehousemen's Union appealed. The Supreme Court, Edmonds, J., held that constitutional provision that corporation or association may be sued in county in which contract is made or is performed, or in county in which principal place of business of such corporation is situated, is applicable only to corporations and did not apply to unincorporated labor association, and venue of action against unincorporated union, not sounding in tort, was properly laid, in accordance with rule of civil procedure, in county in which some of members of defendant union resided.

Order affirmed.

Prior opinion, 229 P.2d 424.

1. Corporations ⇨503(1)**Labor Relations ⇨758**

Constitutional provision that corporation or association may be sued in county where contract is made or is to be performed, or where obligation or liability arises, or breach occurs, or in county where principal place of business of such corporation is situated, is applicable only to corporations and does not apply to unincorporated associations, and venue of action against unincorporated union, not sounding in tort, was properly laid, in accordance with rule of civil procedure, in county in which members of union or some of them resided. Const. art. 12, § 16; Code Civ.Proc. § 395.

2. Associations ⇨1

As general rule, theory that unincorporated association is jural entity is inapplicable except where specifically provided to contrary by statute.

3. Associations ⇨20(1)

Statutory relaxation of common law contained in provision allowing persons associated in business under common name to be sued under that name applies only to associated defendants, and associated plaintiffs must still sue in their individual names, Code Civ.Proc. § 388.

Gladstein, Andersen, Resner & Leonard, George R. Andersen and Lloyd E. McMurray, San Francisco, for appellants.

Thelen, Marrin, Johnson & Bridges and Gordon Johnson, San Francisco, for respondent.

EDMONDS, Justice.

By an action commenced in Marin county, Juneau Spruce Corporation is suing International Longshoremen's and Warehousemen's Union and International Longshoremen's and Warehousemen's Union, Local No. 16, both unincorporated associations, upon a foreign judgment. The union's appeal from an order denying a change of venue presents only the question as to whether its rights in this regard are to be determined by the rules of law applicable to a corporation or is the residence of the association's members the controlling factor.

The timely motion of I. L. W. U. to transfer the action to San Francisco was made upon the grounds that the association maintains its sole place of business there and it is being sued upon an alleged obligation which the complaint does not charge was either incurred or to be performed in Marin County. By supporting affidavit, it is averred that the I. L. W. U. is a resident of San Francisco and that Local 16 of the union does not maintain an office anywhere in California, nor does any member of Local 16 reside in California.

The corporation's affidavit in opposition to the motion states that I. L. W. U. "is an unincorporated association consisting of several thousand members residing throughout the State of California". Upon information and belief, it is alleged that over two hundred of the members reside

in Marin County. The names and addresses in Marin County of two of them were given.

The association made no denial of the facts as to the residence of its members which were presented by the creditor. The motion was denied and the appeal is from that order.

Article XII, section 16, of the Constitution provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; *or in the county where the principal place of business of such corporation is situated*, subject to the power of the court to change the place of trial as in other cases." The I. L. W. U. contends that the italicized phrase applies to both corporations and unincorporated associations. In any event, it asserts, an association of the type of a labor union should be treated as a corporation. The respondent argues that the latter portion of the constitutional provision applies solely to a corporation and relies upon section 395 of the Code of Civil Procedure which fixes venue in the county in which the defendants, or some of them, reside at the time of the commencement of the action.

[1] The I. L. W. U. takes the position that the venue of an action, not sounding in tort, against an association is controlled by the constitutional provision and not by the Code of Civil Procedure; venue in the county where a defendant resides can be had only in an action against an individual. The present action, it says, is in the nature of one upon a contract and the only proper place for trial, under the provisions of the Constitution, is the county of the association's principal place of business. Furthermore, according to the I. L. W. U., the action is solely against the association, binding only the joint property of the associates. No individual is sought to be held liable and there is no logical reason for the residence of an individual member to control the place of venue.

The respondent corporation, on the other hand, argues with compelling logic that (1) unincorporated associations are not re-

garded as entities for venue or other procedural purposes in the absence of a specific statutory provision; (2) Article XII, section 16, of the Constitution recognizes that an unincorporated association does not have a residence for venue purposes; and (3) the constitutional provision should not be interpreted contrary to its obvious meaning and without regard to the fact that its provisions are permissive rather than mandatory.

The decisions of this state have not declared an unincorporated association to be a jural entity for the purposes of venue. Obviously, the first four clauses of the constitutional provision apply to both corporations and associations, but it is conceded by the parties to this appeal that none of those clauses is here applicable. The fifth clause, which the I. L. W. U. contends is controlling, speaks only of "such corporation". No mention is made of the principal place of business of an unincorporated association, and there is reason to believe that this omission was deliberate.

Prior to the adoption of section 16, Article XII of the Constitution, venue in transitory actions was determined by the residence of the defendant in accordance with section 395 of the Code of Civil Procedure. When a partnership or an association was sued, the residence of its members controlled venue. The enactment of section 16 added four places of venue for a transitory action against either a corporation or an association; namely, where the contract is made, where it is to be performed, where the liability or obligation arises, and where the breach occurs. A fifth place of venue was added in the case of "such corporation" which was and is required by law to maintain a principal place of business. Cal. Const., art. XII, § 14, repealed in 1930. But Corp. Code, § 301 requires the articles of incorporation to state the county in California where the principal office for the transaction of the business of the corporation is located. No principal place of business being required by law for unincorporated associations, it would appear clear that the word association was deliberately omitted in the provision for a fifth place of venue.

[2, 3] In this state an unincorporated association is not recognized as a jural entity for all procedural purposes. The general rule is that the entity theory is rejected except where specifically provided for by statute. For example, persons associated in business under a common name may be sued under that name. Code Civ.Proc., § 388; *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291. However, it does not follow that the association may be regarded as an entity for all other purposes. " * * * this statutory relaxation of the common law applies only to associated defendants. Associated plaintiffs still must sue in their individual names. *Holden v. Mensinger*, 175 Cal. 300, 305, 165 P. 950." *Case v. Kadota Fig Ass'n*, 35 Cal.2d 596, 602, 220 P.2d 912, 916.

Artana v. San Jose Scavenger Co., 181 Cal. 627, 629, 185 P. 850, is relied upon by the I. L. W. U. in support of its argument that an association is a jural entity for procedural purposes. However, that case holds only that an association is a legal entity distinct from its members for the purpose of section 388 of the Code of Civil Procedure permitting it to be sued in its common name. The plain language of the opinion so limits the decision. The same may be said as to *Jardine v. Superior Court*, supra.

In *Sperry Products v. Association of American R. R.*, 2 Cir., 132 F.2d 408, 411, 145 A.L.R. 694, the court said: "Thus, for most purposes the law still looks at such associations as mere aggregations of individuals. Since, however, for the purpose of suit it has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity * * *." The discussion in the *Sperry* case, as argued by the I. L. W. U., is persuasive, but persuasive only for legislative or constitutional change. Contrary to the existing law in California, the Federal Rules of Civil Procedure, 28 U.S.C.A., permit a partnership or unincorporated association to sue as well as be sued in its common name, Rule 17(b), and process may

be served in the same manner as upon a corporation. Rule 4(d) (3). Under section 388 of the Code of Civil Procedure process in an action against an association sued in its common name must be served on "one or more of the associates". The different procedures in the two jurisdictions are too great to regard the *Sperry* case as being other than a rational argument for a change in the existing law embodied in our statutes and Constitution.

The I. L. W. U. concedes that if it were organized for ordinary business purposes, it would not be entitled to a change of venue. But it asks for special consideration and the benefit of the law of venue applicable to corporations because it is a labor organization. There is no logical or legal basis under either common or statutory law for making such a distinction.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



106 Cal.App.2d 660

LORD et al. v. LUND et al.
Civ. 6511.

District Court of Appeal, Third District,
California.
Sept. 27, 1951.

Proceeding in contempt on petition of H. S. Lord and A. F. Bishop, as co-partners transacting business under the firm name and style of Lord & Bishop, against Mattie R. Lund, as Tax Collector and Treasurer of the County of Butte, and D. W. Cooper, as County Auditor, in which it was contended that the defendants had failed to comply with previous order of court directing them to pay monies in bond redemption fund to bondholders. The District Court of Appeal, Van Dyke, J., held that mere showing of state of facts which may not have justified county

board of supervisors in placing certain funds in bond redemption fund was insufficient to overcome presumption of propriety of official action and consequently afforded no justification for refusal of defendants to make payment in accordance with mandate of court, and defendants were guilty of contempt.

Order in accordance with opinion.

1. Counties ☞187

A county may make advances to bond redemption fund only by mandatory levy, not exceeding 10 cents on each \$100 of taxable property in county, or by transfer of monies from general fund when there are surplus monies available. St.1921, p. 1658.

2. Evidence ☞83(1)

There is presumption that official action has been properly taken.

3. Mandamus ☞186

Where county officers charged with contempt for failure to heed mandate directing them to pay funds in bond redemption fund to bondholders contended that county board of supervisors had exceeded its authority in first instance in placing such funds in bond redemption fund, mere proof of state of facts which may not have justified board's action was insufficient to overcome presumption that official action has been properly taken, but it was incumbent upon county officers to show that the board had in fact acted illegally. St.1921, p. 1658.

4. Mandamus ☞186

County officers who failed to heed mandate of court directing payment of monies in bond redemption fund to bondholders and who failed to establish purported justification in alleged impropriety of county board's action in placing such monies in bond fund were guilty of contempt, but such contempt would, in discretion of court, be purged by compliance with order within specified period. St. 1921, p. 1658.

Raymond A. Leonard, Dist. Atty., Oroville, for respondents.

VAN DYKE, Justice.

Proceeding in contempt.

In 1930 the Board of Supervisors of Butte County created an improvement district under the County Improvement Act of 1921, Stats.1921, p. 1658, for the purpose of making certain improvements in the designated area. The work was done and bonds were issued. Assessments levied to pay the bonds became delinquent and on August 30, 1937, the lands were sold to the State for the sum of \$12,828.03. Bondholders then brought action to compel the board of supervisors to levy a tax in accordance with the act to provide money wherewith to pay the sum for which the lands were sold. This court ordered the supervisors to do this. McGrath v. County of Butte, 30 Cal.App.2d 734, 87 P.2d 381. The tax was levied and the money so provided was paid into the bond redemption fund. When demand was made that the disbursing officers of the county, the treasurer and the auditor, pay these moneys to the bondholders they refused to do so and a second proceeding in mandate, this time against these officers only, was begun. After some time it was stipulated that a writ issue. By that writ this court commanded the respondents, who are the same persons now brought before this court in this proceeding, that they disburse the moneys in the fund to the bondholders; and this court further commanded them, as such officers, to audit and issue warrants and pay out pro rata to such bondholders all sums which might thereafter be paid into the fund. The payment of moneys then in the fund was made. Since that time other moneys have accumulated in the bond redemption fund which the bondholders have demanded, and respondents herein again refusing to pay, petitioners, the bondholders, filed in the same proceeding in mandate last referred to, an affidavit charging respondents with contempt of this court in that they had refused to disburse said sums to bondholders as ordered. This court issued an order to re-

White & Harber, Sacramento, for petitioners.

spondents that they show cause why they be not declared in contempt, and in response thereto respondents have made return as follows: They say there is now in the fund the sum of \$13,750.72 and they do not contend that of that sum the amount of \$4,724.04 is not properly payable to bondholders as being derived from sources to which they have lawful right to look for the payment of their bonds. But as to the balance of \$9,026.68 they say the same is not properly available to meet the bondholders' demands because derived from a resale to private purchasers of the lands bought by the State at the first sale for delinquent assessments. As to this money they argue that the bondholders have received the amount for which the lands were sold to the State, which moneys were provided through the mandated tax levy made pursuant to our order in *McGrath v. County of Butte*, supra; that when these lands, not having been redeemed, were sold to private purchasers and the said sum of \$9,026.68 received therefor, the money was paid into the bond redemption fund by mistake; that it should have been retained by the county in recoupment for the funds the county had raised by the tax levy and paid into the fund under said mandate.

[1-4] It is to be borne in mind that respondents here are in effect saying that because these moneys were derived from resale of the tax-deeded lands it was beyond the power of the board to thereafter place them in the bond redemption fund, and that we must therefore absolve respondents of any duty to pay them to petitioners. But it does not follow that because the disputed funds were so acquired by the county they or an equal amount from the general funds of the county could not be legally deposited in the bond redemption fund by the board and then become available to meet bond requirements. Advances to the bond redemption fund by the county "are authorized to be made from two possible sources, one the mandatory levy

not exceeding 10 cents on each \$100 of taxable property in the city [here the county], * * *; and, second, the transfer of moneys from the general fund when there are surplus moneys available, as advances on the amount of improvement assessment installments falling due on lands sold to the city subsequent to the delinquent tax sales." *Kerr Glass Mfg. Corp. v. City of San Buena Ventura*, 7 Cal.2d 701, 707, 62 P.2d 583, 586. It may well be that when these moneys were returned to the county upon sale of the tax-deeded lands they became surplus moneys in the general fund of the county and were advisedly paid over into the bond redemption fund by the board to meet improvement assessments falling due on lands sold to the county subsequent to the delinquent tax sales. If that was the case then the supervisors could legally pay the moneys into the bond fund and it would become the duty of respondents to disburse them to the bondholders. It is to be presumed that official action has been properly taken. By their return filed herein respondents have done no more than show a state of facts that *may* not have justified the board's action; that, in view of the presumption, is not enough. To prevail here respondents must show a state of facts whereunder, in all events, the board acted illegally. This, as we have pointed out, they have not done. It follows that respondents have not obeyed the order of this court nor shown cause why they have not done so. It is ordered that respondents disburse the disputed funds to the bondholders in accordance with law and the previous order of this court; that this be done within twenty days; that within twenty days after payment proof thereof be made to this court by respondents, whereupon respondents shall stand purged of contempt; that if respondents fail herein such further action be taken as shall be appropriate.

PEEK, J., and SCHOTTKY, Justice pro tem., concur.

106 Cal.App.2d 690

PEOPLE v. OVIEDO.**Cr. 907.**District Court of Appeal, Fourth District,
California.

Sept. 28, 1951.

Claude Oviedo was convicted in the Superior Court of Riverside County, Russell S. Waite, J., of wilfully and unlawfully, in connection with the prescribing and furnishing of a narcotic, giving a false name and false address, and defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that statute providing that no person shall, in connection with prescribing or dispensing of a narcotic, give a false name or false address does not eliminate receiver as the offender and it was immaterial that defendant would have received narcotics if he had not committed acts forbidden by the statute.

Order denying a new trial affirmed.

1. Poisons ☞4

Statute providing that no person shall, in connection with the prescribing or dispensing of a narcotic, give a false name or false address does not eliminate receiver of narcotic as an offender. Health and Safety Code, § 11170.5.

2. Statutes ☞241(1)

Penal code provision abolishing common-law rule of strict construction of penal statutes, is not restricted in application to criminal statutes found in Penal Code. Pen.Code, § 4.

3. Poisons ☞4

Statute providing that no person shall, in connection with prescribing or dispensing of a narcotic, give a false name or false address is not required to be strictly construed. Health and Safety Code, § 11170.5; Pen.Code, § 4.

4. Poisons ☞4

Statute providing that no person shall, in connection with prescribing or dispensing of a narcotic, give a false name or false address makes certain conduct criminal and it is immaterial that defendant would have received narcotics if he had not committed acts forbidden by statute. Health and Safety Code, § 11170.5.

J. David Hennigan, Public Defender, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant and appellant was charged with and convicted by the court of violating sec. 11170.5, Health and Safety Code, in that he did wilfully and unlawfully, in connection with the prescribing and furnishing of a narcotic, give a false name and false address. Probation was granted. Defendant appealed.

The agreed facts appear in a portion of the preliminary hearing and the facts stipulated to at the trial. They are that defendant's true name is Claude Oviedo; that he has lived at 401 South Berkeley Street, San Bernardino, for the past six or eight years; that sometime in 1949, he was told by certain persons that he could see a Dr. Reid, at Perris, state that he had a headache, and that by doing so he could obtain some narcotic, "dilaudid"; that "some of these fellows" gave him some of these narcotic tablets; that he melted them and injected some of the substance in his arm with a hypodermic needle; that on June 30, 1950, he went to see Dr. Reid for the express purpose of obtaining these narcotics; that defendant informed the doctor that his name was Frank Queyer and that he lived at the Santa Fe Section House, Romoland, California; that the defendant complained of certain physical pains in his head that justified the doctor in issuing to him a prescription for a quantity of dilaudid narcotic tablets; that the doctor furnished such a prescription; that the defendant appeared at the pharmacy, turned over the prescription to the pharmacist, and obtained the quantity of dilaudid narcotic tablets called for in the prescription; that the name "Frank Queyer" was a false name in that the defendant had never been known by that name, and that the address given was a false address and that the defendant had never lived at that address nor ever used it as a mailing address. It was then stipulated that when the defendant procured

the prescription from the doctor, the doctor would have given the defendant the same prescription if the defendant had given his true and correct name, and his true and correct address. From a reading of the transcript it appears that defendant had previously obtained one or two similar prescriptions under false names; that when he went there on this occasion he went there for the express purpose of obtaining these narcotics; and that he used them by melting them and injecting them into his arm.

The only questions raised on this appeal, as we construe it, are (1) that the legislative history, pertaining to this particular law, impels the conclusion that the section does not apply to persons who receive a prescription for narcotics; (2) that the section is a penal statute and it should be strictly construed; and (3) that to apply the section to defendant would lead to absurd results and therefore it should be construed to exclude the defendant.

[1] Counsel for defendant sets out the origin of sections 11170 and 11170.5 as being Stats. 1937, p. 1950, chap. 687, sec. 1, and concedes that the section, as then written, would be applicable to the defendant in that it prescribes that "No person shall, in connection with the prescribing * * * or dispensing of any narcotic drug * * * give a false name or address or make any false statement to any person authorized by law to prescribe, * * * or dispense any such drug." (Italics ours). The argument is that by the enactment of sec. 11170.5, i. e., "No person shall, in connection with the prescribing, * * * or dispensing of a narcotic, give a false name or false address", the Legislature changed the words of a perfectly understandable section of law creating a prohibition against the use of a false name when applied to those who deal with physicians, etc., and by omitting the emphasized phrase the prohibition was directed only to those persons who, "in connection with the prescribing, * * * or dispensing of a narcotic, give a false name or false address"; that under the facts shown the defendant was not doing the prescribing and accordingly his acts cannot be said to have been done "in

connection with" the prescribing or furnishing of such a narcotic. This contention appears to us to be super-technical. Section 11170.5 clearly falls within the category of statutes which leave no room for judicial interpretation. It is apparent from the provisions of the Health and Safety Code, Chap. 3, Div. 10, that a prescription must involve two persons, the person authorized to prescribe and the person who may receive the prescription. On its face that section provides that any person connected with the prescription, whether the person receiving the narcotic or the person writing the prescription, cannot give a false name or address without violating the section. It does not eliminate the receiver as the offender. No other conclusion is possible from the all-inclusive language which now appears in the section after the restrictive language was removed by the Legislature.

[2, 3] The next argument is that since this section is a penal statute, under the common law, it must be strictly construed, citing *United States v. Resnick*, 299 U.S. 207, 57 S.Ct. 126, 81 L.Ed. 127. Defendant concedes that section 4 of the Penal Code abolished the common-law rule of strict construction of penal statutes, but contends that the section only applies to the criminal statutes found in the Penal Code. The courts have rejected any such a distinction. In *re Mitchell*, 1 Cal.App. 396, 398, 82 P. 347; In *re Galivan*, 162 Cal. 331, 122 P. 961.

[4] Lastly, in connection with the contention that absurd results would follow if the statute were strictly construed to include defendant, he cites *United States v. Katz*, 271 U.S. 354, 46 S.Ct. 513, 70 L.Ed. 986, and argues that the giving of a false name by the patient was of no causative effect whatever on the prescribing or in the distribution of narcotics since the evidence shows that the doctor would have prescribed the drug as readily if the true name had been given. The provisions of the Health and Safety Code set up a system of recordation of prescriptions to eliminate, insofar as it is humanly possible, the use of such narcotic prescriptions for illegal purposes. If the

patient is allowed to give a false name and address it would be impossible, through the system, to detect illegal activity. No absurd result is reached by an interpretation of the section which precludes a patient from giving a false name or address in connection with such narcotic prescriptions. That section makes certain conduct criminal and, in the instant case, the person's conduct falls clearly within the provisions of the section. It can scarcely be material that the defendant would have also received the narcotics if he had not committed the acts forbidden by the statute. It does not follow that, because a police measure may affect persons innocent of criminal intent, it thereby produces an absurd result. *People v. O'Brien*, 96 Cal. 171, 179, 31 P. 45; *People v. McClenneen*, 195 Cal. 445, 468, 234 P. 91.

Order denying a new trial affirmed.

MUSSELL, J., concurs.



106 Cal. App.2d 638

PEOPLE v. HERNON.

Cr. 4670.

District Court of Appeal, Second District,
Division 3, California.

Sept. 26, 1951.

Mike Hernon was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., of the crime of false imprisonment, and he appealed from the judgment and an order denying his new trial motion. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. False Imprisonment $\S$ 43

Although it is not essential that a motive on part of defendant be established to show crime of false imprisonment, a mo-

tive on his part is an important circumstance to be considered in determining the facts. Pen.Code, $\S$ 236.

2. False Imprisonment $\S$ 44

Evidence was sufficient to sustain conviction of crime of false imprisonment. Pen.Code, $\S$ 236.

3. Criminal Law $\S$ 594(1)

Where by stipulation prosecution submitted case for false imprisonment upon transcript of the preliminary examination, and parties reserved right to present further testimony, and prosecution rested case subject to reservation of counsel for defendant to recall prosecuting witness, and judge wanted to hear prosecuting witness even though defense did not want to examine him, continuance of trial after parties had rested so prosecuting witness could be located, was not erroneous. Pen. Code, $\S$ 236.

4. Criminal Law $\S$ 1023(10)

Purported appeal from sentence was dismissed on ground that sentence was not appealable.

Redmond & Redmond and William Bronsten, all of Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Dan Kaufmann, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In an information defendant was charged with kidnaping, in that, on July 18, 1950, he did unlawfully and forcibly take, arrest, and carry Robert Hurley to another part of Los Angeles County. Trial by jury was waived. Defendant was adjudged guilty of violation of section 236 of the Penal Code (false imprisonment), a lesser offense than that charged in the information but necessarily included therein. The judgment was that defendant pay a fine in the sum of \$500. Defendant appeals from the judgment, sentence, and order denying his motion for a new trial.

Appellant contends that the evidence is insufficient as a matter of law to justify his conviction of the crime of false im-

prisonment. He also contends that the trial court erred prejudicially in granting plaintiff a continuance after the plaintiff and defendant had rested.

Defendant's wife, who was lessee of premises (a beer parlor) known as the "Hangout," and who was also owner of the fixtures therein, sold the fixtures to a Mr. Carrell who gave her a chattel mortgage on them to secure payment of the sum of \$3,500. He thereafter failed to make any payments on said indebtedness, and defendant's wife obtained a judgment, in a foreclosure action, for \$4,200—being \$3,500 for principal, \$200 for interest, and \$500 for attorney's fees. The date set for the sale of the fixtures, pursuant to the judgment of foreclosure, was July 18, 1950, at 11 a. m. Prior to that date defendant's wife sold "the business" to Mr. Kesgard, "with the understanding" that she would give him a clear title to the fixtures, and thereafter he operated the business. On July 17, 1950, the day before the sale, Mr. Hurley, a building construction salesman, had a conversation with defendant's wife at the Hangout. According to the testimony of Mr. Hurley, defendant's wife asked him to come to her apartment and talk with defendant; about 3 p. m. that day the witness and Mr. Kesgard went to her apartment and she introduced the witness to the defendant; defendant asked the witness why he was bidding on the fixtures, and the witness replied that he was making a deal with Mr. Kesgard to buy the place for a price, which he understood to be \$7,000, but that he was mistaken because Mr. Kesgard wanted \$8,000; the witness further stated to defendant that his (witness') lawyer had advised him to bid on the fixtures and had told him if he could pick the fixtures up "for \$1500 in that manner," (at the sale) he could save \$2,000 on the purchase price; the witness told defendant if he (witness) could make \$1,000 on the fixtures he would be able to buy the place for \$7,000, the original price he had planned to pay; defendant's wife said it was blackmail for the witness to say he was going to try to make \$1,000, and the witness replied that it was merely a business proposition on his part; defend-

ant told the witness it wouldn't do him any good to get the fixtures as the witness would have to take them out of the place, and the witness replied that he didn't think he would have to move them but if he did have to move them he had a place where he could put them—that his lawyer thought he had a foothold by owning the fixtures; defendant and his wife stated they were prepared to bid \$4,200 on the fixtures, and the witness told them that he was going to the sale with \$3,500 and he would go that high, but if they bid \$3,501 they could have the fixtures; the witness then returned to the Hangout, and he "completed a deal" with Kesgard; he next saw defendant about 10:20 a. m. on the following day (the day of the sale) at the Hangout where the sale was scheduled to take place at 11 a. m.; when the defendant entered the Hangout, defendant's wife had just finished talking to the witness, and the witness said that he wasn't there to argue; defendant stated, "You aren't going to give anyone any argument," and that he would put the fixtures right out in the street if the witness bid them in; the defendant then walked away, and about 10:40 a. m. he came over to the place where the witness was sitting and asked him if he could talk to him "personally"; the witness said, "Yes"; then the defendant walked toward the front door, through some curtains that were hanging outside the door, and "walked out in front" of the Hangout, and the witness followed him; the defendant turned to the right and said something over his right shoulder; he then stepped back against the building and while the witness was walking toward the defendant he (defendant) looked over the shoulder of the witness and nodded; at that time two men, whom the witness had not seen, grabbed him on each side, and a hard dark object struck him in the side; the two men propelled him ahead and said, "Keep walking"; the witness asked, "What is the idea?" and one of the men said, "Just keep walking"; each of the men weighed about 175 pounds; the witness weighed 143 pounds; they held him by his arms and he "was walked up the street to the Club Lorraine Bar," which was

about 8 blocks from the Hangout; during that walk they did not pass anyone, and the witness did not notice whether anyone was on the other side of the street; they entered the Club Lorraine, and the witness sat between the two men at the bar; the two men and the witness each ordered a drink, which the witness paid for; each of them ordered a second drink, which the two men paid for; they stayed there until 5 or 7 minutes after 11 o'clock; the witness said, "I guess you're through with me"; then one of the men went to a telephone booth and after he returned he said, "I guess that's all"; then the three of them walked out of the bar—the witness walking ahead of the two men; the witness went a block west, then he turned around and saw the two men going the other way; the witness had in his possession \$3,000 in cashier's checks payable to himself, \$558 in cash and a diamond ring.

A deputy sheriff of Los Angeles County, called as a witness by the People, testified that he went to the Hangout about 10:30 a. m. on July 18, 1950, for the purpose of holding "the sale of the chattels of the place"; when he arrived there, he thought he saw defendant talking to Hurley; the witness talked to the defendant once or twice; the defendant was "in and out and all around there"; the defendant then went in the direction of Hurley and then the two of them left the Hangout; the witness did not see the defendant or Hurley return to the Hangout; the sale was conducted at 11 a. m. and defendant's wife purchased the fixtures for \$500; the sale was concluded about 2 minutes after 11 o'clock, and Hurley was not there and did not bid on the fixtures.

Defendant testified that on the day before the sale Hurley and Kesgard came to his apartment where Hurley told the defendant that he was going to bid on the fixtures at the auction the following morning, but that he would not bid if defendant and his wife would give him \$1,000; defendant's wife said, "We will not give you or anybody else a thousand dollars"; the defendant told Hurley that he (Hurley) would have the privilege of bidding due to the fact that it was a public auction but

that he would be bidding on the fixtures and not the business, and if he bought the fixtures he would have to take them out; Hurley replied that he would take the fixtures out and put them in storage; he (Hurley) also said that the defendant and defendant's wife had sold the fixtures to Kesgard and if he (Hurley) bought the fixtures the defendant and his wife could not deliver them to Kesgard, and he wanted to know if the defendant would give him \$1,000; defendant replied, "I won't give you no thousand. Go ahead and bid and get the fixtures"; defendant again saw Hurley on the day of the sale in the Hangout, and he went up to Hurley and said, "I would like to have a word with you"; defendant walked out of the Hangout and Hurley followed him; Hurley walked about 8 feet west of the door of the Hangout and defendant said, "I understand you bought the fixtures and all from Mr. Kesgard last night"; Hurley said that he did not buy them but Mr. Rossi bought them; about that time defendant noticed an old friend (Mr. Howard) standing near the door of a restaurant (next door to the Hangout) and about 6 feet behind Hurley; the friend waved his crutch, and the defendant nodded; about the same time Hurley walked off in a westward direction and he met "these two fellows" who came up from the curb, probably from across the street; Hurley said, "How are you, fellows?" and put his arm on the left shoulder of one of the men, and walked away; Hurley was between the two men; defendant had never seen the two men before that time and has not seen them since; after Hurley walked away with the two men, the defendant stood there dumbfounded—he didn't know what was up. He testified further that he did not ask Hurley why he was bidding on the fixtures; he at no time told Hurley that he did not want him to bid on the fixtures; nothing was said about an "argument" on the day of the sale; on that day defendant had a discussion with a customer, talked to one of the auctioneers and then went over to Hurley and said, "Come on out I want to have a word with you." Defendant testified further that the \$500 which his wife paid for the fixtures was

deducted from the "deficiency" judgment against Carrell; and that if anybody else had attended the sale and bid \$3,500 for the fixtures defendant would have received the \$3,500 but would have lost the fixtures.

Defendant's wife testified that on the day before the sale, when she saw Hurley in the Hangout, he said to her, "By the way, I got to buy an engine. Do you know anybody that wants to give me a thousand dollars?" and "I am going to bid on the fixtures. If you give me a thousand dollars I won't bid"; the witness replied that she would not give anyone \$1,000, that it was his privilege to bid if he wanted to; she also told him to see Kesgard; thereafter she told Kesgard that she wanted to see him, and Kesgard and Hurley came to her apartment; Kesgard stayed about a minute and then left; then Hurley stated that he would not bid if the witness would give him \$1,000, and she told him she did not intend to give him any money; defendant told Hurley that he had a right to bid at the public auction and buy the fixtures and take them out; they could replace the fixtures very easily; Hurley asked them how they were going to deliver the fixtures to Kesgard if he (Hurley) bought them. She testified further that on the day of the sale she was in the Hangout; she talked with the sheriff but she was not with Hurley; she saw defendant Hurley talking and saw Hurley follow the defendant outside; she saw Hurley again between 11:00 and 11:30 a. m., after the sale was made.

An employee of the Hangout, called as a witness by defendant, testified that the day before the sale he saw defendant's wife and Hurley in the Hangout; Hurley had a ring which looked like a diamond, and he (Hurley) said he had a diamond which he would like to sell for \$1,000; Hurley was talking about bidding on the fixtures, and he said for \$1,000 he would not make a bid; and defendant's wife told him to bid if he wanted to, that it didn't make any difference to her, and she was not going to give him \$1,000.

Mr. Howard, called as a witness by defendant, testified that on the morning of July 18, 1950, he was in a restaurant next

door to the Hangout; he left the restaurant about 10:30 a. m., and as he opened the door he noticed the defendant and he nodded to him and defendant nodded to the witness; defendant, who was facing the witness, was talking to a man whose back was toward the witness; the witness then noticed two men approach; they were heavy-set men who weighed approximately 175 pounds each; the two men were facing Hurley; he greeted them, and they walked away with Hurley in the center; Hurley seemed to recognize one of the men because he rested his arm around the man's shoulder.

[1,2] Appellant asserts that the evidence is insufficient as a matter of law to justify the conviction. He argues that the testimony relied upon by the prosecution is so improbable or "false" that it amounts to no evidence at all; that the trial judge should have eliminated the testimony of the complaining witness Hurley, and if that testimony had been eliminated there would not have been any evidence "which would connect the defendant," since the only evidence of abduction was the testimony of the complaining witness that he thought he saw the defendant nod to someone. The crime of false imprisonment, of which defendant was convicted, is defined by section 236 of the Penal Code as follows: "False imprisonment is the unlawful violation of the personal liberty of another." Although it is not essential that a motive on the part of defendant be established, a motive on his part is an important circumstance to be considered in determining the facts. The trial judge could have found reasonably that defendant was much interested in not having competitive bidding at the sale by Hurley. Apparently no one, other than defendant's wife and Hurley, was interested in bidding at the sale. The judge could also have found reasonably that defendant conspired with and aided and abetted the two men who removed Hurley from the place where the sale was to be held; that defendant, with the purpose of aiding in the abduction of Hurley, caused him to go, and led him, to the place from which he was abducted; and that when he

had enticed Hurley to the place from which the abduction occurred he nodded to the two men as a signal that it was the time and place to accomplish the abduction. The judge stated that he did not believe the defendant. The evidence was sufficient to support the judgment.

[3] Appellant also contends that the court erred in continuing the trial after the parties had rested. By stipulation the plaintiffs submitted the case upon the transcript of the preliminary examination, and the parties reserved the right to present further testimony. When the judge said that he had read the transcript, the deputy district attorney said that plaintiff rested the case subject to the reservation of counsel for defendant "to recall Mr. Hurley as soon as we can locate him." Thereupon defendant's counsel called the defendant as a witness and proceeded with the defense. When defendant's counsel said that defendant rested the case, the judge said: "I understand that you want to cross examine Mr. Hurley further. He can come in tomorrow morning." Counsel for defendant said: "As far as the examination of Mr. Hurley is concerned we are not interested at this point." The judge then said: "Well, I am. I want to hear something more from him. You get him here in the morning." The deputy district attorney said that he wanted Hurley in rebuttal. Thereupon, without objection by defendant, the trial was continued until the next day, December 6th. The next day the deputy district attorney said that the district attorney had been unable to locate Hurley, that the court had previously ordered Hurley to return to court as a witness, and that the employer of Hurley said that on the previous night he had seen Hurley in an intoxicated condition. He also asked that a bench warrant for the apprehension of Hurley be issued and that the trial be continued for a few days. Defendant's counsel objected to the continuance. The judge said that it was the duty of the court "to seek out the facts, and the Court believes that this witness is a necessary and material witness and would like to hear from him." A bench warrant was ordered, and the trial was con-

tinued to December 18th. On December 18th the deputy district attorney said that Hurley had not been located and that under the circumstances the plaintiff would rest. Thereupon the deputy district attorney and counsel for defendant said that the case was submitted. Appellant argues that the judge apparently had some doubt as to the guilt of defendant, otherwise he would not have wanted to hear further from Hurley. In view of the facts that the plaintiff's case had been submitted upon the transcript of the preliminary examination and the judge had not heard Hurley testify, and that the deputy district attorney had said at the beginning of the trial that the stipulation to submit the case on that transcript was subject to the reservation of counsel for defendant to recall Hurley, it appears that it was contemplated that Hurley would be in court to testify at the trial. The fact that the judge indicated that he wanted to see and hear the witness testify does not mean that he had a reasonable doubt as to the guilt of defendant. Even though the deputy district attorney and defendant's counsel had stipulated that the plaintiff's case might be submitted upon the transcript of the preliminary examination, it might be that the trial judge considered that there would be a more satisfactory presentation of the case if the complaining witness were required to appear as theretofore ordered and be cross-examined before the court. In deciding the case the judge said: "I am satisfied that this defendant was in conspiracy with these two strangers who were not apprehended. It is purely a question of fact for the Court to determine. * * * I just don't believe the defendant's story, that is all." Furthermore, it does not appear that defendant was prejudiced by the order continuing the trial. This contention regarding the continuance is not sustainable.

[4] The purported appeal from the sentence is dismissed. See *People v. Tallman*, 27 Cal.2d 209, 215, 163 P.2d 857, 860.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

106 Cal.App.2d 657

BRAHS et al. v. KATCHER et al.

Civ. 7932.

District Court of Appeal, Third District,
California.

Sept. 27, 1951.

Action by Bruce Brahs and Frank Brahs, doing business under the firm name and style of Brahs Bros. Auction Yard, and another, brought action against Abe Katcher and another, to recover value of cattle sold, wherein named defendant interposed a counterclaim for return of \$3,000 allegedly paid involuntarily. The Superior Court, Siskiyou County, James M. Allen, J., denied recovery upon complaint and counterclaim, and named defendant appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain finding that the money was not paid under threat of criminal prosecution.

Judgment affirmed.

1. Appeal and Error ☞1011(1)

Finding of fact will not be disturbed on appeal where there is a conflict in the evidence.

2. Payment ☞87(2)

To render a payment involuntary and hence recoverable, there must be an actual or threatened exercise of power possessed or supposed to be possessed by party receiving payment, and such threat must be clear and direct and not merely inferable.

3. Payment ☞87(2)

Where buyer's drafts as payment for cattle were dishonored, and seller stated to buyer that while buyer could be prosecuted and put in prison for from 1 to 14 years, such procedure would not collect money and that seller had to have his money, whereupon buyer paid \$3,000 allegedly without consideration, seller did not threaten exercise of power possessed which would render payment involuntary and recoverable, but was at the most a statement of power possessed.

4. Payment ☞89(5)

In action by seller to recover value of cattle sold, wherein defendant filed counterclaim for return of \$3,000 alleging that

payment was involuntary, evidence was sufficient to support finding that the money was not paid under threat of criminal prosecution.

Barr & Hammond and Raymond Shone, Yreka, for appellant.

Glenn D. Newton, Redding, for respondents.

PEEK, Justice.

By their complaint plaintiffs sought to recover from defendants, individually, the sum of approximately \$7,000, representing the value of cattle sold by plaintiffs to defendants. The defendants denied generally the allegations of the complaint, and defendant Abe Katcher individually interposed a counterclaim wherein he prayed for the return of \$3,000, alleged to have been paid under coercion and threats of criminal prosecution. The trial court denied recovery to plaintiffs upon their complaint and defendant Abe Katcher upon his counterclaim.

Said defendant now appeals, raising but one question: That the evidence is insufficient to support the finding of the trial court that " * * * it is not true that within one year last past plaintiffs obtained the sum of \$3000.00 from defendant Abe Katcher without consideration or by means of threats of criminal prosecution; that it is not true that the sum of \$3000.00 or any other sum is now due, owing and unpaid." His argument in support of such contention is that the evidence shows that appellant paid the money under duress and threat of criminal prosecution and hence the court should have ordered restitution thereof.

[1] Again we reiterate the familiar rule that a finding of fact will not be disturbed on appeal where there is a conflict in the evidence. *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970. The evidence in support of the trial court's conclusion shows that during the latter part of 1948 appellant made several purchases of cattle from respondents. Drafts in the approximate sum of \$9000.00, which appellant had given in pay-

ment thereof, were dishonored, and in January, 1949, \$3,000 of the amount owing was paid under the circumstances here in dispute. The facts surrounding the payment of said sum were that respondent Brahs telephoned appellant Katcher from the office of the district attorney of Siskiyou County, stating to Katcher, in substance, that while he could be prosecuted and put in prison for from one to fourteen years, such a procedure would not collect the money which was what he wanted, since Katcher could go through bankruptcy if he desired; that Brahs had played along with Katcher for a long time, but that all he got from him was promises, and that he had to have his money.

[2] The law is well established in this state that to render a payment involuntary and hence recoverable, there must be an actual or threatened exercise of power possessed or supposed to be possessed by the party receiving payment. *Brumagin v. Tillinghast*, 18 Cal. 265; *Wake Development Co. v. O'Leary*, 118 Cal.App. 131, 4 P.2d 802. The threat must be clear and direct. It is not sufficient that a threat might possibly be inferred. In *Brane v. First Nat. Bank in Wichita*, 137 Kan. 403, 20 P.2d 506, 507, the Supreme Court of Kansas held that a complaint which alleged merely that defendants told plaintiffs that payment of the amount demanded would protect plaintiff's son-in-law from criminal prosecution failed to state a cause of action for the recovery of money paid under duress. The court observed that in "these cases cited by parties in this connection, there is not one instance of duress that does not have a specific and definite threat," and went on to say that to establish duress by threat of criminal prosecution "requires a threat, and a mere suggestion of payment affording a protection from criminal prosecution is not sufficient."

[3] In the present case the testimony of respondent Bruce Brahs shows at the most a statement of power possessed, rather than a threatened exercise of that power.

[4] Accordingly, we conclude, on the basis of the testimony most favorable to

the respondents, that the trial court was justified in finding that the money was not paid under threat of criminal prosecution.

The judgment is affirmed.

SCHOTTKY, J. pro tem., and VAN DYKE, J., concur.



106 Cal.App.2d 572

**WILSON v. LOS ANGELES COUNTY
CIVIL SERVICE COMMISSION
et al.**

Civ. 18104.

District Court of Appeal, Second District,
Division 1, California.

Sept. 19, 1951.

Rehearing Denied Oct. 17, 1951.

Hearing Denied Nov. 15, 1951.

Action by H. J. Wilson against Los Angeles County Civil Service Commission and others for determination of the respective rights and duties of the parties regarding civil service promotional examinations. The Superior Court of Los Angeles County, Allen W. Ashburn, J., dismissed the action and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the complaint sufficiently stated a cause of action for declaratory relief.

Judgment reversed.

1. Declaratory Judgment $\S$ 313

A complaint seeking declaratory relief must allege facts which justify the declaration of rights or obligations in regard to a matter of actual controversy, within purview of declaratory relief statute, involving justiciable rights. Code Civ. Proc. $\S$ 1060 et seq.

2. Declaratory Judgment $\S$ 6, 394

Although under declaratory relief statute wide powers have been conferred upon trial court, its discretion is not unlimited, but it is a legal or judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review. Code Civ. Proc. $\S$ 1060-1062a.

3. Appeal and Error ☞1178(1)
Declaratory Judgment ☞389

Declaratory relief must be granted when facts justifying that course are sufficiently alleged, and where a case is properly before trial court, under complaint which is legally sufficient and sets forth facts showing that a declaratory adjudication is entirely appropriate, trial court may not properly refuse to assume jurisdiction, and if it does enter a dismissal it will be directed by appellate court to entertain the action. Code Civ.Proc. § 1060 et seq.

4. Declaratory Judgment ☞319

Complaint for declaratory relief seeking determination of respective rights and duties of parties regarding civil service promotional examinations and standings on eligible list for position of county clerk sufficiently stated cause of action for declaratory relief. Code Civ.Proc. § 1060 et seq.

H. J. Wilson, appellant, in propria persona.

Harold W. Kennedy, County Counsel, Andrew O. Porter and John B. Anson, Deputy County Counsel, Los Angeles, for respondents.

DRAPEAU, Justice.

To plaintiff's first amended complaint for declaratory relief, defendants interposed a demurrer, a motion to strike and a motion to dismiss. The latter motion was made upon the ground "that the declaratory relief sought is neither necessary nor proper at the time under all the circumstances." Sec. 1061, Code of Civil Procedure. Such motion was granted. The demurrer and motion to strike were ordered off calendar.

From the judgment of dismissal which followed, plaintiff appeals.

In his opening brief, appellant points out that this action in declaratory relief is the fourth proceeding between the parties hereto by which appellant has sought a determination of their respective rights and duties regarding civil service promotional

examinations under the Los Angeles County Charter, to-wit:

1. Certiorari: After judgment setting aside an examination, respondent commission changed its rules, and nothing was accomplished.

2. Mandamus: The trial court set aside an examination, and on appeal by the commission, the judgment was reversed and remanded for a new trial. *Wilson v. Los Angeles County Civil Service Comm.*, 97 Cal.App.2d 777, 218 P.2d 547. Meanwhile, the commission proposed certain charter amendments, which were adopted by the People.

3. Mandamus: Petition denied by the trial court. Now on appeal. Note: The judgment of the trial court was affirmed on appeal on April 12, 1951, and hearing was denied by the Supreme Court on June 11, 1951. *Wilson v. Los Angeles County Civil Service Comm.*, 103 Cal.App.2d 426, 229 P.2d 406.

4. The instant action for declaratory relief.

The instant complaint contains eight causes of action. Briefly, the *first* challenges the right of respondent commission to certify the name of W. G. Sharp on any eligible list created as the result of a promotional examination, particularly the list promulgated on February 24, 1949, for the position of county clerk. It is alleged that Mr. Sharp did not meet the minimum requirements of the county charter or the rules of the commission for participation in any promotional examination, and that the inclusion of his name on that particular list was "arbitrary, capricious and in excess of the authority of said commission." In this connection, it is further alleged that Mr. Sharp's appointment on August 5, 1946, to the position of executive assistant to the county clerk was void, because no examination was ever given, no one but Mr. Sharp applied to take it, and his name alone appeared on the list from which the appointment was made. Also, that from the time Mr. Sharp entered the service in 1937 as an "intern in government", appointment to most of the positions

held by him were not made from eligible lists.

The *second* cause of action seeks a judicial determination to the effect that the commission acted arbitrarily, capriciously and fraudulently in holding that Mr. Sharp possessed the necessary experience requirements.

The *third* alleges that while Article IX, section 34 (11) of the county charter provides among other things for promotion in the classified service based upon seniority, respondent commission's Rule VIII, section 5, is contrary thereto because it limits credit for seniority in promotional examinations to that accruing for four years and seven months of service, and denies any credit for service beyond that period. Further, that this rule was used to appellant's prejudice in determining his standing on the eligible list for the position of county clerk.

The *fourth and fifth* causes of action attack the respondents' standards of efficiency and in particular the efficiency rating given to appellant by Mr. Sharp, when the latter was acting county clerk under a temporary appointment, which resulted in lowering appellant's standing on the eligible list for the position of county clerk.

The *sixth* alleges that the charter provides that the commission place successful applicants on an eligible list in the order of their standing in examination (Art. IX, Sec. 34 (4)); that the commission wilfully disregarded this provision in creating the eligible list for county clerk, and arbitrarily and capriciously added credits for seniority and efficiency to the standing of such candidates, and then placed the successful candidates on the list according to their standing in the examination plus the arbitrary credits for efficiency and seniority.

The *seventh* cause of action alleges that it is the mandatory duty of the commission to call departmental promotional examinations and create an eligible list therefrom whenever there are qualified candidates within any county department wherein a promotional vacancy occurs, before the Commission may call an interdepartmental

promotional examination and create an eligible list therefrom to fill such vacancy.

In his *eighth* cause of action appellant alleges that a binding declaration of rights in this action respecting promotional examinations will determine all issues arising in the case of *Wilson v. Los Angeles County Civil Service Comm.*, 97 Cal.App.2d 777, 218 P.2d 547, in which this court reversed the judgment and remanded the cause for a new trial, while a decree in that case will have no effect upon the issues presented here.

Among other things, appellant prays that "the court construe the provisions of the Charter, and of the Rules of the Los Angeles County Civil Service Commission * * * relating to promotion within the classified service of Los Angeles County, and determine whether or not the Commission may hold a promotional examination for any position in the classified service that is not open to all qualified eligibles within the whole of said classified service."

Also, "that the Court declare the rights and duties of the parties hereto in the causes herein separately set out, and as to the matters therein stated; and for such other relief as may be proper."

While not so stated in the judgment of dismissal from which this appeal is taken, the record herein sustains an inference that the trial court granted respondents' motion to dismiss under section 1061 of the Code of Civil Procedure, because of the then pending appeals in the mandamus proceedings.

Many of the allegations of the instant complaint, as well as appellant's arguments in support thereof, are of necessity repetitions of averments contained in his several petitions for the writ of mandate, above mentioned.

The last of those to come before this court was *Wilson v. Los Angeles County Civil Service Comm.*, 103 Cal.App.2d 426, 229 P.2d 406, where it was held that the writ of mandate could not be employed to compel a public administrative body to act in a particular manner. And that courts should let such boards and officers

work out their problems with as little judicial interference as possible.

Here the remedy sought is different. Appellant prays for a judicial declaration of the powers, rights and duties of the parties respecting the subject of promotional examinations for positions in the classified service of Los Angeles County. This involves not only the parties hereto, but indirectly affects all employees of the county. The judicial declaration of such rights and duties will require the courts to construe and interpret Article IX of the Los Angeles County Charter, as well as certain rules and regulations of respondent commission which, it is alleged, are inconsistent therewith.

In *Hoyt v. Board of Civil Service Com'rs of City of Los Angeles*, 21 Cal.2d 399, 405, 132 P.2d 804, it was held that an action for declaratory relief to obtain an interpretation of the Los Angeles city charter could be properly maintained under the provisions of section 1060 et seq., Code of Civil Procedure.

[1] A complaint seeking declaratory relief must, of course, allege facts which justify the declaration of rights or obligations in respect of a matter of "controversy", the controversy being "actual" within the purview of section 1060, Code of Civ. Proc., and involving justiciable rights. "Doubtless, the requirement is met by allegations showing a controversy respecting the rights of parties to a written instrument, accompanied by a request that these rights be determined and declared." 5 Cal.Jur.Supp. (1944 Rev.) 131, sec. 30; and authorities there cited.

[2,3] As was so aptly stated in the case of *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 762, 161 P.2d 217, 221, 162 A.L.R. 747: "Although under the declaratory relief statute, Code Civ.Proc., §§ 1060-1062a, wide powers have been conferred upon the trial court, its discretion is not unlimited. It is a legal or judicial discretion, hardened by experience into

rule, and its exercise is subject to appellate review. Borchard, *Declaratory Judgments*, p. 299. As said by a text-writer (Anderson, *Declaratory Judgments*, p. 525, § 172): 'It would seem to be a self-evident principle that this discretion is not an arbitrary one, and is not one that may be granted as a special favor, or one that may be exercised personally by the court; but is a sound judicial discretion and one that is controlled in a great measure by legal principles; and in consonance with the rule that the discretion exercised in these cases * * * is a judicial or legal one, and must be bottomed upon good reason, it may be generally stated that such discretion is subject to review at the hands of appellate tribunals.' *Where, therefore, a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; and if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged.*" (Emphasis added.)

Again in *Lord v. Garland*, 27 Cal.2d 840, 852, 168 P.2d 5, 12, it is said: "However, it is equally true that section 1061 of the Code of Civil Procedure, which allows the trial court to refuse to render a declaratory judgment, does not apply where, upon the facts stated, the plaintiff is entitled to some relief in connection with the matter which occasioned the controversy." See, also, *Kessloff v. Pearson*, 37 Cal.2d 609, 233 P.2d 899.

[4] The complaint herein, while not a model pleading, sufficiently states a cause of action for declaratory relief. Consequently, the dismissal by the trial court amounted to an abuse of discretion.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

**SWIFT et al. v. SUPERIOR COURT OF
STATE, IN AND FOR CITY AND COUN-
TY OF SAN FRANCISCO et al.**

Civ. 14977.

District Court of Appeal, First District,
Division 1, California.

Sept. 26, 1951.

Rehearing Denied Oct. 26, 1951.

Hearing Granted Nov. 19, 1951.*

Jean Swift, and others, filed a petition for a writ of prohibition against the Superior Court of the State of California, in and for the City and County of San Francisco, Honorable Timothy I. Fitzpatrick, as Judge thereof, to restrain the probate department of the court from taking any further proceedings on petition for probate of a lost or destroyed will. The District Court of Appeal, Bray, J., held that where alleged lost or destroyed will was filed for probate, and proper parties raised issues as to existence of such will, its destruction, if it ever existed, and its validity, if it ever existed and was destroyed, proponent who demanded jury trial had right to jury trial of disputed issues of fact concerning establishment of will and its contents.

Writ granted.

1. Wills ☞316(1)

Where petition for probate of will has been filed with either objections thereto or contest thereof, determination of issues is for jury, if demanded, but for court alone on hearing of petition for probate. Probate Code, §§ 329, 350, 352, 370, 371, 382.

2. Jury ☞19(7½)

Where alleged lost or destroyed will was filed for probate, and proper parties raised issues as to existence of such will, its destruction if it ever existed, and its validity, if it ever existed and was destroyed, proponent, who demanded jury trial, had right to jury trial of disputed issues of fact concerning establishment of will and its contents. Probate Code, §§ 329, 350, 352, 370, 371, 382.

3. Wills ☞312

Court's duty as to probate of will is to determine whether a prima facie showing in favor of validity of will has been made before submitting issues to jury trial. Probate Code, §§ 329, 350, 352, 370, 371, 382.

* Subsequent opinion 241 P.2d 217.

4. Wills ☞231

At common law proceedings for establishment of lost wills were cognizable only in courts of chancery and jury could not be demanded.

5. Jury ☞10

Right of trial by jury is secured by constitution only in cases in which it had previously existed in administration of justice according to course of common law.

6. Wills ☞222

A contest of a will and proceedings to revoke its probate are special proceedings.

Anthony S. Devoto, San Francisco, for petitioner.

Charles R. Collins, San Francisco, for respondents.

Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, for respondents Edward I. Creely, Andrew J. Creely, Anita O'Connor.

BRAY, Justice.

This petition for a writ of prohibition to restrain the probate department of the Superior Court of San Francisco from taking any further proceedings on petitioners' petition for probate of a lost or destroyed will raises the question, not heretofore decided in California, as to whether, where there is no contest of the will pending, a proponent of an alleged lost or destroyed will has a right to a jury trial of the disputed issues of fact concerning the establishment of the will and its contents.

Record.

On March 21, 1951, petitioners filed a "Petition for Probate of Lost or Destroyed Will by Persons Named Therein as Beneficiaries" in which it was alleged that a certain document, copy of which was annexed, was the last will and testament of Thomas R. Creely, deceased; that prior to his death and without his knowledge or consent a named niece stole this will from the coat pocket of the testator and fraudulently destroyed it. Certain heirs at law or next of kin of said deceased filed answers denying the material allegations of

the petition and praying that the purported will be denied probate. Thereafter petitioners filed a demand that the issues of fact be tried by a jury. This demand was refused. It is conceded that the probate judge intends, unless restrained by us, to try these issues without a jury.

Have Petitioners a Right to a Jury?

The issues of fact on a petition for probate of a destroyed will are (1) was there a will which was fraudulently destroyed (2) prior to testator's death (3) without his knowledge, and (4) the contents of the will (this must be proved by two credible witnesses). The Probate Code sections specifically referring to probate of a lost or destroyed will, §§ 350, 351 and 352, make no reference either directly or indirectly to a jury trial. There is no special notice provided for lost or destroyed wills, so the procedure and notice are similar to those required upon a petition for probate of a will.

[1] There has been considerable confusion in California over the question of just what the situation is where there is a petition for a probate of a will and there has been filed either objections thereto, or a contest thereof. This confusion was cleared up, however, in *Estate of Black*, 199 Cal. 257, 248 P. 1015, where the court discussed the fact that some of the cases seemed to hold that in such event there were two separate proceedings, one to be tried by the court, the other by a jury. It reconciled these cases with others and laid down the rule that "the determination of the issues is for the jury, if a jury is demanded. Upon the hearing of the petition for the probate of the will, the determination of the issues is for the court alone. *Estate of Relph* [192 Cal. 451, 221 P. 361], supra. * * *

"We are satisfied that, upon proceedings for the probate of a will involving both a contest of the will and a petition for probate the court is not at liberty, upon the preliminary and formal showing of due execution, to finally determine upon its merits any of the issues raised by the contest, but is limited to a determination of whether or not a *prima facie* case has been established

in favor of the validity of the will, sufficient to warrant the submission of the case to a jury.

"Inasmuch as section 1312 of the Code of Civil Procedure guarantees to either party litigant the right to a trial by jury upon any of the issues raised by the contest, it seems to us that the issues should be submitted to a jury for its determination, unless there is such a dearth of evidence that the granting of a motion for a nonsuit would be proper." (199 Cal. at page 262, 248 P. at page 1017.

[2] Applying this rule to the case at bar, the trial court's duty is to determine whether the proponents can make a *prima facie* case. Petitioners have filed for probate an alleged destroyed will. Proper parties have appeared and objected to the probate thereof, raising issues as to (1) the existence of such will, (2) its destruction, if it ever existed, and (3) its validity, if it ever existed and was destroyed. It has been said that "The only difference between the probate of a will which can be produced and one which has been lost is as to the nature and quantity of the evidence required to prove it." *McCormick v. Jernigan*, 1892, 110 N.C. 406, 14 S.E. 971. Thus, the parties appear and contest the will, as contemplated by section 329 of the Probate Code and provided in section 370, "Any person interested may contest the will by filing written grounds of opposition to the probate thereof * * *." If the proponents make out a *prima facie* case, then the actual trial of the issues must be by jury, if demanded, and it was demanded here. "Any issue of fact involving * * * the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by a jury * * *." Probate Code, § 371. The issues raised here come within this language.

[3] *Estate of Carr*, 82 Cal.App.2d 780, 187 P.2d 912, is not contrary to our decision. There it was held that where a will contest with request for jury trial was instituted prior to probate and before trial thereof a second and conflicting instrument was offered for probate, there was

no right to a jury trial on the question as to which was the later will. The reason given was that such an issue is not included in the issues for which section 371 of the Probate Code provides a jury trial. The case approves the decision in *Estate of Black*, supra, 199 Cal. 257, 248 P. 1015, to the effect that as to probate the court's duty is to determine whether a prima facie showing in favor of the validity of the will has been made before submitting the issues to a jury trial. It also approves *Estate of Mollenkopf*, 164 Cal. 576, 129 P. 997, in which the court stated: "It is not disputed that if the written opposition was properly served on petitioner's attorney, and was not filed too late to entitle it to be considered, it was a bar to the admission of the alleged will to probate until disposed of in the manner provided by law. Such disposition involved an opportunity to those interested in the will to answer the opposition, and a trial of the issues thus made, by a jury if either party so requested." 164 Cal. at page 578, 129 P. at page 997.

[4-6] While it may seem anomalous that in proceedings for probate of a will a proponent must first make out a prima facie case before the issues are submitted to the jury to which he is entitled, it is probably a result of the historic denial of juries in probate proceedings. At common law proceedings for the establishment of lost wills were cognizable only in courts of chancery and hence a jury could not be demanded. Originally in California a jury was not permitted in any probate proceeding, even contests of wills. In 1855 the Probate Act was amended to permit a jury trial in will contests before probate. In 1872 section 1330 of the Code of Civil Procedure was adopted. It permitted juries in contests after probate also, but only if the original probate was had without a contest. In *Estate of Dolbeer*, 1908, 153 Cal. 652, at page 657, 96 P. 266, 268, in so limiting the right to a jury, the court said: "It has been held that the right of trial by jury is secured by the Constitution only in cases in which it had previously existed, in the administration of justice according to the course of the common law. Probate

matters belong to ecclesiastical jurisdiction, where a jury was not a right. Such a proceeding is not really an action at law, as defined in the Code.' In re Moore, 72 Cal. 335, 13 P. 880. A contest of a will and proceedings to revoke its probate are special proceedings. *Estate of Joseph*, 118 Cal. 660, 50 P. 768; *Carpenter v. Jones*, 121 Cal. 362, 53 P. 842. It follows, then, in the absence of a statute providing for trial by jury, probate proceedings have always been heard by the court, without the intervention of a jury. Only in those probate proceedings where the statute expressly confers a right to a trial by jury does the right exist. [Citations.]" At the present time in contests of wills both before and after probate a jury is allowable. Probate Code, §§ 371, 382.

The true rule is set forth in *Goodale v. Murray*, 227 Iowa 843, 289 N.W. 450, at page 456, 126 A.L.R. 1121, quoting from *Coulter v. Petersen*, 218 Iowa 512, 255 N.W. 684: "'The question, however, as to the terms of the lost instrument is for the court in the first instance. If the court should find that the proof is insufficient to establish the terms of the lost instrument, the plaintiffs, of course, must fail. If, on the other hand, the court finds that the lost instrument is properly proven and established, then the next question is whether or not the same should be admitted to probate as the last will and testament of the deceased. When this point is reached the matter stands as do all wills when they are offered for probate; that is, the same is subject to contest on any of the recognized grounds of law, and if so contested may be tried to a jury.'" (Emphasis omitted.)

In *Budde v. Superior Court*, 97 Cal.App. 2d 615, 218 P.2d 103, the court held that persons filing written opposition to applications for appointment of guardian of the person and estate of an alleged incompetent were entitled to a jury trial. It reviewed many of the California cases considering the right to a jury in probate proceedings and concluded that the test of this right is whether there is statutory authority for a triable issue of fact in the particular pro-

ceeding. As pointed out hereinbefore, the issues in our case are triable ones for which there is statutory authority.

The petition alleges that the trial judge has stated that petitioners as proponents of the alleged destroyed will are not entitled to have any of the issues tried by a jury and that the judge intends to try all such issues himself. These facts are conceded, respondents contending that petitioners are not entitled to have the issues tried by a jury. They rely principally upon *Estate of Relph*, 192 Cal. 451, 221 P. 361, which is one of the cases considered and explained in *Estate of Black*, supra, 199 Cal. 257, 248 P. 1015. Also, they refer to *Estate of Cazaurang*, 75 Cal.App.2d 217, 170 P.2d 694, and *Estate of Bell*, 58 Cal.App.2d 333, 136 P.2d 804, which held that in probate proceedings jury trials may not be had unless authorized by statute. But, as we have pointed out, and as is pointed out in *Estate of Black*, supra, there is express authorization for the trial of the issues on opposition to the probate of a will. Cases like *Estate of England*, 214 Cal. 298, 5 P.2d 428; *Estate of Land*, 166 Cal. 538, 137 P. 246, and *Estate of Dolbeer*, supra, 153 Cal. 652, 96 P. 266, denying jury trials in certain specified probate proceedings, are not in point.

Respondents contend that petitioners in demanding a jury trial did not comply with Rules of the Superior Court and refer to rule 6 which refers to memorandum to set in civil cases, and to rule 18 which deals with matters in which a party desires a jury trial where the right thereto is not guaranteed by law,—in other words, where the granting of a jury trial is in the discretion of the court. Neither of these situations is the situation here. We do not have the record before us and hence do not know in what manner the jury was demanded. In view of section 371 of the Probate Code which provides that the issues of fact therein mentioned "must be tried by a jury, unless a jury is waived as provided by the Code of Civil Procedure", it is obvious that rules 6 and 18 do not apply.

Let the peremptory writ issue, without prejudice, however, to the determination by

the trial judge whether petitioners can present a prima facie case as set forth in *Estate of Black*, supra, and herein.

PETERS, P. J., and FRED B. WOOD, J., concur.



106 Cal.App.2d 616

LIPMAN et al. v. ASHBURN et al.

Civ. 18269.

District Court of Appeal, Second District,
Division 3, California.

Sept. 25, 1951.

Action by Joshua Lipman, a minor, through his guardian ad litem, David R. Lipman, against John S. Ashburn and others, doing business as Ashburn Bros. Heating Co., and another to recover for injuries sustained when his motorcycle collided with the corporate defendant's truck driven by its agent. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for defendants and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that in absence of a showing as to what plaintiff intended to prove no prejudicial error would be presumed from sustaining objection to the expert testimony.

Judgment affirmed.

1. Appeal and Error ⇨1031(3)

Where objection was sustained to testimony of expert, who had opinion as to speed of motorcycle at time of collision gathered from hypothetical facts, and plaintiff offered only direct evidence as to speed, but failed to state what he expected to prove by expert's testimony and question did not indicate answer, no prejudicial error would be presumed.

2. Trial ⇨63(1)

Party did not have right to withhold testimony forming essential part of case in chief to offer it in rebuttal.

3. Trial ⇨53(2)

Party who has affirmative may not reserve portion of his evidence until opposite

party has exhausted his to negative that offered in first instance, and if he does so, court may refuse to allow him to come in and make out his case after defendant rests.

4. Trial ⚡68(1)

Refusal of trial court to reopen case to permit plaintiff to introduce testimony of a tardy witness, who was under subpoena but had been excused by attorney to appear on request, after once granting delay to permit witness to testify, was not abuse of discretion, particularly in view of fact that testimony was essential part of case in chief.

5. Automobiles ⚡246(60)

In action by motorcyclist against truck driver and his employer for injuries sustained when motorcyclist collided with truck, at intersection, trial court properly refused to give instruction that it was to be presumed that motorcyclist used ordinary care for his own safety, in view of fact that motorcyclist gave full and explicit testimony as to his conduct.

J. George Bragin, Hollywood, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

SHINN, Presiding Justice.

This is an action brought by a minor, through his guardian ad litem, to recover for injuries sustained when his motorcycle collided with a truck of Ashburn Bros. Heating Company driven by its agent Teubner. Verdict and judgment were for the defendants and plaintiff appeals.

The sufficiency of the evidence to justify the verdict is not questioned. The grounds of the appeal are: (1) The exclusion of expert testimony; (2) refusal to reopen the case for the purpose of receiving additional evidence, and (3) refusal of an instruction requested by plaintiff.

The collision occurred at the intersection of Edinburgh Avenue and Fourth Street in the City of Los Angeles. Plaintiff approached the intersection from the south; the truck approached it from the west.

Traffic on Edinburgh was not controlled by a boulevard stop sign at Fourth Street but east and west traffic on Fourth Street was so controlled. Testimony was given by Teubner and another employee who was riding with him that the truck was brought to a stop and proceeded slowly through the intersection. Teubner testified that before he entered the intersection he looked both ways on Edinburgh and saw nothing; when the front of the truck was about the the center of Edinburgh he saw the motorcycle about 75 feet south of the intersection; he applied his brakes immediately and stopped the truck within 8 or 9 feet, when it was struck by the motorcycle on the right side behind the cab. Plaintiff testified that when he was 100 feet from the intersection he saw the truck approaching from the west, assumed it would make the boulevard stop, observed it was not going to stop, speeded up his motorcycle to pass in front of the truck, realized this was not feasible, applied his brakes, endeavored to turn to the right with the truck but did not succeed. He had accelerated the motorcycle "to its full extent." He had been going about 25 miles an hour and was going at least 40 miles an hour when he applied his brakes. Testimony was given by a police officer that the motorcycle skidded 65 feet up to the point of the collision.

[1] After defendants' evidence was closed plaintiff produced, as a witness, Frank C. Lynch, a consulting engineer. Hypothetical facts were stated to the witness which he said were sufficient to enable him to form a scientific opinion as to the speed of the motorcycle. He was asked to state his opinion. An objection was interposed upon numerous grounds and was sustained. Defendants had offered no direct evidence as to the speed of the motorcycle although they had established the length of the skid marks. The only direct evidence as to the speed of the motorcycle was given by plaintiff, namely, that when he applied his brakes he was going at least 40 miles an hour. Plaintiff's hypothetical question assumed that the motorcycle had left skid marks of 65 feet. It was evidently plaintiff's purpose to have the witness estimate the speed of the motorcycle which was in-

licated by the skid marks. But if we assume that the witness should have been allowed to state his opinion the record fails to show prejudicial error. Plaintiff did not, at the time the objection was made nor afterward, state what he expected would be the testimony of the witness. The record leaves us in the dark as to whether the opinion would have supported or contradicted plaintiff's testimony as to his speed. Defendants had offered no expert evidence as to the rate of speed that was indicated by the skid marks. It was incumbent upon plaintiff to state what he expected to prove by the witness. His question did not indicate what the answer would be. It is therefore impossible for this court to know whether the answer would have been favorable to plaintiff, whether it would have been corroborative or contradictory of plaintiff's testimony, and whether its exclusion was either erroneous or prejudicial. Prejudicial error will not be presumed under such circumstances. The rule which applies here was clearly stated in *Brown v. Southern Pacific Co.*, 92 Cal.App. 2d 639, 207 P.2d 632. Appellant's first ground of appeal is therefore untenable.

The next point is that plaintiff's witness, Mrs. Dearing, intended to be used in rebuttal, failed to appear when expected and that the court granted plaintiff insufficient time for her to come to court. On Friday afternoon at adjournment plaintiff announced that his evidence was closed. Defendants' evidence consumed less than the morning session on Monday. An early adjournment was had until 2 o'clock to enable plaintiff's attorney to examine some pictures. It appears that before the opening of the afternoon session plaintiff asked time for the production of an additional witness. The opening of court was deferred for 25 minutes in compliance with plaintiff's request. Plaintiff produced the above mentioned expert witness. After this witness had been excused plaintiff stated that he was expecting another witness, a Mrs. Dearing, and asked a delay of 5 or 10 minutes. Proceedings were suspended for 20 minutes. Further discussion occupied an additional 12 minutes. It appears from the record that Mrs. Dearing finally

appeared in court at 20 minutes to 4. Argument was under way and plaintiff did not ask to call her to the stand. On Tuesday morning plaintiff moved to reopen the case for the receipt of Mrs. Dearing's testimony. The motion was denied. During the foregoing proceedings it was disclosed that Mrs. Dearing was under subpoena by plaintiff but had been excused by plaintiff's counsel, to appear upon request. No statement was made in open court, nor does the record show that the court was advised as to the testimony Mrs. Dearing would give. On plaintiff's motion for a new trial Mrs. Dearing made affidavit that she had witnessed the accident and that the truck made no stop before entering the intersection.

[2] The described proceedings lay within the discretion of the trial court. In the absence of a clear abuse of discretion it cannot be said that justice has miscarried. The trial judge was patient and fair. There is a hazard in excusing a witness to appear on call which counsel should anticipate. Reasonable indulgence on the part of the court upon the failure of a witness to appear when wanted is all that should be expected, and such indulgence was granted in the present case. But even if counsel had stated what he expected to prove by Mrs. Dearing the court would not have been required to delay proceedings for her to appear. Evidence that the truck did not stop before entering the intersection was an essential part of the case in chief. Plaintiff did not have a right to withhold her testimony for the purpose of offering it in rebuttal.

[3, 4] It is well settled that a party who has the affirmative may not reserve a portion of his evidence until the opposite party has exhausted his to negative that offered in the first instance, and if he does so, the court may refuse to allow him to come in and make out his case after the defendant rests (24 Cal.Jur., Trial, secs. 45, 48). Plaintiff had far less claim upon the court's indulgence in delaying proceedings than he would have had if he had endeavored to use Mrs. Dearing's testimony as a part of his case in chief, and she had made a tardy appearance. There was no abuse of discretion.

[5] It was not error to refuse the instruction requested by plaintiff that it was to be presumed that he used ordinary care for his own safety. Plaintiff had given full and explicit testimony as to his conduct. It would have been error to give the instruction. *Ford v. Chesley Transportation Co.*, 101 Cal.App.2d 548, 225 P.2d 997.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



106 Cal.App.2d 612

**MILLER v. MIDWAY FISHING TOOL
CO. et al.**
Civ. 18201.

District Court of Appeal, Second District,
Division 1, California.
Sept. 25, 1951.

Harry L. Miller, employee, brought action against Midway Fishing Tool Co., a corporation, and others, for injuries sustained when part of an oil well handling elevator leased to employer came loose and struck employee. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment for the defendant, and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem., held that evidence of prevailing general custom of oil equipment rental companies to inspect equipment and that defendant company followed custom of the trade, was admissible, though there was no contractual relationship between rental company and employee.

Judgment affirmed.

1. Negligence ⇨124(3)

Evidence of custom of a trade is ordinarily admissible in negligence cases where it has a bearing on either negligence or contributory negligence.

2. Negligence ⇨124(3)

Evidence of custom is received in a negligence case not as proof of, or as sub-

stitute for, the substantive law's standard of conduct, which is due care, but merely to aid jury in determining from that evidence and from all other evidence whether particular conduct of a party does or does not measure up to the legal standard.

3. Bailment ⇨35

In action by employee against oil equipment rental company for injuries sustained when part of an oil well handling elevator leased by company to employer came loose and struck employee, evidence of prevailing general custom of oil equipment rental companies to inspect such equipment and that defendant company followed custom of the trade, was admissible, though there was no contractual relationship between rental company and employee.

4. Appeal and Error ⇨756

Practice of not detailing facts of, and quotations from, cases cited in respondent's brief and argument except to a very minor extent, with cited cases, if not detailed or quoted from, digested and set forth in an appendix to the brief, was commended.

Warren White, Mark F. Jones, and Mark F. Jones, Jr., Los Angeles, for appellant.

Swaffield, Madden & McCarry, Long Beach, Gibson, Dunn & Crutcher, by Norman S. Sterry and Philip C. Sterry, Los Angeles, William B. Clemmer, Los Angeles, of counsel, for respondent.

HANSON, Justice pro tem.

The only question presented by this appeal is whether the trial court erred in receiving evidence as to the customary preliminary inspection made of drilling pipe hoists by oil equipment rental companies at the time the hoists were rented to drilling concerns.

The respondent who was the defendant below is engaged in the business of supplying oil well tools and equipment to oil drilling concerns upon a rental basis. The defendant leased to the employer of appellant what is known in the oil industry as a "handling elevator." It is used to hoist oil well steel casing upwards in an oil derrick so that it can then be lowered into the

well that is being drilled. A part of the "handling elevator" consists of a steel collar to which is attached steel cables. As it is necessary to fit the collar around the pipe to be hoisted the collar is provided with a hinge and directly opposite on the outer side with a latch and pin.

While the elevator was being operated at an oil well by co-employees of the plaintiff the casing came loose when about 30 feet in the air and struck the plaintiff causing severe and permanent injuries. The plaintiff charged that the collar was unsafe for the purpose for which it was leased, in that the inside circumference of the collar was too large to securely hold a seven-inch casing and that various parts of the collar or elevator were worn and in bad repair.

The defense centered about the claim that the casing fell because the collar was either imperfectly latched or not latched at all by the co-employees of plaintiff who were operating the elevator. The jury returned a verdict for the defendant.

In the course of the trial employees of the defendant testified to the manual and visual inspection they gave the elevator and its appliances before it was delivered to the employer of the plaintiff. Thereafter, over the objection of the plaintiff, the defendant was permitted to show by the testimony of numerous witnesses the general custom prevailing in the trade with respect to inspecting such equipment and to show that the defendant followed the custom of the trade.

Shortly stated, appellant contends that the admission of testimony as to the general custom was prejudicial error, that such evidence is inadmissible where there is no contractual relation between the plaintiff and the defendant, and the plaintiff has not assumed the risk.

[1] The rule is well established that evidence of the custom of a trade is ordinarily admissible in negligence cases where it has a bearing on either negligence or contributory negligence. *Fowler v. Key System Transit Lines*, 37 Cal.2d 65, 230 P.2d 339; 38 Am.Jur., Negligence, sec. 317. In *Burke v. John E. Marshall, Inc.*, 42 Cal.App.2d

195, 108 P.2d 738, 743, hearing denied, the court said: "Where the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence of the ordinary practice and custom which is generally followed in the performance of such act under the same or similar circumstances is competent. *Thomas v. Southern Pacific Co.*, 116 Cal.App. 126, 2 P.2d 544; *Hennessey v. Bingham*, 125 Cal. 627, 58 P. 200."

[2] Evidence of custom is received not as proof of, or as a substitute for, the substantive law's standard of conduct, which is due care, but merely to aid the jury in determining from such evidence and all the other evidence in the case whether the particular conduct of a party does or does not measure up to the legal standard. See 2 *Wigmore on Evidence*, 3rd ed., sec. 461.

We come then to the more pointed question in this case which is whether there is an exception to the rule, as appellant contends, in cases which do not arise out of contractual relationships. In support of this contention appellant cites four cases: *Phoenix Assur. Co. v. Texas Holding Co.*, 81 Cal.App. 61, 252 P. 1082; *Carroll v. Central Counties Gas Co.*, 96 Cal.App. 161, 273 P. 875, 274 P. 594; *Home Fire Insurance Co. v. Southwestern Engineering Corp.*, 114 Cal.App. 235, 299 P. 771; *Johnson v. Western Air Express Corp.*, 45 Cal. App.2d 614, 114 P.2d 688. The *Phoenix* is the main case relied on.

[3] In that case the defendant was sued for damages occasioned to chattel property on an adjoining highway caused by the explosion of one of its oil storage tanks. The trial court excluded evidence offered by defendant to show that other oil companies in the field were using the same type of tank because he regarded such mere usage by others as being immaterial. In making that ruling he announced he would permit the defendant to show, if it could, that the use by it of the tank in question comported with good and proper practice among oil men. We think the ruling of the trial court in that case could properly have been sustained on the ground that the question

as it was framed was improper in form or that the evidence of usage offered was limited to too narrow a field and perhaps on other grounds. But we do not think that the evidence could properly be excluded on the ground which seems to be suggested by the appellate court, i. e., that custom or usage is not admissible in cases where there is no contractual relationship between the parties involved. We fail to see that any such distinction can be made on the basis of sound reason and we know of no authority that sustains any such rule.

In view of what we have here said it is not necessary to discuss the Carroll case cited to us by appellant further than to say it cites and purports to follow the rule laid down in the Phoenix case. However, it should be noted that the court based its ruling not only on the theory of the Phoenix case but also upon the fact as it put it that "the specific practice of others cannot be admitted in testimony *as an excuse for the alleged negligent act of the defendant.*" [81 Cal.App. 61, 252 P. 1087.] (Italics supplied.)

As we have pointed out evidence of custom may not be offered for the purpose of "excusing a negligent act" but the same evidence of custom may be offered for the bearing it has to evidence due care or a want of it. Cf. Prosser on Torts, sec. 37.

In the Insurance Co. case it was held that a question propounded to a witness as to custom was improper not only because of the precedent set in the Phoenix case but because no proper foundation had been laid for expert testimony.

The ruling in the Johnson case was not based upon the principle laid down in the Phoenix case.

In view of the conclusion we have reached it is unnecessary to consider the contention made by respondent that a contractual relationship existed between the parties.

[4] In this case the respondent has adopted the procedure of not detailing the facts of, and quotations from, the cases it cites in its brief and argument except to a very minor extent. However, all the cases cited, if not detailed or quoted from

are digested and set forth in an appendix to the brief. Accordingly, we have found it easy to follow the brief and argument and have found the appendix a quick and ready reference where we desired to read in some detail a case cited. We think there is much to commend in the practice here adopted by respondent.

Judgment affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



106 Cal.App.2d 686

KAUFMAN v. BROWN et al.

Civ. 4263.

District Court of Appeal, Fourth District,
California.

Sept. 28, 1951.

Robert H. Kaufman brought action against John W. Brown, and others to recover damages for alleged wrongful arrest and imprisonment. The Superior Court of San Diego County, C. M. Monroe, J., entered a judgment and order adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Griffin, Acting P. J., held that order, entered after final judgment, ordering plaintiff to prepare a full transcript of the testimony, instead of the portion transcribed, was not an appealable order.

Attempted appeal from order dismissed, and judgment affirmed.

I. Appeal and Error $\hookrightarrow$ 607(1)

Where original notice to clerk with respect to transcript contained no statement of points to be raised, and there was no designation therein of portion of oral proceedings to be transcribed, and there was no stipulation of the parties that any portion of oral proceedings be not transcribed, and so-called amended notice to clerk which sought a limited reporter's transcript, was not filed within 10 days after filing notice of appeal as provided by court rule, trial court was within its

rights in refusing to certify the limited reporter's transcript and in ordering a complete transcript of the testimony within prescribed period. Rules on Appeal, rules 4, 4(a).

2. Appeal and Error ⚡371

Court reporter should not be compelled to furnish a transcript without payment of required fee.

3. Appeal and Error ⚡117

Order of trial court after final judgment, ordering plaintiff to prepare a full transcript of the testimony, instead of the portion transcribed, within two weeks from date of order, was not an "appealable order". Code Civ.Proc. § 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

4. Appeal and Error ⚡82(1)

In order that a special order, made after final judgment, be appealable, such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or by staying its execution.

5. Mandamus ⚡57(1)

Mandate is a proper remedy to control questions dealing with record on appeal.

T. T. Crittenden, San Diego, for appellant.

Vincent Whelan, Thomas Whelan, San Diego, for respondents.

GRIFFIN, Acting Presiding Justice.

Plaintiff and appellant brought this action against defendants and respondents for claimed wrongful arrest and imprisonment. On a former appeal from a judgment of dismissal after sustaining demurrers to the complaint without leave to amend, the judgment was reversed. Kaufman v. Brown, 93 Cal.App.2d 508, 209 P.2d 156. The action went to trial, before a jury, upon a second amended complaint, the allegations of which are recited in the former opinion. A judgment of nonsuit resulted as to defendants George, Ulrick,

Besnak and Stearns, and was denied as to the remaining defendants. After trial a verdict and judgment in their favor resulted. On December 29, 1950, plaintiff filed a notice of appeal from the judgment thus entered. On January 8, 1951, counsel for plaintiff gave notice to the clerk of such appeal and requested him to prepare record on appeal to include judgment roll, minutes, and reporter's transcript. On January 18, 1951, plaintiff filed an amended notice requesting the clerk to prepare the record on appeal and to include the judgment roll, minutes and "limited reporter's transcript" of the testimony of John W. Brown, taken under sec. 2055, C.C.P., the testimony of Cyrus Stearns, and the court's instructions to the jury. After the clerk gave notice of the completion of the limited reporter's and clerk's transcripts, defendants, on February 26, 1951, filed objections thereto upon the ground that the reporter's transcript was not a full and correct transcript of the oral proceedings provided for in Rule 4 of Part II, Rules on Appeal, and that plaintiff had not complied with Rule 4, subdivision (b), and requested that plaintiff be required to present a complete transcript. On April 6, 1951, plaintiff filed a motion that he be permitted to amend his notice of appeal and to limit the grounds of appeal permitting him to use the incomplete reporter's transcript previously requested and prepared. The motion and objections thereto were heard on April 6, 1951, and denied. Plaintiff, on April 19, 1951, secured an order from another judge allowing him to proceed in forma pauperis. The trial judge found by order duly signed on April 30, 1951, that a complete transcript of the testimony should be prepared; that it should be accomplished forthwith and submitted for certification to the judge within two weeks of that date. Plaintiff did not secure the completion of such a reporter's transcript. It is from this last-mentioned order that plaintiff, on May 9, 1951, filed his notice of appeal, and states as his grounds that he should be permitted (1) to amend the notice and limit his appeal to three points set forth, using a partial transcript; (2)

to file by the alternate method a bill of exceptions and effect his appeal in that way; and (3) that this court should reverse *Rucker v. Superior Court*, 104 Cal.App. 683, 286 P. 732, and direct the preparation of a full transcript without cost.

[1] The original notice to the clerk contained no statement of the points to be raised and there was no designation therein of the portions of the oral proceedings to be transcribed. There was no stipulation of the parties that any portion of the oral proceedings be not transcribed. The so-called amended notice to the clerk to prepare record on appeal, which sought a limited reporter's transcript involving only the testimony of two witnesses and the court's instructions to the jury, was not filed within ten days after filing notice of appeal, as provided by Rule 4, Rules on Appeal. The trial court was within its rights in refusing to certify the limited reporter's transcript as prepared and in ordering a complete transcript of the testimony within a prescribed period. Rule 4(a), Rules on Appeal; *Western Concrete Pipe Co. v. Grabovich*, 118 Cal.App. 367, 5 P.2d 71; *Darcy v. Moore*, 49 Cal.App.2d 694, 698, 122 P.2d 281.

Instead of preparing the entire record, as ordered, plaintiff subsequently, on June 26, 1951, applied to this court, under Rule 12(a), Rules on Appeal, for permission to augment the record on appeal by transmitting to this court only the limited transcript prepared and which the trial court refused to certify. This application was denied.

After briefs were filed the action was regularly placed on the calendar on its merits. In the argument counsel for plaintiff suggested lack of funds precluded him from obtaining a full reporter's transcript. This court ordered the appeal submitted on its merits. The record before us consists of the clerk's transcript (including the judgment roll) as requested by plaintiff.

[2] In *Rucker v. Superior Court*, supra, the court refused a writ of mandate to compel the court reporter to furnish a transcript without the payment of the required fee. No just cause appears why the rule there adopted should be reversed. See, also, Rule 4(c), Rules on Appeal.

[3, 4] It is respondents' argument that the order of the court ordering plaintiff to prepare a full transcript of the testimony, instead of the portion transcribed, within two weeks from the date of the order, is not an appealable order. This contention must be sustained. Sec. 963, C.C.P. In order that a special order made after final judgment, as contemplated by that section, be appealable, such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or by staying its execution. *Lake v. Harris*, 198 Cal. 85, 243 P. 417.

[5] Mandate is a proper remedy to control questions dealing with the record on appeal. *Darcy v. Moore*, 49 Cal.App.2d 694, 122 P.2d 281; *Cross v. Superior Court*, 104 Cal.App.2d 594, 232 P.2d 255. Since the order involved is not an appealable order, the attempted appeal from it must be dismissed.

The other questions presented in plaintiff's brief are claimed error of the trial court (1) in granting a nonsuit as to certain defendants; (2) in receiving in evidence a certain ordinance; and (3) in erroneously instructing the jury.

There is nothing before this court to consider except the clerk's transcript. Plaintiff has not obtained a complete reporter's transcript, as ordered by the court. The record does not support plaintiff's claim that the trial court erred in respect to the questions presented.

Attempted appeal from the order to prepare complete transcript dismissed. Judgment affirmed.

MUSSELL, J., concurs.

106 Cal.App.2d 669

**PENINSULA PROPERTIES CO., Limited,
et al. v. SANTA CRUZ COUNTY et al.**

Civ. 14938.

District Court of Appeal, First District,
Division 1, California.

Sept. 28, 1951.

Hearing Denied Nov. 26, 1951.

Peninsula Properties Company, Ltd., and others brought action against the County of Santa Cruz and others to have tax deeds issued to the state and tax deeds issued to third party purchasers at tax sales declared invalid, and for declaratory relief, and defendants filed cross-complaints seeking to quiet titles based on tax deeds and to recover rents, issues, and profits. The Trial Court entered a judgment and certain orders adverse to the plaintiffs, and the plaintiffs appealed and filed a petition for writ of supersedeas, and the defendants moved to dismiss the appeals. The District Court of Appeal, Peters, P. J., held that the judgment was merely an interlocutory judgment and not appealable and that the orders were not appealable.

Motion to dismiss appeals granted, and petition for supersedeas denied.

1. Appeal and Error ⇨66

No appeal can be taken from an interlocutory order or judgment unless the order or judgment is designated by statute as being appealable.

2. Statutes ⇨181(I)

If a statute is clear, courts should enforce the legislative intent as disclosed by the statutes.

3. Constitutional Law ⇨70(I)

Courts should not, through the guise of interpretation, make an order appealable that the Legislature intended and provided should not be appealable.

4. Constitutional Law ⇨70(I)

Whether an order shall be deemed interlocutory or final, and whether an interlocutory order shall be appealable, and at what stage of the proceedings it should become appealable, are questions for the Legislature to determine.

5. Appeal and Error ⇨76(I)

The designation of a particular order or judgment as interlocutory by trial court,

is not conclusive, and an appellate court must determine from the substance and effect of the order or judgment whether it is final or interlocutory.

6. Taxation ⇨699

The Legislature has the constitutional power to determine, at least after property is tax-deeded to the state, when privilege of redemption should terminate. Revenue and Taxation Code, §§ 3618 et seq., 3627, 3631.

7. Appeal and Error ⇨80(3)

Judgment providing that plaintiffs take nothing by their action challenging validity of tax deeds issued to the state and to third party purchasers at tax sales and for declaratory relief, and that tax deeds were valid in all respects, that delinquent taxes and assessments, on basis of which deeds were executed, were valid, that title to realty was quieted in the state, and that within 90 days from date of "this interlocutory judgment" if right of redemption has not been previously terminated, redemption may be made by plaintiffs, but that if redemption is not made, then all further right of redemption shall terminate, whereupon a "final judgment" shall be entered, and that the state should have judgment against plaintiffs in certain sums for rents, was an "interlocutory judgment" and not an "appealable judgment" and appeal therefrom would be dismissed. Code Civ.Proc. § 963; Revenue and Taxation Code, §§ 3627, 3631.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Judgment" and "Interlocutory Judgment".

8. Appeal and Error ⇨82(3)

Order refusing to vacate judgment providing that plaintiffs take nothing by their action to have tax deeds issued to the state and to third party purchasers at tax sales declared invalid, and order denying motion for order directing manner of redemption of realty, and order denying plaintiffs' motion for order directing segregation on partial redemption of realty, were not "appealable orders" on ground that they were special orders after final judgment, where alleged final judgment relied on by plaintiffs was an interlocutory judgment and not appealable. Code Civ.Proc. § 963, subd. 2.

Carlyle Miller, Aptos, for petitioner.

June D. Borina, Dist. Atty., Santa Cruz County, Edmund G. Brown, Atty. Gen., E. G. Benard, Deputy, Wyckoff, Gardner, Parker & Boyle, Watsonville, and Lucas, Wyckoff & Miller, Santa Cruz, for respondents.

PETERS, Presiding Justice.

There are pending before this court a petition for a writ of supersedeas filed by the plaintiffs, and motions by defendants to dismiss certain appeals taken by plaintiffs. The key question presented is whether a judgment upholding certain tax deeds to the state and entered by the trial court on January 9, 1951, is or is not an appealable judgment. This turns upon whether that judgment is an interlocutory judgment, or a final judgment within the meaning of section 963 of the Code of Civil Procedure.

The controversy involves some 1100 parcels of land in Santa Cruz County. The plaintiffs have paid none of the special assessments levied against the lots since 1935, and have paid no county taxes since about 1940. In the year 1940 practically all of the parcels were deeded to the state for non-payment of the special assessments. Thus, since 1940, the state has had absolute title to the lots, which title was subject to defeasance if the former owner exercised his privilege of redemption in the manner provided by statute. *People v. Maxfield*, 30 Cal.2d 485, 183 P.2d 897.

Ever since 1935 the plaintiffs have disputed the validity of the special assessments. In 1946 they commenced an action, primarily aimed at testing the validity of these assessments, and the sales and tax deeds based thereon. The complaint is entitled "Complaint to Determine Validity of Tax Sales and Tax Deeds, and for Declaratory Relief," and states five causes of action.

The first cause of action, and the main one here involved, was brought pursuant to Chap. 5.7 of Part 6 of Division 1 of the Revenue and Taxation Code, and challenges the validity of the tax deeds issued to the state. In addition to the county and state, various public taxing agencies and revenue districts were joined as defendants pursu-

ant to the provisions of section 3623 of the Revenue and Taxation Code.

The second, third and fourth causes of action sought to determine the validity of certain tax deeds issued to third party purchasers at tax sales. The third cause of action was dismissed prior to trial.

The fifth cause of action was for declaratory relief, the plaintiffs praying for a judgment declaring their rights and duties and the rights and duties of the public bodies and officials involved in reference to:

A. A certain contract between Peninsula Properties Company, one H. Loomis, and the county of Santa Cruz;

B. The existence of liens upon many of the parcels here involved arising out of the levy in 1930 of special assessments thereon, under the County Improvement Act of 1921, Stats.1921, p. 1658, Chap. 872, and in the manner provided by the Improvement Bond Act of 1915, Stats.1915, p. 1441, Chap. 733;

C. The validity of the sales to the state and the tax deeds issued to it by reason of the failure of plaintiff to pay the installments on the special assessments;

D. An accounting of the redemption fund created by the county treasurer for the payment of the bonds.

Answers and cross-complaints of the various defendants were filed in which the state sought to quiet its titles based on the tax deeds, and the individual defendants sought to quiet their titles to the parcels conveyed to them. In addition, the state, by cross-complaint and pursuant to the provisions of sections 3651 and 3652 of the Revenue and Taxation Code, sought to recover rents, issues and profits allegedly taken by plaintiffs from some of the properties since they were deeded to the state.

The trial was had partly in 1948 and partly in 1950. The trial judge then rendered a memorandum opinion in which he stated that he was of the opinion that all of the tax proceedings involved were regular and valid; that all of the causes of action were barred by the statute of limitations; that any defects in the delinquency proceedings were cured by certain tax validation statutes; and that the

state, on its cross-complaint, was entitled to a judgment against plaintiffs for \$32,-621.22 for rents received by plaintiffs from the tax-deeded lands. Defendants were directed to prepare findings in accordance with this opinion. The opinion is dated September 13, 1950. Findings of fact, conclusions of law and the judgment were signed on January 2, 1951, and the judgment was filed January 9, 1951. The judgment is entitled: "Interlocutory Judgment on the First Count of the Complaint Pursuant to section 3627 Revenue and Taxation Code and Final Judgment on Cross-Complaints and Second, Fourth and Fifth Counts of the Complaint."

On January 5, 1951, plaintiffs secured from the trial court, *ex parte*, an order staying execution of these judgments for ten days after the determination of any motion for a new trial that might be filed. The main purpose of this stay was to try to extend the period in which plaintiffs could redeem, because the judgment, in disposing of the first cause of action, provided, as required by section 3627 of the Revenue and Taxation Code, that plaintiffs had ninety days from the date of the entry of the judgment to redeem, and that, if they did not redeem within that period, the right of redemption was forever lost. This ninety-day period would expire on April 9, 1951.

On February 8, 1951, plaintiffs served a notice of intention to move for a new trial. On March 13, 1951, the plaintiffs, again *ex parte*, secured from the trial court an amended order purporting to stay execution which specifically provided that the period of redemption should not terminate until thirty days after the determination of the motion for a new trial. The defendants thereupon filed a notice of motion for an order vacating this amended order staying execution.

On March 30, 1951, plaintiffs filed exceptions to the findings, a motion to vacate the judgment, a motion for an order directing the manner of redemption, a motion for an order directing segregation on partial redemption of property, and notice of motion for the appointment of a referee. A hearing was had on these various matters

and all of them, including the motion for a new trial, were denied on April 6, 1951.

On April 7, 1951, the plaintiffs filed their notice of appeal from the judgment of January 9, 1951, and from the order denying the motion for a new trial, from the order refusing to vacate the judgment, from the order denying plaintiffs' motion for an order directing the manner of redemption, and from the order denying plaintiffs' motion for an order directing segregation on partial redemption of property.

On this same day—April 7, 1951—the county auditor informed plaintiffs that the period of redemption would expire on April 9, 1951, and that he had been advised that the amended order staying execution beyond that date was void, and for that reason would be disregarded.

On April 9, 1951, plaintiffs filed this petition for a writ of supersedeas, requesting this court to suspend generally the enforcement of the judgment during the hearing of the pending appeals, and specifically to extend their period of redemption pending the hearing of said appeals. This court, after an informal hearing with all counsel, issued an order to show cause why such a writ should not issue, an order preserving the status quo, and an order staying all proceedings in the action (with the exception of the money judgment granted the state) until the final determination of the order to show cause.

On May 7, 1951, defendants filed a notice of motion to dismiss the appeals of plaintiffs from the interlocutory decree upon the first cause of action, and from the orders denying the four motions above enumerated. It is the theory of these motions that the four orders and the interlocutory decree are not appealable. It will be noted that defendants do not seek to dismiss the appeals from that portion of the judgment disposing of the second, fourth or fifth causes of action, nor do they seek to dismiss the appeal from the money judgment secured by the state on its cross-complaint.

The proceedings on the writ of supersedeas and the motions to dismiss have been consolidated for consideration.

The basic question involved is whether the so-called "interlocutory" judgment on the first cause of action is an appealable judgment. Plaintiffs urge that, regardless of its designation, the judgment is, in fact, a final judgment and therefore appealable. The judgment provides the following:

1. That plaintiffs take nothing by their action;

2. That each one of the tax deeds is valid in all respects; that the delinquent taxes and assessments upon the basis of which the deeds were executed are valid in all respects; and that the various funds of the county of Santa Cruz out of which advances were made to the 2-B Bond Redemption Fund are entitled to be first reimbursed out of any surplus that may remain in that fund;

3. That the title to the described properties is quieted in the State of California; that "within ninety (90) days from the date of this Interlocutory Judgment, if the right or privilege of redemption has not been previously terminated, redemption may be made with the usual penalties and costs provided by law; but if redemption is not so made within said ninety (90) day period, then all further right or privilege of redemption shall stop, cease and terminate as to all of said real property, whereupon a final judgment shall be entered which shall recite whether or not said real property has been redeemed within said ninety (90) day period, and as to any of said real property not so redeemed, shall provide that all right or privilege of redemption has been terminated; that defendant State of California is the owner in fee simple absolute thereof;" and that plaintiffs be perpetually enjoined from claiming any interest in said property;

4. That the state have judgment against plaintiffs and cross-defendants in the sum of \$32,621.22, together with \$8,296.91 interest, and costs;

5. That the two individual defendants, Hall and Anderson, have judgment against plaintiffs that said defendants are the owners in fee of certain described property, with a perpetual injunction against plaintiffs, as above.

[1] If this judgment, insofar as it deals with the first cause of action, is interlocutory in nature it is admittedly not appealable. No appeal can be taken from an interlocutory order or judgment unless the order or judgment is designated by statute as being appealable. *Title Ins. & Trust Co. v. California Development Co.*, 159 Cal. 484, 486, 114 P. 838; *Johnson v. Solomons*, 124 Cal.App. 43, 45, 12 P.2d 140; *Krotzer v. Clark*, 178 Cal. 736, 738, 174 P. 657. Section 963 of the Code of Civil Procedure, after providing that an appeal may be taken from "a final judgment entered in an action," then lists certain orders, including certain interlocutory orders, that are appealable. Admittedly, the type of judgment disposing of the first cause of action is not there listed. This portion of the judgment is appealable only if it is "a final judgment" within the meaning of section 963 of the Code of Civil Procedure. So far, the parties agree.

By section 3627 of the Revenue and Taxation Code, the legislature has designated the portion of the judgment here involved as being "interlocutory." That section appears in Chapter 5.7, Division 1, Part 6, of that Code which is entitled "Taxpayer's Action to Contest the Validity of Tax Sale or Tax Deed". Section 3627 provides: "If the taxes and the tax deed, if any, are determined to be valid in all respects, the court shall enter its interlocutory decree, quieting the title of the State under the tax deed. If property tax sold but not tax-deeded, the court shall enter its interlocutory decree determining the validity of the taxes. Within 90 days thereafter, if the right or privilege of redemption has not been previously terminated, redemption may be made with the usual penalties and costs. If redemption is not made within such period all further right or privilege of redemption shall thereupon cease and terminate as to all tax-deeded property. The final decree shall recite whether or not the property has been redeemed within the 90-day period, and if not so redeemed, shall provide that all right or privilege of redemption has been terminated as to tax-deeded property."

Admittedly, the trial court entered the judgment disposing of the first cause of action under this section. It will be noted that the section describes the judgment as an "interlocutory" one, and further, that nothing is said in the section about that judgment being appealable. In this connection section 3627 is to be contrasted with section 3631, another section in the same chapter of the Revenue and Taxation Code. That section provides: "After all necessary steps ordered by the court have been taken, the court shall render its interlocutory decree requiring the payment, within six months after the interlocutory decree becomes a final judgment, of the amount of taxes, computed as of the date of payment, without interest, penalties or costs thereon. The interlocutory decree shall declare that if payment is not made within such six months period, a final decree shall be rendered, quieting the State's title under the tax deed as to tax-deeded property. As to tax sold property which has not been tax-deeded, the interlocutory decree shall declare that, if payment is not made within such six-month period, a final decree shall be rendered, determining the correct amount of taxes due and no redemption shall be made without interest, penalties or costs thereon. *This interlocutory decree is an appealable judgment.* No costs shall be awarded to either party in any action under this chapter. * * *" (Italics added.)

Section 3627 applies to the situation where the taxpayer loses his case in the superior court, while section 3631 is applicable where the taxpayer has been successful in the trial court in securing a ruling that the tax sale or deed is invalid. Both statutes expressly provide that, at the conclusion of the trial, a judgment, designated by the legislature as an "interlocutory" judgment, shall be entered, to be followed by the entry of a "final" judgment. Where the trial court has upheld the validity of the tax sale or deed then, under section 3627, the taxpayer is given ninety days from entry of the "interlocutory" judgment to redeem. At the end of this ninety days, if the property is not redeemed, the right of redemption is lost, unless the taxpayer

can secure a reversal of the "final" judgment then entered. After the ninety days has expired, and pending the appeal, the taxpayer may not redeem. But if the taxpayer is successful in securing an "interlocutory" decree to the effect that the tax sale or deed is invalid, then, under section 3631, the "interlocutory" decree shall set forth the true amount owed and the taxpayer may, within six months "after the interlocutory decree becomes a final judgment," redeem by paying this amount, without interest, penalty or costs. It is expressly provided that this interlocutory decree is appealable.

The statutes involved appear to be quite clear in their wording. The legislature designated the decrees to be entered as "interlocutory" and then, to make its meaning and purpose clear, provided that the interlocutory entered under section 3631 should be appealable. Thus, it would appear that the legislature intended and provided that the interlocutory decree entered under section 3627 should not be appealable.

[2-4] If this be the proper construction of the statutes that is the end of this phase of the case. If the statute is clear the courts should enforce the legislative intent as disclosed by the statutes. The courts cannot, or at least should not, through the guise of interpretation, make an order appealable that the legislature intended and provided should not be appealable. It is for the legislature to determine whether an order shall be deemed interlocutory or final, whether an interlocutory order shall be appealable, and at what stage of the proceedings it should become appealable. As long as the ultimate right of review is preserved, these are matters of legislative and not judicial concern. As this court stated in *Leplat v. Wiles*, 60 Cal. App.2d 83, 86, 140 P.2d 43, 45: "Whether an order or judgment is appealable, and at what stage of the proceedings the order or judgment becomes appealable, are matters of legislative determination. The legislature having spoken, and there being no room for interpretation, the appellate courts, through the guise of interpretation, should not attempt to amend the statute by

judicial mandate. The clarification required must come through the legislative and not through the judicial process."

The plaintiffs concede that the law is as set forth in the Leplat case. But they strenuously urge that section 3627 is ambiguous and must be interpreted. They argue, ably and at length, that the mere designation of the judgment as "interlocutory" in the statute is not conclusive on the courts, and that, regardless of such designation, it is for the courts to determine, from the substance and effect of the decree, whether it is a final or an interlocutory decree. They then argue that, in substance and effect, this so-called interlocutory decree is a final decree and not interlocutory. At least, so it is urged, an ambiguity exists. Based on these premises it is then argued that it is illogical, unjust, unfair and inequitable to preserve the right of redemption where the state is the loser and appeals, and to make that decree appealable, but to cut off the right of redemption where the taxpayer is the loser, and to make that decree not appealable. None of these arguments is sound.

[5] It is undoubtedly the law that where a *trial court* designates a particular order or judgment as "interlocutory," such designation is not conclusive, and that an appellate court must determine from the substance and effect of the order or judgment whether it is final or interlocutory. The label placed upon the order or judgment by the trial court is not conclusive. This principle was stated in *Zappettini v. Buckles*, 167 Cal. 27 at page 33, 138 P. 696, 699, and then the court continued: "The general rule applicable in determining whether a judgment is final or merely interlocutory, as deducible from the authorities, is that, if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only. Mr. Freeman in his work on Judgments says that, if after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, the decree is final." This basic principal has been

stated in many cases. See *Phillips v. Cleaver*, 82 Cal.App.2d 751, 756, 187 P.2d 80; *Caminetti v. Imperial, etc., Life Ins. Co.*, 54 Cal.App.2d 514, 516, 129 P.2d 432; *Lyon v. Goss*, 19 Cal.2d 659, 669—see page 670, 123 P.2d 11 citing many cases.

It is very doubtful that the rule of these cases is applicable to the problem here presented. Here it is the *legislature* that has designated a particular judgment as interlocutory, and it the *legislature* that has used that term in opposition to "final." Moreover, the legislature has, in one section, expressly provided that one type of interlocutory judgment shall be appealable, and in another related section failed to so provide. It is one thing to say that, where a trial court has rendered what is in substance and effect a final judgment, it cannot change the nature of the judgment by labelling it "interlocutory," but quite another thing to say that, where the legislature declares a particular decree to be interlocutory and fails to provide that it shall be appealable, the courts can say that in substance and effect the decree is final and therefore appealable. Since it is for the legislature to determine at what stage of the proceedings the judgment shall become appealable, it would appear clear that when the legislature has expressly provided for the entry of an "interlocutory" decree and for the entry of a "final" decree, it has necessarily declared that the appeal shall be from the final and not from the interlocutory decree. That this must have been the intention of the legislature is made quite clear by the provisions of section 3631, because there it provided for the entry of an interlocutory and then for the entry of a final decree and expressly provided that the interlocutory should be appealable. Thus, even if the so-called "interlocutory" entered pursuant to section 3627 had the attributes of what would normally be a final decree, since the legislature has clearly indicated that the appeal from a decree entered pursuant to section 3627 should be from the decree designated by it as "final" and not from the decree designated by it "interlocutory," that legislative determination is binding upon the courts.

Even if the rule under discussion were applicable to a decree described by the legislature as interlocutory, it is quite doubtful if the decree here involved has sufficient attributes of finality to require a holding that it is a final decree. Plaintiffs emphasize that the decree is supported by findings of fact and conclusions of law, claim that it determines all issues, point out that it quiets title in the state, and decides the obligations of costs. They urge, therefore, that the decree determines every legal issue before the court, and that it leaves no judicial act to be performed by the court. The plaintiffs argue as follows: While the final decree must recite whether or not the property has been redeemed within the ninety days, that is a mere collateral independent matter not at all involved in the issues presented to the trial court. The chapter of the Revenue and Taxation Code involved gives the taxpayer the right to challenge the validity of tax sales or deeds—that is the issue litigated and the issue that will be presented on the appeal. The right of redemption, say plaintiffs, is not the issue litigated. The fact and manner of redemption are merely collateral to the main appeal. These arguments are not convincing. The legislature saw fit to grant the privilege of redemption for ninety days after the entry of the interlocutory decree, and saw fit to require the final decree to ascertain and determine whether redemption had in fact been made. While it is true that the interlocutory determined that the tax sales and deeds were valid, and quieted the titles in the state, the force and effect of such adjudication was conditioned upon the expiration of the ninety-day period, and the entry of a final judgment determining whether the properties had or had not been redeemed. The interlocutory, of course, could not be enforced during this ninety-day period. During that period the effectiveness of the interlocutory was suspended. Thus, whether the taxpayer has or has not redeemed is a basic issue to be determined in the final decree. Redemption is not collateral to the main issue but an integral part of it, and made so by statute. As was said in *City of San Diego*

v. Alpha Securities Corp., 99 Cal.App.2d 246, 249, 221 P.2d 770, 772:

"An examination of the provisions of this judgment [giving a taxpayer the right to redeem] leads us to conclude that it is not *res adjudicata* as to the issues in the instant action and is not a final judgment. It is interlocutory in substance and effect. [Citing three cases.]

"It cannot be determined from the judgment whether the taxpayer would elect to redeem the property under its terms and obviously the title to the lot here involved was not finally adjudicated by the decree." That is precisely true of the present case. Of course, determining whether a valid redemption has or has not been made is a judicial and not a mere ministerial function.

The legal situation is somewhat comparable to that where an action for dissolution and accounting is filed, and the trial court enters its judgment determining all of the issues between the parties except the accounting and orders an accounting by a referee or the court. Such a judgment is interlocutory and not final, and therefore non-appealable. *David v. Goodman*, 89 Cal.App.2d 162, 200 P.2d 568; *Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge No. 9*, 91 Cal.App.2d 582, 205 P.2d 722. Here all the problems involved in determining whether redemptions have been legally made must be determined on the final decree. That these may be complex and certainly may involve judicial questions is demonstrated by the several motions in connection therewith filed by plaintiffs.

We are not impressed with the argument that the statute so construed is illogical, unfair or inequitable. Plaintiffs emphasize and reiterate that the effect of holding that the decree entered pursuant to section 3627 is interlocutory and non-appealable is to cut off the taxpayer's right of redemption ninety days after entry, and to cut off such right during the period of the appeal taken from the final judgment. To thus cut off the right of redemption while plaintiffs are trying to appeal from

the judgment holding the tax deeds to be valid appears to them to be most unfair and unjust. This unfairness is accentuated, according to plaintiffs, by the provisions of section 3631 preserving the right of redemption during the period an appeal by the state is pending.

Such arguments do not tell the entire story. Plaintiffs may appeal from the final judgment adverse to them. They may challenge the correctness of the ruling that the tax sales and deeds were valid. If they are successful on that appeal, then a judgment under section 3631 must be entered, and the taxpayer may redeem during the period provided in that section. It must be remembered that we are dealing with delinquent taxpayers. In the instant case the plaintiffs have refused to pay special assessments levied against their property for a period of sixteen years, and have failed to pay county taxes for eleven years. The amount claimed to be due is close to \$200,000. The properties have been not only sold to the state, but also deeded to the state because of these delinquencies. These deeds, most of which are dated 1940, transferred absolute title to the state, subject only to whatever privilege of redemption the legislature might see fit to grant. After the properties were deeded to the state in 1940 the state could have sold any parcel to third persons, and this would have terminated the right of redemption and left the taxpayer only the right to challenge the validity of the deed. Under the provisions of section 3627 the state has adopted a somewhat similar procedure to terminate the right of redemption, but to preserve the right to challenge the validity of the deed.

The practical effect of sections 3627 and 3631 is this: The state has granted to the taxpayer the privilege of bringing an action to test the validity of tax sales and deeds without first paying the taxes under protest. These sections permit the state to be sued for such purposes. But by these sections the state has placed a statutory limitation on the consent thus granted. The state, by this legislation, has, in effect, said to the taxpayer: "You did not pay your taxes or assessments; you suffered them

to go delinquent, then to sale, and then to deed. You question the validity of the sale and deed. It is fair and just that some proceeding should exist whereby you can challenge such sales and deeds without first paying the taxes or assessments. For that reason we, the state, will consent to be sued. We will grant to you, the taxpayer, the privilege of bringing an action against the state for these purposes. While this action is pending in the trial court we will continue your privilege of redemption. If the trial court determines that the sales and deeds are valid, then, under section 3627, we will even continue your right of redemption for ninety days after the entry of the interlocutory, but at the end of ninety days your privilege of redemption shall terminate. You may appeal from the final judgment, and, if successful on that appeal, then under section 3631 your privilege of redemption shall be revived for the period there provided. But if you lose that appeal your right of redemption has expired. On the other hand, if you win in the trial court and you are successful in securing a ruling that the tax sales and deeds are invalid, and the defect is curable, we, the state, will give you a chance to pay your just taxes without interest, penalties or costs, and we will give you six months after decision to make such payment."

This is not treating the taxpayer unfairly. He has had a long time to pay, and has had the privilege of redeeming for even ninety days after the entry of the interlocutory. If the taxpayer does not like this setup he can always refrain from instituting the action. But if he elects to use this procedure he must do so on the state's own terms.

The history of these sections strongly suggests that the interpretation here given to them is the proper one. Chapter 5.7, Part 6, Division 1 of the Revenue and Taxation Code was first enacted in 1941. Prior to that time there was no procedure by which the taxpayer might sue the county or state to have the validity of taxes or assessments against his property determined without first paying such taxes or assessments. He could, of course, pay the taxes

or assessments under protest and sue for a refund. Or he could wait until the tax lien had been foreclosed and the property deeded to a third person purchaser. He could then contest with that person, by quiet title action usually, the validity of the tax proceedings or deed. If the taxpayer chose this last procedure his right of redemption was terminated upon the sale to a third person and he could only have the property restored to him if he was successful in his litigation with that third person. Pending an appeal in that litigation he had no right to redeem.

In 1937 the Supreme Court decided the case of *Otis v. Los Angeles County*, 9 Cal. 2d 366, 70 P.2d 633. That decision had the legal effect of invalidating most tax deeds in Los Angeles County. This decision resulted in several pieces of legislation. In the extra session of 1938 the legislature first enacted the present provisions of Chapter 5, Part 6, Division 1 of the Revenue and Taxation Code as part of the Political Code, Extra Session, 1938, Chap. 23, p. 110, granting to the *state* the privilege of commencing an action to determine the validity of tax deeds. This procedure apparently was not entirely successful, because in 1941 the legislature, by an urgency measure, added Chap. 5.7 to the Revenue and Taxation Code granting to the taxpayer the privilege of bringing an action to have determined the validity of tax deeds. Stats. of 1941, Chap. 293, p. 1436. In 1943, also by an urgency measure, the scope of the remedy was enlarged to make it available to tax sales as well as to tax deeds. Stats. of 1943, Chap. 709, p. 2463; see *Wong Him v. City and County of San Francisco*, 87 Cal.App.2d 80, 196 P.2d 135. The statements of fact which the legislature recorded in support of both the 1941 and 1943 urgency measures are substantially the same. The 1941 statement, after first reciting that numerous tax levies have been held to be invalid, states: "Many taxpayers are willing to pay these delinquent taxes and to redeem properties from tax sale if a quick and immediate remedy can be afforded for so doing. No such remedy now exists which has met with the approval of title companies and attorneys for pub-

lic bodies. It is estimated that large amounts of delinquent taxes, necessary to the continued welfare of the fiscal systems of local governments, will be immediately paid upon the adoption of a quick and simple remedy by which such tax liabilities can be determined in an action brought by the taxpayer. It is essential that such remedy be adopted and become effective at the earliest possible time." Stats. of 1941 at p. 1440.

The 1943 statement was of the same tenor. Stats. of 1943 at p. 2465.

As part of this same general tax legislation the law-making body also passed several tax validating acts. Stats. of 1943, Chap. 458, p. 1993, Gen.Laws, Act 8443; Stats. of 1945, Chap. 1134, p. 2176, Gen. Laws, Act 8443a; Stats. of 1947, Chap. 605, p. 1615, Gen.Laws, Act 8443b; see, generally, *Wall v. State of California*, 73 Cal.App.2d 838, 167 P.2d 740; *Elbert, Ltd. v. Nolan*, 87 Cal.App.2d 24, 196 P.2d 88; *Howard v. Judson*, 86 Cal.App.2d 128, 194 P.2d 138; *Barrett v. Brown*, 26 Cal.2d 328, 158 P.2d 567.

This background suggests, and the whole tenor of Chap. 5.7 of the Revenue and Taxation Code demonstrates, that there was no legislative inadvertence in providing that there should be no appeal from an interlocutory decree under section 3627, while expressly providing for such an appeal under section 3631. The legislative history shows a legislative intent and policy of fixing definite periods for terminating the privilege of redemption. As already pointed out, the delinquent taxpayer had the absolute right of redemption until deeds were issued to the state in 1940. The state could have cut off, by appropriate legislation, the privilege of redemption thereafter. But the state saw fit to grant the privilege of redemption thereafter until the property was sold to a third person, or until the taxpayer saw fit to institute an action under Chap. 5.7, and even then granted him the privilege of redemption while that action was pending in the trial court and for ninety days after a decision upholding the tax sale or deed. But where the tax sale or deed is held by the trial court to be invalid, the legislature saw fit to allow

the state to appeal from the interlocutory and to preserve the privilege of redemption in the meantime. Such procedure is fair and logical, and is neither discriminatory nor inequitable.

[6] Such interpretation is in accord with the modern policy adopted by the legislature and courts towards the delinquent taxpayer. The early cases expressed great concern over the so-called rights and privileges of the delinquent taxpayer, and the courts leaned over backwards to preserve these rights and privileges. The result was that some taxpayers, on questionable technicalities, were able to avoid their just obligation to pay their taxes and assessments, thus increasing the burdens of those who did pay. These cases, many of them, overlooked the duty of the taxpayer to assume his just proportion of the costs of government. The modern cases and statutes have remedied this oversight. While preserving the right and the privilege of redemption for reasonable periods, these cases and statutes recognize that, in fairness to the other taxpayers and to the government, these rights should have definite termination points. That is the philosophy of section 3627. The legislature has the constitutional power to determine, at least after property is tax-decided to the state, when the privilege of redemption should terminate. Once the legislature has spoken, the courts should not try to extend the period of redemption by forced, technical and unreasonable constructions of the applicable statute.

[7] For these reasons the purported appeal from the interlocutory judgment of January 9th must be dismissed, that judgment not being appealable.

[8] The motion to dismiss is also directed to appeals taken from the order denying the motion for a new trial, from the order refusing to vacate the judgment, from the order denying the motion for an order directing the manner of redemption, and from the order denying plaintiffs' motion for an order directing segregation on partial redemption of property. Plaintiffs concede that the order denying the motion

for a new trial is not appealable and must be dismissed. As to the other orders, it is their main theory that these are special orders after final judgment, and therefore appealable under section 963, subd. 2, of the Code of Civil Procedure. The "final" judgment mainly relied upon is the judgment already held in this opinion to be interlocutory and not final. This being so, such orders are not special orders after final judgment, but orders entered before final judgment. As such, they are not separately appealable but reviewable on appeal from the final judgment under section 956 of the Code of Civil Procedure. If these orders, on such review, are found to have been in error, the final decree would have to be reversed and the parties would then have the legal right to proceed from the point where error, if it exists, first came into the proceeding. *Steen v. City of Los Angeles*, 31 Cal.2d 542, 547, 190 P.2d 937.

The plaintiffs also seek to defend the appealability of these orders on the theory that the judgment in disposing of the fifth cause of action—declaratory relief—is final, and these orders, so it is claimed, were entered after that judgment was entered. Therefore, so it is contended, these orders are special orders after that final judgment and appealable. The argument is unsound. Counsel cannot, by joining an action for declaratory relief with one brought under Chapter 5.7 of the Revenue and Taxation Code, make the interlocutory judgment appealable. The questioned orders were all directed to securing an interpretation of that portion of the interlocutory judgment dealing with redemption. They cannot be distorted into orders seeking an interpretation of the declaratory portions of the judgment.

For the foregoing reasons the petition for supersedeas is denied and the motion to dismiss the appeals granted. The stay order heretofore issued is continued in effect until when, as, and if this opinion becomes final, in which event it is terminated.

BRAY, and FRED B. WOOD, JJ., concur.

106 Cal.App.2d 630

**AMERICAN AUTO. INS. CO. v. AMERICAN
FIDELITY & CASUALTY CO. OF
RICHMOND, VA., et al.**

Civ. 18289.

District Court of Appeal, Second District,
Division 3, California.

Sept. 26, 1951.

Rehearing Denied Oct. 23, 1951.

American Automobile Insurance Company, a Missouri corporation, brought an action for declaratory relief against American Fidelity and Casualty Company of Richmond, Virginia, a Virginia corporation, and others, for determination whether under a motor vehicle liability policy named defendant was liable for damages caused by its insured arising out of use of motor vehicle, or whether plaintiff was liable under policy issued by it insuring operators of oil terminal against liability imposed for damages arising out of maintenance of terminal but excluding any loss or damage arising out of operation, maintenance or use of motor vehicles. The Superior Court of Los Angeles County, Otto J. Emme, J., rendered judgment declaring that named defendant was liable under its motor vehicle liability policy and named defendant appealed. The District Court of Appeal, Vallée, J., held that where damages for which claims were presented to insured arose out of escape of Diesel oil into harbor waters from partially open intake riser while oil was being pumped from insured's truck into connected intake riser, running oil to intake riser was integral part of unloading process and was covered by defendant's policy insuring against liability imposed on insured for damages arising out of ownership, maintenance and use of motor vehicles, including use of motor vehicles and loading and unloading thereof.

Affirmed.

1. Insurance ⇨434

Where defendant insurer's policy insured against liability imposed on operator of oil terminal by loss or damages arising out of ownership, maintenance and use of motor vehicles and provided that use of automobiles was for commercial purposes, and term "use" included loading and unloading thereof, provision "loading and unloading" was intended to expand meaning of term "use" of motor vehicles in defendant's policy to cover all activities of operator of

terminal while acting as commercial truckmen and in making of deliveries as such.

2. Evidence ⇨20(1)

As a matter of common knowledge, "commercial delivery" includes taking articles from their usual place of storage or assembly to place of destination and turning them over to control or possession of purchaser or receiver, and although a delivery may be made by depositing things on sidewalk or on platform or other convenient place, normally, delivery is not completed until deliverer has finished his handling of article, has completed his assignment or task of putting articles into possession of receiving party.

3. Insurance ⇨434

Where defendant insurer's policy provided for payment of damages because of injury to property caused by accident arising out of use of insured's motor vehicles, policy did not require that injury be direct and proximate result, in any strict legal sense of that term, of use of motor vehicle covered by policy.

4. Insurance ⇨434

Where damages for which claims were presented to insurers arose out of escape of Diesel oil into harbor waters from partially open intake riser while oil was being pumped from insured's truck into connected intake riser at insured's marine terminal, and defendant insurer's policy made it liable for damages because of injury to property caused by accident arising out of use of motor vehicle, including loading and unloading, accident fell within coverage of "loading and unloading" provision of policy, since accident occurred while unloading was in progress and before oil had come to rest in storage tank, its ultimate destination.

McBain & Morgan, Angus C. McBain, Los Angeles, for appellant.

Parker, Stanbury & Reese, J. H. Peckham, Jr., Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant American Fidelity and Casualty Company from a judgment in a declaratory relief action decreeing that

under a motor vehicle liability policy it was liable for damages caused by its assured arising out of the use of a motor vehicle.

Exeter Oil Co., Ltd., a corporation, and two of its affiliated enterprises (all referred to as Exeter), operated an oil terminal in the Los Angeles Harbor area. Plaintiff's policy insured Exeter against liability imposed upon it by law for damages arising out of the ownership, maintenance and use of its property, both real and personal, at its marine terminal, but specifically excluded any loss or damage arising out of the operation, maintenance or use of its motor vehicles. (It is conceded that in excluding loss or damage arising out of the operation, maintenance or use of motor vehicles, plaintiff was excluding loss or damage arising out of the loading or unloading of motor vehicles.) Defendant-appellant's policy insured Exeter against liability imposed upon it by law for damages arising out of the ownership, maintenance and use of its motor vehicles. It contained the following provision: "The purposes for which the automobile is to be used are Commercial * * * (b) The term 'commercial' is defined as use principally in the business occupation of the named insured * * * (c) Use of the automobile for the purposes stated includes the loading and unloading thereof." The occupation of insured was listed as "Commercial Truckmen."

On June 15, 1947, and while both policies were in force, a quantity of Diesel oil escaped from a partially open valve on the unloading rack of Exeter's marine terminal, spilled into the waters of the harbor, and caused damages for which claims have been presented to Exeter. Exeter has requested that plaintiff and defendant pay these claims.

The circumstances surrounding the escape of the Diesel oil were established at the trial by the following stipulated facts: The unloading rack was a stationary part of the terminal, with a pair of intake risers, A-1 and B-2, for unloading Diesel oil. The risers, with intake valves, were joined to an underground pipe which conducted oil entering the risers to storage tanks. A hose was attached to each intake riser, and in unloading a truck or trailer was attached

to an outlet on the truck or trailer. A pump on the loading rack, operated by an employee of Exeter known as a pumper, was used to pump oil from trucks and trailers to the storage tanks. When the intake riser hose was connected to a truck or trailer, it was the practice of the driver thereof to open the valve on the truck or trailer when told to do so by the pumper. At the same time the pumper opened the valves on the intake risers and put the pump in operation. As unloading neared completion it was the practice of the driver to assume a position on top of the truck or trailer where he could look through the open dome and, as the truck or trailer emptied or sucked air, turn off the valve, whereupon the pumper would turn off the valve on the intake riser and stop the pump.

Approximately one-half to one hour before the accident, a tank truck and trailer, owned by Exeter and carrying Diesel oil, was unloaded as was the practice through intake risers A-1 and B-2. After unloading, the truck and trailer drove away. A half hour later a tractor and semi-trailer, owned by Exeter, driven by its employee, and covered by defendant's policy, arrived with a load of Diesel oil. The semi-trailer only was to be unloaded. The driver connected the hose from intake riser A-1 with the metal outlet on the semi-trailer and, when told to do so by the pumper, opened the valve on the trailer. At the same time, the pumper opened the valve on intake A-1 and put the pump in operation. The two men then went to a shack some 20 feet away and some minutes later, while the unloading was proceeding, noticed Diesel oil running from the hose on intake riser B-2. It was this oil which drained into the harbor and caused the damages for which claims have been filed. The pumper had, apparently, failed to entirely close the valve on intake riser B-2 after the unloading of the truck and trailer which preceded the semi-trailer, and the oil which was pumped from the semi-trailer through intake riser A-1 entered the pipe joining intake risers A-1 and B-2 and was forced through the B-2 open valve.

The superintendent of the terminal testified that it was not possible for oil to

run out of the storage tanks because of a check valve in the line, and that if any oil spill occurred during an unloading operation the oil could come only from the unloading of the truck. There was testimony that the oil which leaked "spilled during the process of the unloading" of the semi-trailer.

Plaintiff filed the present action for declaratory relief, seeking to have determined whether both of the insurance policies, or only one of them, covered the claims for damages. The court found that any loss arising as a result of the accident, occurred during the unloading of the oil from Exeter's semi-trailer, and concluded that its liability for the damages caused by the overflow was covered by defendant's, and not by plaintiff's, policy.

Defendant contends the evidence does not support the finding that the damages were caused during the unloading of the semi-trailer, arguing that the oil had been delivered to the marine terminal when it entered the intake valve provided to receive the oil for the pipe line; that it was the use and maintenance of the terminal's properties while transporting oil from the unloading rack to the storage tanks, which caused the escape of the oil and, therefore, any damages caused thereby were not covered by its policy but were covered by plaintiff's policy.

Counsel have cited no case in which the scope of a "loading and unloading" provision in an insurance contract, similar to the one involved here, has been considered by the California courts, and so far as

we have been able to ascertain the case is one of first impression in this State. The provision has, however, been considered by courts in other jurisdictions, with the result that there is a decided conflict with respect to the construction to be given the "loading and unloading" provision. Generally speaking, in determining whether the accident occurred during the unloading of a motor vehicle within the meaning of a "loading or unloading" provision in a liability policy, the courts have adopted one of two theories, the "coming to rest" or the "complete operation" doctrine.

Of the two, the "coming to rest" doctrine gives the more limited construction to the "loading and unloading" provision. Under this doctrine, "unloading" includes only the actual removing or lifting of the article from the motor vehicle up to the moment when it has actually come to rest and has started on its course to be delivered by other powers and forces independent of the motor vehicle, and the motor vehicle itself is no longer connected with the process of unloading. The motor vehicle is then said to be no longer in use.¹

Under the "complete operation" doctrine, which is the broader of the two, "unloading" is regarded as embracing all the operations which are required in any specific situation to effect a completed delivery of the article. For practical purposes, this doctrine makes no distinction between "unloading" and "delivery."²

It has uniformly been held that the "loading and unloading" provision in insurance contracts, such as involved here, is one of

1. *Stammer v. Kitzmiller*, 226 Wis. 348, 276 N.W. 629, 631; *American Casualty Co. v. Fisher*, 195 Ga. 136, 23 S.E.2d 395, 144 A.L.R. 533, followed in *Fisher v. American Casualty Co.*, 68 Ga.App. 806, 24 S.E.2d 229; *St. Paul Mercury Indemnity Co. v. Standard Accident Ins. Co.*, 216 Minn. 103, 11 N.W.2d 794; *Ferry v. Protective Indemnity Co.*, 155 Pa. Super. 266, 38 A.2d 493; *Handley v. Oakley*, 10 Wash.2d 396, 116 P.2d 833; *Maryland Casualty Co. v. United Corporation*, D.C.Mass.1940, 35 F.Supp. 570, 572; *Zurich General Accident, etc., Co. v. American Mut. Liability Ins. Co.*, 118 N.J.L. 317, 192 A. 387, 388; Anno: 160

A.L.R. 1259, 1264; see, also, *The Lawyer and Law Notes*, Spring Issue, 1948, p. 21.

2. *State ex rel. Butte Brewing Co. v. District Court, etc.*, 110 Mont. 250, 100 P. 2d 932, 934; *Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co.*, 108 Utah 500, 161 P.2d 423, 428, 160 A.L.R. 1251; *Turteltaub v. Hardware Mut. Casualty Co.*, 62 A.2d 830, 834, 26 N.J.Misc. 316; *Wheeler v. London Guarantee & Accident Co.*, 292 Pa. 156, 140 A. 855; *Washington Assur. Corp. v. Maher*, 31 Del.Co.R., Pa., 575; *B. & D. Motor Lines v. Citizens Casualty Co.*, 181 Misc. 985, 43 N.Y.S.2d 486, 487-488, affirmed

extension. It expands, rather than limits, the term "the use of" the motor vehicle somewhat beyond its usual connotation so as to bring within the policy some acts in which the motor vehicle itself does not play any part.³

In *Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co.*, 108 Utah 500, 161 P.2d 423, at page 427, 160 A.L.R. 1251, the court adopted the "complete operations" doctrine, and reviewed at great length many of the cases cited here, and others, and from them formulated the following rules:

"1. The intention of the parties to the insurance contract should be kept constantly in mind by the court in determining the scope of coverage brought within 'loading and unloading' clauses or 'ownership, maintenance and operation' clauses.

"2. Loading and unloading include more than mere placing the goods on the truck or removal of the goods from the truck, so that when they are taken directly from the truck, and in one continuous operation carried into the customer's place of business, they are still in the process of being unloaded when set down therein.

"3. There must be some causal relationship between the use of the insured vehicle as a vehicle and the accident for which recovery is sought."

The court concluded, 161 P.2d at page 428: "that the proper rule of construction of policies such as here involved is that the mission, or transaction, or function being performed by the insured's employees at the time of the accident is the controlling ele-

ment in determining whether the situation from which the accident occurred is included in loading and unloading. The job being performed here, that part of the insured's business functioning at the time of the accident was that of making a proper commercial delivery. The policy of plaintiff included and the policy of defendant excluded the business of making commercial deliveries. Both policies treat the 'use of the truck' as expanded to cover all activities involved not only in transporting and hauling, but in doing all things in getting the articles onto the truck and off the truck, which were necessary and proper in making and completing the commercial delivery of the goods—all things which insured's employees were required to do in making delivery of the beer, and in which the truck was involved as one of the media of transport."

[1,2] Since plaintiff's policy expressly excluded from its coverage losses arising out of the use of motor vehicles (in so doing it excluded any loss or damage arising out of the loading or unloading thereof), and since defendant's policy expressly included in its coverage all losses arising out of the use of motor vehicles, including the "loading and unloading" thereof, the conclusion is inescapable that the provision "loading and unloading" was intended to expand the meaning of the term "use" of the motor vehicles in defendant's policy to cover all activities of Exeter while acting as "Commercial Truckmen" and in the making of deliveries as such. As a matter of common knowledge, "commercial delivery" includes

267 App.Div. 955, 48 N.Y.S.2d 472, leave to appeal denied, 268 App.Div. 755, 49 N.Y.S.2d 274; *Krasilovsky Bros. Trucking Corp. v. Maryland Casualty Co.*, City Ct., 54 N.Y.S.2d 60; *Schmidt v. Utilities Ins. Co.*, 353 Mo. 213, 182 S.W.2d 181, 154 A.L.R. 1088; *Maryland Casualty Co. v. Cassetty*, 6 Cir., 119 F.2d 602, 604; *St. Paul Mercury Indemnity Co. v. Crow*, 5 Cir., 164 F.2d 270; *Maryland Casualty Co. v. Tighe*, D.C., 29 F.Supp. 69, 70-71, affirmed 9 Cir., 115 F.2d 297; *Connecticut Indemnity Co. v. Lee*, 1 Cir., 168 F.2d 420, 425; *Connecticut Indemnity Co. v. Lee*, D.C., 74 F.Supp. 353; *Maryland Casualty Co. v. Dalton Coal & Material Co.*, 8 Cir., 184 F.2d 181, 182;

Coulter v. American Employers' Ins. Co., 333 Ill.App. 631, 78 N.E.2d 131, 135-136; *London Guarantee & Accident Co. v. C. B. White & Bros.*, 188 Va. 195, 49 S.E. 2d 254, 258-259; Anno: 160 A.L.R. 1259, 1267; see, also, *The Lawyer and Law Notes*, Spring Issue, 1948, p. 21.

3. *Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co.*, 108 Utah 500, 161 P.2d 423, 424, 160 A.L.R. 1251; *Washington Assur. Corp. v. Maher*, 31 Del.Co. R., Pa., 575; *Ferry v. Protective Indemnity Co.*, 155 Pa.Super. 266, 38 A.2d 493, 494; *Connecticut Indemnity Co. v. Lee*, 1 Cir., 168 F.2d 420, 425; 7 Appleman, Insurance, § 4322, p. 92; Anno: 160 A.L.R. 1259, 1263.

"taking the articles from their usual place of storage or assembly to the place of destination and turning them over to the control or possession of the purchaser or receiver. Sometimes delivery may be made by depositing things on the sidewalk or on a platform or other convenient place. That, however, is usually indicated by the custom of the business or agreement of the parties. Normally a delivery is not completed until the deliveror has finished his handling of the article, has completed his assignment or task of putting the articles into the possession of the receiving party." *Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co.*, supra, 108 Utah 500, 161 P.2d 423, 428.

Necessarily, no general rule can be laid down as to when an accident arises out of the "unloading" of a vehicle, but each case must be separately considered according to the particular facts involved.⁴

In *St. Paul Mercury Indemnity Co. v. Crow*, 5 Cir., 164 F.2d 270, it was held that an accident which occurred while delivering fuel oil from a truck to a storage tank by means of a five-gallon can and funnel, which were carried on the truck as part of its equipment, arose out of the use or unloading of the truck. The tank overflowed, oil ran out, ignited, and burned a sawmill. In *General Accident, etc., Corp. v. Hanley Oil Co.*, 321 Mass. 72, 72 N.E.2d 1, 171 A.L.R. 497, it was held that the accident occurred during the unloading of a truck by means of a hose, which was a part of the equipment of the truck and which was connected to the fill pipe of a storage tank. Oil pumped into the tank through the hose, overflowed, ignited about three hours after the truck had left, and burned a house.

[3] Defendant makes much of the fact that the intake risers and pump were a part of the loading rack, a stationary part of the terminal, and that the accident was, as it asserts, proximately caused by the negligence of the pumper in charge there-

of. Under defendant's policy it is liable for damages because of injury to property caused by accident and arising out of the use of the motor vehicle. Such a policy does not require that the injury be a direct and proximate result, in any strict legal sense of that term, of the use of the motor vehicle covered by the policy. *Schmidt v. Utilities Ins. Co.*, 353 Mo. 213, 182 S.W.2d 181, 183, 154 A.L.R. 1088; *Merchants Company v. Hartford Accident & Indemnity Co.*, 187 Miss. 301, 308, 188 So. 571, 192 So. 566; *Panhandle Steel Products Co. v. Fidelity Union Casualty Co.*, Tex.Civ.App., 23 S.W.2d 799; 7 *Appleman, Insurance Law & Practice*, § 4317.

The question whether the accident occurred during the unloading of the trailer is not answered by saying, as does defendant, that the driver of the truck and semi-trailer was not negligent and that the pumper was negligent, and that, therefore, the leakage of oil occurred in the maintenance and use of the unloading rack, and did not occur in the unloading of the trailer. The question is whether use of the unloading rack was part of the operation of unloading the trailer. Unloading is the removing of the load or the part of load that is being unloaded from the time that operation is started until that operation is completed. Running the oil from the trailer through the intake riser into the storage tank was not an act separate from and independent of the use of the trailer, but a step attached to its use and necessary to accomplish the purpose for which the trailer was being used. The ultimate purpose was to deliver the oil into the storage tank. Only by running the oil through the intake riser could the mission of the trailer be accomplished and its use be made effective. Running the oil through the intake riser was an integral part of the unloading process and it was covered by defendant's policy.

[4] Irrespective of whether the "complete operation" doctrine or the "coming

4. *American Oil & Supply Co. v. United States Casualty Co.*, 18 A.2d 257, 259, 19 N.J.Misc. 7; *Franklin Co-op. Creamery Ass'n v. Employers' Liability Assur. Corp.*, 200 Minn. 230, 273 N.W. 809, 810;

235 P.2d—41½

Turteltaub v. Hardware Mut. Casualty Co., 62 A.2d 830, 832; 26 N.J.Misc. 316; *Connecticut Indemnity Co. v. Lee*, D.C., 74 F.Supp. 353, 359; 7 *Appleman Insurance*, § 4322, p. 92.

to rest" doctrine is applied, it is clear from the foregoing that the accident falls within the coverage of the "loading and unloading" provision of defendant's policy since the accident occurred while unloading was in progress and before the oil had come to rest in the storage tank, its ultimate destination.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



106 Cal.App.2d 663

DALE v. PALMER et ux.

Civ. 7953.

District Court of Appeal, Third District,
California.

Sept. 27, 1951.

Rehearing Denied Oct. 26, 1951.

Hearing Denied Nov. 21, 1951.

Herbert R. Dale, an individual doing business under the firm name and style of the Dale Real Estate Company, brought action against Peter Palmer and Olive Palmer (his wife) to recover damages for breach of an agreement providing for the exclusive listing of certain homes then under construction by defendants. The Superior Court of Sacramento County, Malcolm C. Glenn, J., entered a judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, Peek, J., held that agreement was void as violative of the provision of the Business and Professions Code authorizing commissioner to revoke a real estate license where the licensee is guilty of the practice of claiming compensation or commission where such agreement does not contain a definite, specified date of final and complete termination.

Judgment reversed.

Brokers ⇐7

Contract between real estate broker and contractor that in consideration for services of broker in securing financing for contractor, contractor agreed to list all houses built by him with broker, and that such listing would start automatically when construction began and continue exclusive-

ly and irrevocably until 30 days after notice of completion had been filed, was void as violating provision of the Business and Professions Code that commissioner may revoke a real estate license where licensee is guilty of practice of claiming commissions where the agreement does not contain a definite, specified date of final and complete termination. Business and Professions Code, § 10176(f).

Lewis & Lewis, Sacramento, for appellants.

Pease & Lally, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by defendants from a judgment in favor of the plaintiff in an action for damages for breach of an agreement providing for the exclusive listing of certain homes then under construction.

In April, 1947, respondent and appellant Peter Palmer entered into the following agreement:

"In consideration of securing the services of the Dale Real Estate Co. to arrange construction financing for the undersigned contractor and personally introducing him to the manager of the lending agency the contractor agrees to list all houses built by him and financed through this lending institution with the Dale Real Estate Co. Said listing to automatically start when construction begins and continue exclusively and irrevocably with said agent until thirty days after notice of completion has been filed. The commission for selling each house shall be five per cent of the selling price. The selling price shall not exceed the higher of two limits, namely: F.H.A. or Federal G.I. This contract shall remain in full force and effect for a period of one year and all houses started during that period shall become a part of this agreement.

"(Signed) Peter Palmer

Contractor"

"Carlton E. Owen

Herbert R. Dale

Witnesses"

Within the following year construction was begun on seven houses, for one of which respondent procured a purchaser and effected a sale, receiving a commission therefor. Shortly thereafter a dispute arose between the parties as to the purchase price to be set for the sale of the remaining houses, and as to the manner in which the respondent had handled the first transaction. Said appellant discharged respondent, obtained the services of another realtor, and, subsequent to the filing of this action, sold the remaining six houses. Respondent commenced this suit for damages for anticipatory breach of the listing agreement, praying damages in the amount of five per cent of the sale price of each house. The trial court found that Peter Palmer had repudiated the above agreement, refused to let respondent sell any of the remaining houses, and engaged another real estate broker to sell the houses. The court further found that respondent was entitled to a commission of five per cent of the purchase price for which the six houses were actually sold, and awarded damages accordingly.

Appellants contend that the agreement here involved is unenforceable, being in violation of section 10176, subdivision (f), of the Business and Professions Code. That section provides, in part, as follows:

"The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee within the immediately preceding three years, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

* * * * *

"(f) The practice of claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to sell, buy or exchange real estate for compensation or commission where such agreement

Cal.Rep. 235-236 P.2d-21

does not contain a definite, specified date of final and complete termination."

Appellants also contend that the agreement in the present case fails to contain a "definite, specified date of final and complete termination" within the meaning of the said subdivision (f).

In the case of *Castleman v. Scudder*, 81 Cal.App.2d 737, 185 P.2d 35, 36, this court considered precisely the same question with regard to a nearly identical provision in section 10301, subdivision (f), of the Business and Professions Code. Section 10301, establishes as a ground for the suspension or revocation of a business opportunity broker's license, "(f) The practice of claiming or demanding a fee * * * under any exclusive agreement * * * where such agreement does not contain a *definite, specified date of final and complete termination*." (Emphasis added.) There the petitioners sought review of the action of the real estate commissioner in revoking a business opportunity broker's license. The agreements into which the parties had entered contained the clause: "This agency shall continue 30 days from date hereof and thereafter until three days have elapsed after receipt of written notice from the Owner, terminating this agency, sent by registered mail, or delivered in person to said agent." We held that the agreements failed to provide a definite, specified date of termination, and in so doing we stated: "The statute does not refer to a *method* of computation of the termination date upon the happening of some future event, but rather to the failure to set forth a definite specified *date* of final and complete termination. * * * By its particular wording section 10301 (f) can be construed only to denote a definite date of termination specifically set forth in a contract at the time of its execution by the owner. An interpretation such as is contended for by petitioners if adopted would only perpetuate the very indefinite feature which the legislature has said is contrary to the general public welfare." The agreement under consideration in the present case is subject to the same defect. The final termination date can be computed only by reference to the happening of a future event.

In other words, the agreement does not contain a definite, specified date of termination. Because of the similarity in the two code sections, there can be no doubt but that the reasoning of the Castleman case applies equally to section 10176 (f) of the Business and Professions Code. Neither is our conclusion that the contract here involved does not contain the required specified date of termination in any way altered by the holding of the District Court of Appeal in the recent case of *Lowe v. Loyd*, 93 Cal.App.2d 684, 209 P.2d 851. There the authorization to sell was to terminate automatically six months following 90 days from the date of the agreement. The final termination date was definite, specified, and in no way dependent upon the happening of some future event.

The remaining question then is whether or not the agreement is thereby rendered void. In *Smith v. Bach*, 183 Cal 259, 262, 191 P. 14, 15, the applicable rule is stated as follows: "The general rule controlling in cases of this character is that, where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se*, or merely *malum prohibitum*. A statute * * * prohibiting the making of contracts, except in a certain manner, *ipso facto* makes them void if made in any other way. 13 Cyc. 351; 13 Corpus Juris, p. 410. The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. This general rule finds support in the decisions of this state. *Berka v. Woodward*, 125 Cal. 127, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31, and cases cited; *Bentley v. Hurlburt*, * * * [153 Cal. 796, 96 P. 890]." Furthermore, where the statute imposes a penalty for the doing of an act, even though it does not expressly prohibit it or make the act void, a contract founded upon such act is void. *California Delta Farms v. Chinese American Farms*, 207 Cal. 298, 278 P. 227. Thus since that portion of section 10176 of the Business and Professions Code which authorizes the

real estate commissioner to forfeit the license of a broker or salesman is highly penal in nature, *Schomig v. Keiser*, 189 Cal. 596, 209 P. 550, it is immaterial that the imposition of the penalty may rest within the discretion of the commissioner, or that no penalty was imposed for the acts here involved. The contract founded upon the illegal act was void *ab initio*, *Smith v. Bach*, supra, and cannot thereafter be rendered valid by the fact that no penalty was actually imposed for the doing of the illegal act.

But respondent argues that the present agreement does not come within the purview of the code section because it is not a listing contract, but rather an agreement to list in the future. Subdivision (f) refers to "any exclusive agreement authorizing or employing a licensee to sell * * *." (Emphasis added.) Under the provisions of this agreement, already set forth, the appellant agreed to list all houses built by him, the listing to start automatically when construction begins. There can be no question but that under the agreement respondent became employed to sell all the houses in question. Clearly, it is the type of contract contemplated by subdivision (f).

Since we have concluded that the agreement here sued upon is void, being in contravention of section 10176 of the Business and Professions Code, and since no circumstances appear which would bring the case within any of the exceptions to the rule that a party to an illegal contract cannot come into court to enforce rights arising out of the illegal transaction, *Franklin v. Nat. C. Goldstone Agency*, 33 Cal.2d 628, 204 P.2d 37, it follows that the respondent is not entitled to damages. It is unnecessary to consider, therefore, the other contentions raised by the appellants pertaining to the alleged bad faith of the respondent, and the alleged failure of the contract to contain any formula for arriving at a definite purchase price.

Judgment is reversed.

VAN DYKE, J., and SCHOTTKY, J.
pro tem., concur.

Hearing denied; SHENK, CARTER,
and SCHAUER, JJ., dissenting.

CLIFFORD v. RUOCCO.

Civ. 4259.

District Court of Appeal, Fourth District,
California.

Sept. 25, 1951.

Rehearing Denied Oct. 22, 1951.

Hearing Granted Nov. 19, 1951.*

Action by Mary R. Clifford against R. T. Ruocco for personal injuries sustained by plaintiff when involved in intersection accident while riding in automobile owned and operated by defendant. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment on verdict for plaintiff, but plaintiff appealed on ground of inadequacy of damages. The District Court of Appeal, Mussell, J., held that award of \$1,500 for small scalp wound, injury to left leg over shin bone resulting in some adhesion of tissue, and bruises to left side and left thigh, necessitating incisions to remove liquid mass formed thereon was not inadequate.

Judgment affirmed.

1. Automobiles ⇨244(20, 36)

In action by occupant of automobile against owner-driver for injuries sustained in intersection accident which occurred when driver failed to heed red light and collided with another vehicle, evidence sustained finding that occupant was passenger and that defendant was negligent and that such negligence had been proximate cause of accident and passenger's injuries.

2. Damages ⇨208(1)

Trial ⇨139(1), 149(1)

Problems of weight and sufficiency of evidence and credibility of witnesses and of award of damages are primarily matters for determination by jury.

3. New Trial ⇨9, 72, 75(1)

On motion for new trial it becomes duty of trial judge to again weigh evidence and to sufficiently measure credibility of witnesses and to consider adequacy or inadequacy of amount of damages awarded, and if he finds damages to be inadequate, it is his duty to grant new trial either generally, or upon special issue of amount of damages.

4. Appeal and Error ⇨1004(1)

Determination by jury on question of damages will be sustained on appeal except

* Subsequent opinion 246 P.2d 651.

when amount of award indicates passion, prejudice or corruption on part of jury.

5. Damages ⇨130(4)

Award of \$1,500 to plaintiff who had sustained slight scalp wound and injury to left leg over shin bone resulting in adhesion of tissue and bruises to left side and left thigh which thereafter necessitated an incision to remove liquid mass, was not inadequate, even though plaintiff had introduced evidence of special damages, consisting of hospital and doctor bills, over \$700 in excess of amount of award.

6. New Trial ⇨161(1)

Where \$1500 verdict was not insufficient as matter of law, and defendant consented to an increase to \$2000, denial of new trial was not an abuse of discretion.

Edgar B. Harvey, San Diego and Henry F. Walker, Los Angeles, for appellant.

McInnis & Hamilton, by John W. McInnis, San Diego, for respondent.

MUSSELL, Justice.

Plaintiff brought this action to recover damages for injuries sustained by her in an intersection accident while she was riding in an automobile owned and operated by defendant R. T. Ruocco. A jury returned a verdict in favor of plaintiff in the sum of \$1,500. She appeals from the judgment thereupon entered, claiming that the damages awarded are inadequate and that the trial court erred in denying her motion for a new trial on condition that the defendant offer to pay a larger sum than that awarded by the jury.

The questions involved are: (1) Whether the verdict and judgment are supported by substantial evidence; and (2) Whether the trial court abused its discretion in denying plaintiff's motion for a new trial. We conclude that the first question must be answered in the affirmative and the second in the negative.

Plaintiff was employed in San Diego and had arranged with defendant and his wife, who lived several miles from the city, to live with them until she secured an apart-

ment. On the morning of January 19, 1950, defendant was taking plaintiff to a bus stop in El Cajon, so that she could catch the bus to her place of employment, when he failed to see the "red" traffic light at an intersection and drove his car in a southerly direction into another vehicle crossing the street from the east.

[1] The jury expressly found that plaintiff was a passenger and the evidence is ample to sustain that finding and the implied findings that defendant was negligent and that his negligence was a proximate cause of the accident and plaintiff's injuries.

Plaintiff's motion for a new trial is based principally upon the claimed insufficiency of the evidence to justify the verdict in so far as it relates to the amount of damages awarded.

Plaintiff sustained a scalp wound, which at the time of trial was barely visible, and an injury to her left leg over the shin bone, resulting in some adhesion of the tissue. There was no evidence of bone fracture, however. Plaintiff sustained bruises to her left side and a deep bruising of the tissue of the left thigh, necessitating an incision to remove a liquid mass which had formed in the bruised tissue. This thigh injury did not heal as expected and a second operation was performed on October 26, 1950. Dr. Gallagher, a physician called by the plaintiff, testified that this wound eventually healed but that plaintiff suffered some pain and discomfort by reason of adhesions. He stated that plaintiff would probably need another operation, the reasonable cost of which would be the sum of \$300. The doctor charged plaintiff \$700 for his services and testified that his charges were reasonable.

Evidence was introduced as to the following items of "special damages":

Ambulance	\$ 10.00
Dr. Randolph	20.00
La Mesa County Hospital.....	46.17
Dr. Gallagher	700.00
Mercy Hospital (2/1-2/9).....	78.35
Mercy Hospital (3/29-4/3).....	95.20
Mercy Hospital (10/25-11/6)...	209.70

Loss of earnings (12-1/2 weeks)	750.00
Future operative cost.....	300.00

Total \$2,209.43

[2-4] Plaintiff argues that the amount awarded by the jury was less than the special damages proved and was therefore inadequate. In considering this question we must bear in mind the firmly established rules that the jury is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses; that the question of the award of damages and the amount is primarily one for the jury; that on a motion for a new trial it becomes the duty of the trial judge to again weigh the evidence and to sufficiently measure the credibility of the witnesses; that in so doing it is also his duty to consider the adequacy or inadequacy of the amount of damages awarded; that if he finds the damages inadequate, it is his duty to grant a new trial either generally or upon the special issue of the amount of damages. There is no fixed standard by which we may determine the exact amount of money that will compensate one for an injury and in the absence of such a standard or precise rule, the assessment of the amount of general damages, to a large extent, must be left to the good sense and sound discretion of the jury. It is only when the amount of the award indicates passion, prejudice or corruption on the part of the jury that an appellate court can interfere with the amount of an award. *Sassano v. Roullard*, 27 Cal.App.2d 372, 373-374-375, 81 P.2d 213.

As was said in *Gersick v. Shilling*, 97 Cal.App.2d 641, 645, 218 P.2d 583, 586: "The question as to the amount of damages is a question of fact. In the first instance, it is for the jury to fix the amount of damages, and secondly, for the trial judge, on a motion for a new trial, to pass on the question of adequacy. Whether the contention is that the damages fixed by the jury are too high or too low, the determination of that question rests largely in the discretion of the trial judge. The appellate court has not seen or heard the witnesses, and has no power to pass upon their cred-

ibility. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered."

[5] In the instant case, damages having been awarded in a lump sum, there is no indication of the actual amounts allowed for each item of special damages claimed. The jury may have believed that the amount charged by Dr. Gallagher for his services was excessive and may have allowed much less for that item. Likewise, the jury may have believed that the item of \$300 for a future operation of plaintiff was excessive or that such an operation was entirely unnecessary. The jury may also have made a deduction from the amount charged for loss of earnings. Under these circumstances, we cannot say that there was no award made for general damages nor can we say that the award actually made was less than the special damages alleged and sufficiently proved. There is no indication in the record of passion, prejudice or corruption upon the part of the jury and we cannot say that the evidence demonstrates that the award made by it is insufficient as a matter of law.

Much is said in the briefs relative to the trial court's comments made at the hearing on the motion for a new trial concerning conditions inserted in the order which he made denying the motion. The order provided "That if, within ten days from the date hereof, defendant shall file herein a written offer to pay to plaintiff the sum of \$2,000 in full satisfaction of all claims involved in the above entitled cause, then plaintiff's motion for a new trial herein

shall be denied. Should defendant fail to file such written offer within said period of time, then plaintiff's motion for a new trial herein shall be granted upon all of the issues." The defendant filed his "Consent to Additur" wherein it was provided that "The defendant * * * hereby consents to pay to plaintiff * * * the total sum of \$2,000 in full payment and satisfaction of all claims and causes of action involved in the above entitled cause now pending in the above entitled court." Following the filing of the said consent by the defendant, plaintiff filed a notice declining to accept the sum of \$2,000 in full satisfaction of all said claims and the trial court thereupon denied the motion for a new trial.

[6] At the hearing on the motion the court remarked that the doctor's bill was "Pretty high for what he said he did," and the attorney for plaintiff replied "It is pretty strong." The court then stated he didn't "Take too much stock in the gravity of plaintiff's injuries." The trial judge further stated that had the matter been tried without a jury, he would have awarded a sum in excess of the verdict rendered. He apparently endeavored to increase the award of the jury by the imposition of conditions which were not acceptable to plaintiff. The result was that the motion for new trial was denied and the jury's verdict was undisturbed by the trial court. Under the circumstances presented, we are unable to say that the trial court abused its discretion in refusing to grant a new trial. Since the verdict of the jury was not affected by the order refusing the new trial, it becomes unnecessary to consider or pass upon the question of the power of the court to modify the verdict.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

106 Cal.App.2d 578

GRISWOLD v. HOLLYWOOD TURF CLUB et al.
Civ. 18286.

District Court of Appeal, Second District,
Division 3, California.
Sept. 19, 1951.

Action by Eugene L. Griswold against Hollywood Turf Club, etc., and others, for damages for alleged malicious prosecution, false imprisonment and assault and battery. The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered judgment granting certain defendants a new trial and denying plaintiff's motions for new trial, to vacate portion of judgment, and for mistrial and plaintiff appealed from the judgment and all orders made. The District Court of Appeal, Shinn, P. J., held that where patron, who appeared at turf clubhouse premises in soiled working clothes, was conducting himself properly, actions of guards who admittedly forcibly ejected patron constituted an assault and battery.

Judgment affirmed in part and reversed in part.

1. Judgment ⇨235, 306

Where form of verdict given to jury contained instruction to draw a line through the name of any defendant not to be included in verdict, defendants through whose names lines were drawn were entitled to judgment, and failure to enter judgment for them was properly corrected as a clerical error.

2. Corporations ⇨423

In absence of evidence of authorization of acts constituting assault and battery or knowledge and ratification by officers of turf club of conduct of individuals who engaged in acts of violence against patron, turf club could not be held liable.

3. Malicious Prosecution ⇨74

New Trial ⇨162(1)

In patron's action against turf club and police officer for malicious prosecution, false imprisonment and assault and battery, where jury awarded \$7,500 exemplary damages to patron on assault and battery charge, court's order granting new trial

unless patron would accept \$500 as exemplary damages was proper.

4. Malicious Prosecution ⇨74

In patron's action against turf club and police officer for malicious prosecution, granting of new trial, after verdict for patron, was not improper, in view of fact that evidence would have justified a verdict for turf club and police officer.

5. False Imprisonment ⇨31

Malicious Prosecution ⇨64(1)

In patron's action against security agency, proprietor of agency and agency guard for malicious prosecution and false imprisonment, evidence was sufficient to sustain verdicts in favor of defendants.

6. Appeal and Error ⇨702(1)

Where appellant failed to furnish instructions on which motion for new trial was predicated, District Court of Appeal could not determine whether instructions constituted prejudicial error.

7. Assault and Battery ⇨2

Where patron, who appeared at turf clubhouse premises in soiled working clothes, was conducting himself properly, actions of guards who admittedly attempted to forcibly eject patron constituted an assault and battery.

8. Assault and Battery ⇨35

In patron's action against security agency, proprietor of agency and police officer for assault and battery, evidence was sufficient to sustain acquittal of officer.

9. New Trial ⇨8

In patron's action against turf club, security agency, proprietor of agency, and agency guards for malicious prosecution, false imprisonment and assault and battery, where orders as to certain guards who had not been served were mere dismissals, denial of patron's motion for new trial as to such guards was not error.

10. Assault and Battery ⇨42

In patron's action against turf club and police officers for assault and battery, where evidence indicated certain police officer came upon scene late, endeavored to quiet participants, and was drawn into fight,

granting of nonsuit as to police officer was not error.

William H. Haupt and George W. Lawrence, Inglewood, for appellant.

Freston & Files, Los Angeles, Ralph E. Lewis, Gordon L. Files, Los Angeles, of counsel, for respondents.

SHINN, Presiding Justice.

Plaintiff was forcibly evicted from the race course of Hollywood Turf Club, arrested, charged with breach of the peace, tried and acquitted. He sued the Turf Club and certain others for malicious prosecution, false imprisonment, and assault and battery. Plaintiff is a plastering contractor. On a summer afternoon in 1947 he was admitted to the track as a paying customer. He entered the exclusive club house premises with friends who, he testified, had bought a club house ticket for him. He did his betting unmolested until shortly after the seventh race. He had not dressed up for the occasion; he had on the clothes of a working man and his appearance excited the suspicion of a member of the track's Security Police, one Stern. This guard asked him to show a club house ticket stub which he did not have. (These are usually thrown away by persons entering the club house gate.) Plaintiff endeavored to persuade the guard that he had entered on a ticket, but did not succeed. The guard grabbed him and attempted to forcibly eject him from the club house premises. They went through the gate and a scuffle occurred, either after plaintiff had reentered or was attempting to reenter the club house premises. Inside the gate Stern attempted to force plaintiff to the outside and plaintiff resisted. Other guards came, held him, tripped him to the ground, tore his clothes, broke his glasses, handcuffed him and placed him under arrest. There was no conflict in the evidence as to the treatment of plaintiff thus described. He was taken to a police substation on the Turf Club premises, later to the Inglewood police station, released on bail, charged with breach of the peace, tried and acquitted.

The alleged offense for which plaintiff was placed under arrest consisted of fighting and offering to fight, and using bad language. The private officers involved testified that while plaintiff was being handcuffed he said: "You bastards are all alike," and used other expressions of a similar nature, which might be expected of an uninhibited and articulate citizen under the circumstances. As plaintiff was taken to the police substation, curious bystanders followed. Two strange women appeared in an outer room of the station, and other persons, including women, sensing excitement, were peeking through the station door to see and hear what went on. It was claimed that plaintiff, at the station, offered to whip any of the officers if the handcuffs were removed, and used language similar to that previously mentioned, which presumably shocked the sensibilities of the curious onlookers. All of this was charged to be a violation of section 415 of the Penal Code, enacted in 1872, amended 1877-8, p. 117.

Plaintiff sued the Turf Club, defendants Long, an Inglewood Police officer, Jones, a Hawthorne Police officer (who was on vacation and working for the Turf Club), Security Service Agency, Williams, a proprietor of the agency, Patton, Arrojo and Stern, guards furnished by the agency to the Turf Club. He charged them all with liability under each of the three counts of the complaint. Arrojo and Stern were not served and the action was dismissed as to them on plaintiff's motion and a nonsuit was granted as to defendant Patton, and as to Long on the assault and battery charge. The case was tried to a jury. One form of verdict furnished the jury was in favor of plaintiff on the malicious prosecution charge and against the Turf Club, Security Service Agency, Williams, Jones and Long; another was in favor of plaintiff and against each of the same defendants on the false imprisonment count, and a third was in favor of plaintiff on the assault and battery count against the defendants other than defendant Long. Each of the forms contained the following: "(Draw a line through the name of any defendant not to be included in this verdict.)" In each verdict lines were drawn through the

names Security Service Agency, Raymond H. Williams and Robert E. Jones. The verdict for malicious prosecution was against the Turf Club and Long for \$1,995 damages and no punitive damages; the verdict for false imprisonment was against the Turf Club and Long for "nil" damages and "nil" punitive damages; the verdict for assault and battery was against the Turf Club alone for "nil" damages and \$7,500 punitive damages. The court refused to accept the verdicts, and after instructions and deliberation the jury changed the malicious prosecution verdict to \$1,895 damages and "nil" punitive damages, and changed the assault and battery verdict to \$100 damages and \$7,500 punitive damages. No change was made as to the defendants whose names had been crossed out. Judgment was entered in favor of plaintiff in accordance with the verdicts but not in favor of any of the defendants whose names had been deleted from the forms of verdict. The Turf Club and Long, considering themselves aggrieved, made a motion for a new trial. The Security Agency, Williams and Jones made a motion to amend the judgment so that it would run in their favor. Plaintiff made several motions. First he moved for a new trial as to all defendants appearing in the action on the false imprisonment count, the assault and battery count and the malicious prosecution count; then he moved to vacate a portion of the judgment and for a mistrial as to Security Service Agency, Williams and Jones, on the false imprisonment count, and a mistrial as to the Turf Club for the reason that the jury had not found the extent of the damage suffered by reason of the false imprisonment. He also moved to restore Arrojo and Stern as defendants.

The court granted the motion of the Turf Club and Long for a new trial, specifying insufficiency of the evidence, with the proviso that if plaintiff would accept a reduction of the exemplary damages from \$7,500 to \$500 the motion would be denied. Plaintiff refused to accept the reduction. The court amended the judgment by an order reciting that the failure to enter judgment in favor of Security Service Agency, Jones and Williams, was a clerical error.

Plaintiff's motions were denied. Plaintiff appeals from the judgment, and from all orders made, whether appealable or non-appealable.

[1] First, with respect to the amendment of the judgment: The only reasonable interpretation of the verdicts is that they were intended by the jury to be in favor of Security Service Agency, Williams and Jones, as to all causes of action. Their names were crossed out in accordance with instructions contained in the verdicts. According to the verdicts the judgment should have been in their favor. The error was found to be a clerical one and the judgment was properly corrected.

[2-4] The order granting a new trial to the Turf Club and Long may not be disturbed. So far as the exemplary damages are concerned there was no evidence of authorization of the acts constituting assault and battery or knowledge and ratification by the officers of the corporation of any conduct of the individuals who engaged in the acts of violence. *McInerney v. United Railroads*, 50 Cal.App. 538, 547, 195 P. 958; *Alterauge v. Los Angeles Turf Club*, 97 Cal.App.2d 735, 218 P.2d 802. An alternative ground would be that the verdict for exemplary damages was deemed to be excessive, in which case it would have been the duty of the court to reduce the amount, as was done, or to grant a new trial outright as to the Turf Club and Long. *Koyer v. McComber*, 12 Cal.2d 175, 82 P.2d 941; *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 170 P.2d 465; *Williams v. Field Transportation Co.*, 28 Cal.2d 696, 171 P.2d 722. Another sufficient reason is that the evidence would have justified a verdict for these defendants on the malicious prosecution count. As to the false imprisonment count the judgment went against plaintiff and he sought a new trial of that issue.

[5] It was not error to deny plaintiff's motion for a new trial as to Security Service Agency, Williams and Jones, on the malicious prosecution and false imprisonment counts. There was evidence sufficient to support the verdict for the three defendants upon these charges. The court no

doubt believed the verdict to be in accord with the preponderance of the evidence. Therefore, the denial of plaintiff's motion with respect to these defendants on the malicious prosecution and false imprisonment counts is conclusive upon appeal insofar as the evidence is concerned.

[6] It appears to be the contention of plaintiff that his motion for a new trial as to the three last mentioned defendants on the malicious prosecution and false imprisonment charges should have been granted on the ground of error in giving and refusing instructions. Most of the questions discussed were rendered moot by the granting of a new trial as to the Turf Club and Long. Appellant has not furnished us with all the instructions that were given and we are therefore not in a position to determine whether the instructions as a whole support the claims of prejudicial error. *Foster v. Young*, 172 Cal. 317, 321, 156 P. 476; *Podesta v. Delucchi*, 100 Cal.App. 249, 279 P. 1061. Plaintiff has not shown any reason for disturbance of the order denying his motion for a new trial as to the three last named defendants on the malicious prosecution and false imprisonment charges.

[7,8] However, we are of the opinion that error was committed in denying plaintiff's motion for a new trial as to Security Service Agency and Williams upon the charge of assault and battery. The guard, Stern, and another guard, Arrojo, were employees of Security, engaged in the performance of their duties. Whether they were also employees of the Turf Club is not presently material. These two guards admittedly attempted to forcibly eject plaintiff from the club house premises. The evidence as to the manner in which this was attempted was in conflict only as to immaterial details. The guards had a single purpose. Plaintiff was strictly on the defensive, albeit with a vigor that was giving the guards "a bad time." Surely a plasterer has as good a right as a gambler to attend the races without molestation. See *Orloff v. Los Angeles Turf Club*, 36 Cal.2d 734, 227 P.2d 449. Griswold did not

start the trouble; he only wanted to be let alone. The guards offered no plausible excuse for their efforts to eject him. He had been conducting himself properly. If it be granted, as Stern testified, that plaintiff was in need of a shave and was bare-headed, and that his trousers were soiled (they were the working clothes of a plasterer), no reason existed for throwing him off the club house premises. There was no conflict in the evidence upon these essentials of the assault and battery committed in a violent and aggravated manner. The guards simply undertook to force Griswold off the premises, first, because one of them did not approve of his appearance, and then, because he resisted. Their actions were unlawful and Griswold had a right to resist. We entertain no doubt about it. Such is not the case, however, with respect to officer Jones, who came upon the scene late, endeavored to quiet the participants, and was drawn into what had developed into a fight. There was ample evidence to acquit him of the charge of assault and battery.

[9,10] There was no error in refusing a new trial as to Stern and Arrojo, who had not been served. The orders as to them were merely dismissals. Neither was it error to grant a nonsuit as to Long on the assault and battery charge.

The judgment of nonsuit is affirmed as to defendant Long on the assault and battery charge; it is affirmed as to Security Service Agency, Williams and Jones, on the malicious prosecution and false imprisonment charges; the judgment and order are reversed as to Security Service Agency and Williams, and affirmed as to Jones, on the assault and battery charge; the order granting a new trial as to Hollywood Turf Club and Long is affirmed; all attempted appeals not otherwise disposed of are dismissed; appellant to recover costs of appeal.

WOOD, J., concurs.

VALLÉE, J., being disqualified, did not participate.

106 Cal.App.2d 647

PEOPLE v. GALLOW.

Cr. 2272.

District Court of Appeal, Third District,
California.

Sept. 26, 1951.

Virginia Louise Gallow was convicted in the Superior Court of Sacramento County, Grover W. Bedeau, J., of manslaughter, and she appealed. The District Court of Appeal, Adams, P. J., held that whether defendant acted in self-defense or not was for jury under the evidence.

Judgment and order denying new trial affirmed.

1. Homicide ☞250

Evidence sustained manslaughter conviction.

2. Homicide ☞276

In manslaughter prosecution, question whether defendant acted in self-defense or not was for jury under the evidence. Pen. Code, § 197.

3. Criminal Law ☞1144(13), 1159(2)

On appeal by defendant, evidence must be considered in aspect most favorable to the prosecution, and, if there is evidence to support the judgment, it must be affirmed.

John L. Brannely, Joseph C. Lavelle,
Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Gail A.
Strader, Deputy, for respondent.

ADAMS, Presiding Justice.

Virginia Louise Gallow was convicted by a jury of manslaughter of one Dorothy Gibson. A motion for a new trial was denied. Defendant has appealed, her sole contention being that the evidence is insufficient to support the verdict as it shows that the defendant acted only in self-defense.

The evidence shows that defendant and her two children lived about a block away from the place where decedent lived with her mother; that defendant missed her purse and was told by her young son Cal-

vin that he had taken it but had given it to Virdell, the small brother of decedent. knowing that the two boys had played together that afternoon at her mother's home which was next door to the home of decedent, defendant went to her mother's home to search for the purse. Not finding it there she returned to her own home, after a demonstration of temper in front of decedent's home, put an ice pick in her pocket, and, with Calvin, returned to decedent's home. There she engaged in an argument with Dorothy Gibson in which each berated the other. Mrs. Newsome, mother of decedent, told defendant to leave, but this defendant refused to do, and her argument with decedent continued. The latter finally slapped defendant, whereupon, according to witnesses, the two women "came together," wrestled on the sidewalk and in the yard, finally falling over a hedge, with decedent on top of defendant. As decedent did not arise, her mother, who was called from the house by the children, pulled her off of defendant, whereupon the latter got up and retreated to her own home. Decedent was taken into her mother's house and on arrival of a police officer appeared to be dead. An autopsy revealed that she had been stabbed seven times, five of the wounds being somewhat superficial, but one, which caused the death, had penetrated the heart. The autopsy surgeon said that the wounds were apparently caused by a rounded object and that they suggested such an instrument as an ice pick; that the penetration which caused the death was at least four inches deep, and that great force was used to drive the weapon, as it penetrated a rib before entering the heart; and that the wound probably resulted in cardiac failure within a few seconds, and death a minute or two later.

Defendant at the trial contended that she acted in self-defense—that decedent was choking her—but there was evidence to the contrary. One witness testified that during the struggle between the two women Dorothy exclaimed, "No, you don't," or words to that effect, at which time defendant was seen to have some object which she changed from one hand to the

other, indicating that she was attempting to use some means of injuring decedent. There was also evidence that after the two had fallen to the ground defendant said, "Get up off of me." The length of the struggle indicates that defendant made no effort to retreat, and the testimony of police officers who examined her stated that they observed no indication that she had been choked, and that she made no complaint about choking. She admitted at the trial that she had struck decedent with the ice pick, although when taken into custody she denied any knowledge of an ice pick.

[1,2] We are satisfied that there is ample evidence in the record to support the verdict, and that it cannot be said as a matter of law that the homicide was committed by defendant in self-defense. Whether she acted in self-defense or not was for the jury to determine from the evidence before it. Section 197 of the Penal Code provides that where a defendant was the assailant, or where the defendant and the victim of a homicide had been engaged in mutual combat, the defendant must show that he really and in good faith endeavored to decline any further struggle before the homicide was committed.

[3] On appeal by a defendant the evidence must be considered in the aspect

most favorable to the prosecution, and if there is evidence to support the judgment it must be affirmed. *People v. Torrillo*, 60 Cal.App.2d 755, 757, 141 P.2d 472; *People v. Milo*, 89 Cal.App.2d 705, 707, 201 P.2d 556.

This court, in *People v. McDonnel*, 94 Cal.App.2d 885, 888, 211 P.2d 910, 912, said: "The question of whether the defendant as a reasonable man, was justified in believing, under the circumstances of this case, that he was then threatened with imminent danger so as to justify the use of a deadly weapon in necessary self-defense is a problem for the sole determination of the jury. *People v. Zuckerman*, 56 Cal.App.2d 366, 374, 132 P.2d 545. The implied finding of the jury upon that issue was adverse to the contention of the defendant. With that conclusion we may not interfere * * *." Also see *People v. Rilarcosa*, 19 Cal.App.2d 537, 539, 65 P.2d 1325, which quoted from *People v. Miller*, 114 Cal.App. 293, 299, 299 P. 742; and *People v. Mesa*, 121 Cal.App. 345, 349, 8 P.2d 920.

The judgment and order denying a new trial are and each of them is hereby affirmed.

SCHOTTKY, J. pro tem. and VAN DYKE, J., concur.

SUPERIOR INS. CO. v. SUPERIOR COURT
IN AND FOR LOS ANGELES COUNTY.

L. A. 21924.

Supreme Court of California, in Bank.

Sept. 25, 1951.

Rehearing Denied Oct. 22, 1951.

The Superior Insurance Company, a Texas corporation, and Paul Witten, petitioned for a writ of mandate requiring the Superior Court of the State of California, in and for the County of Los Angeles, Sally Priscilla Hays, real party in interest, to vacate an order for perpetuation of testimony and to quash a subpoena duces tecum issued in connection therewith. The Supreme Court, Schaurer, J., held that where applicant, who expected to be party plaintiff in action against insurance company and insured to enforce payment of judgment which was expected to be recovered in pending personal injury action, expected to prove in deposition of company and insured the existence of automobile casualty insurance contracts for protection against liability for personal injuries and property damage and provisions of insurance policies, including effective dates and amounts of insurance, applicant laid a sufficient basis for issuance of order providing for perpetuation of testimony and production of insurance policies.

Alternative writ of mandate discharged and peremptory writ denied.

Edmonds and Traynor, JJ., dissented.

Prior opinion 226 P.2d 365.

1. Mandamus ⇐40, 53

Mandamus is a proper remedy to compel Superior Court to vacate an order for perpetuation of testimony and to quash subpoena duces tecum issued in connection therewith if challenged order should be vacated and subpoena quashed.

2. Depositions ⇐32

Discovery ⇐97(1)

Where applicant, who expected to be party plaintiff in action against insurance company and insured to enforce payment of judgment which was expected to be recovered in pending personal injury action, expected to prove in deposition of company and insured the existence of automobile

casualty insurance contracts for protection against liability for personal injuries and property damage and provisions of insurance policies, including effective dates and amounts of insurance, applicant laid a sufficient basis for issuance of order providing for perpetuation of testimony and production of insurance policies. Code Civ.Proc. §§ 2083-2086, 2083-2089, Insurance Code, § 11580.

3. Insurance ⇐591½

An automobile liability insurance policy evidences a contractual relation which inures to benefit of any and every person who might be negligently injured by assured as completely as if such injured person had been specifically named in policy.

4. Depositions ⇐16, 58

Discovery ⇐88

Provisions of automobile liability insurance policy are not a matter for sole knowledge of named assured and insurance carrier to exclusion of injured person, and the pendency of an action by an injured person brought in good faith against the named insured person gives the injured person a discoverable interest in the policy.

Joseph W. Jarrett and Robert L. Moore, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Belli, Ashe & Pinney, San Francisco, as Amici Curiae on behalf of respondent and real party in interest.

Paul Leiter, Beverly Hills, for real party in interest.

SCHAUER, Justice.

Petitioners seek mandamus¹ to compel respondent superior court to vacate an order for perpetuation of testimony and to quash a subpoena duces tecum issued in connection therewith. We have concluded that the testimony and the documents sought are within the scope of the statutory

1. By petition first filed in the District Court of Appeal, Second Appellate District, and transferred to this court on pe-

tion for hearing after granting of the peremptory writ below.

proceedings for perpetuation of testimony, and that the relief asked should be denied.

Sally Hays, the real party in interest, filed in respondent court an application for perpetuation of testimony under sections 2083 to 2089 of the Code of Civil Procedure, in which she alleges: She expects to be a party to an action in respondent court against Paul Witten and Superior Insurance Company (petitioners herein) to enforce payment of a judgment which she expects will be rendered in her favor and against Witten in an action pending in such court against Witten and others for personal injuries arising out of an automobile accident; the facts expected to be proved (in the deposition) are the existence of automobile casualty insurance contracts insuring Witten against liability for personal injuries and property damage and the provisions of the insurance policies, including the effective dates and the amounts of insurance. The superior court granted the application and ordered the taking of the depositions of Witten and one F. O. Hoffman. Hoffman is president of Superior Insurance Agency, Inc., the sole agent of petitioner Superior Insurance Company, a Texas corporation, for the writing of certain types of casualty insurance in this state; he is also the agent appointed by the petitioner company for the service of process in California. The court also ordered the issuance of subpoenas duces tecum requiring Witten to produce all liability policies insuring him on the date of the accident together with receipts for premiums and notices or correspondence pertaining to the effective periods of such policies; and requiring Hoffman to produce "all policies of insurance issued to" and covering Witten "for liability for personal injury and property damage in effect on" the date of the accident, "together with all records of receipts for premiums paid by * * * Witten pertaining to said policies and all records and correspondence pertaining to the effective dates of said policies."

Petitioners moved in respondent court to quash the subpoenas and to vacate the order for perpetuation of testimony, their

motion was denied, and Witten and Hoffman appeared for the taking of their depositions. At the deposition Hoffman testified that Superior Insurance Company had issued a policy of liability insurance covering Witten, which was in effect on the date of the accident; that "Our investigation has revealed no policy defenses," but that he is not an officer of the insurance company and did not have authority to bind it by a statement that it would pay the limits of the policy and would not interpose any defenses, or that it would "permanently and safely preserve and make available all policies at any time after an action is instituted"; he produced "specimen policies" which he stated to be "an accurate and true and correct reproduction of" the policy issued to Witten, with the exception of the amount of policy limits of insurance and the premiums paid; he refused to testify to the policy limits and, except for the specimen policies, did not produce the documents required by the subpoena duces tecum, although he testified that he had such documents and offered to "file them as a sealed instrument with the Clerk of the Superior Court." Witten produced no documents and refused to testify as to the policy limits.

Hoffman was thereupon ordered to show cause before the superior court why he should not answer the disputed questions; also pending in that court is an order to show cause why the documents should not be produced. Before the hearings on such orders an alternative writ was issued in this mandamus proceeding. Petitioners ask that the peremptory writ be granted either quashing the subpoenas duces tecum and vacating "in its entirety" the order for the taking of the depositions, "or in the alternative quashing said subpoenas duces tecum and amending" such order so as to limit the oral examination of the witnesses to testimony as to whether automobile liability insurance was in effect on the date of the accident, whether there are any known policy defenses, whether premiums have been paid, and "whether said insurance company will satisfy any final judgment rendered against Paul Witten as a result of

the personal injury action referred to in said petition to the full contractual indemnity liability under said policy of insurance."

[1, 2] It is settled that mandamus is a proper remedy if upon the facts shown the challenged order should be vacated or the subpoena quashed. (See *Brown v. Superior Court* (1949), 34 Cal.2d 559, 561-562, 212 P.2d 878.) Here, as in *Demaree v. Superior Court* (1937), 10 Cal.2d 99, 103, 73 P.2d 605, it appears that the application to take the deposition meets the requirements of sections 2083-2086 of the Code of Civil Procedure in that it is shown by such application that the applicant expects to be a party to an action; the names of the persons who it is expected will be adverse parties are given as well as the names of the witnesses to be examined; a general outline of the facts expected to be proved is stated; and it further appears that the proof of such facts is desired and necessary to establish matters which it may hereafter become material to establish. In that case it was held that "[I]t must be conceded that the provisions of the policy of insurance are germane to * * * [the applicants'] cause and material to their anticipated action, when and if brought. We are of the view, therefore, that the applicants laid a sufficient basis for the issuance of the order providing for the perpetuation of testimony and the production of the insurance policy." (See also *Kutner-Goldstein Co. v. Superior Court* (1931), 212 Cal. 341, 345, 298 P. 1001.) Mandate was granted to compel the trial court to issue the subpoena and order the witness to testify with reference to the policy.

Petitioners in the instant case seek to distinguish the *Demaree* holding, urging that there the material fact sought to be established was whether the liability insurance policy covered the defendant driver of the automobile involved in the accident as well as the owner thereof, whereas here it is the policy limits that are sought. The attempted distinction is not persuasive. From the opinion in *Demaree* it appears that the applicants there sought to establish by the testimony of the defendant automobile owner that "he was in fact insured," as well as to compel him to produce

his policy. The witness appeared at the deposition but "failed to produce the policy of insurance as directed in the *subpoena duces tecum*, and, during the ensuing examination and interrogation, refused to answer certain material questions then and there propounded to him regarding the insurance policy and its provisions. The questions are, with particularity, set forth in the report of the notary. However, * * * [the witness] admitted the existence of the policy and that it had been in his possession two days before the examination." (Pages 101, 102 of 10 Cal.2d, page 606 of 73 P.2d.) The holding is that the policy itself must be produced and that the witness may not be permitted to confine his testimony to the fact that insurance exists.

[3, 4] The *Demaree* case specifically rejects the contention that to require the production of the insurance policy "would result in unreasonable search and seizure, in violation of the provisions of the constitution." (Page 103 of 10 Cal.2d, page 607 of 73 P.2d.) Petitioners here urge, however, that "the sanctity of a private contract should not be subjected at this time * * * to inspection and review merely because someone alleges that some day he expects to sue another 'to enforce payment of a judgment' expected to some day be obtained." A sufficient answer to such contention is found in the fact that an automobile liability policy evidences "a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy," i.e., a contractual relation is "created between the insurer and third parties." (*Malmgren v. Southwestern A. Ins. Co.* (1927), 201 Cal. 29, 33, 255 P. 512; see *Abrams v. American Fidelity & Cas. Co.* (1948), 32 Cal.2d 233, 234, 195 P.2d 797; Ins. Code, § 11580; 2 Cal.Jur. 10-Yr. Supp. 145 and cases there cited.) The provisions of such a policy are not, therefore, a matter for the sole knowledge of the named assured and the insurance carrier to the exclusion of the injured person; the very pendency of an action by the injured person brought in

good faith against the named insured person gives the former a discoverable interest in the policy.

Petitioners urge that "to permit further perpetuation of testimony for the sole purpose of discovery of policy limits would be contrary to the rule of New York Casualty Co. v. Superior Court (1938), 30 Cal.App.2d 130, 132, 85 P.2d 965, that such proceedings must be maintained in good faith and for a legitimate purpose and not be oppressive." The case is not in point. There Burford, the injured person, had already recovered judgment against the automobile driver and owner, respectively; the owner had appealed; and Burford had sued the insurance carrier. The documents sought were the carrier's "confidential reports and investigation of the accident * * * [which] had all been procured for the special use of the attorney for the company, and were in his possession," and the questions put to the automobile owner were the same "which were put to him and answered in the main action, and which are fully 'perpetuated' in the record on appeal." The court declared that "The entire deposition proceedings are obviously taken in bad faith and for no legitimate purpose. They can result in nothing but oppression to the witnesses and an invasion of the legal rights of the parties. The particular order here under attack [that petitioners "answer certain questions," and "produce private documents"] must be annulled as in excess of the jurisdiction of the trial court." The present controversy presents no such situation.

Petitioners' further argument that knowledge of the policy limits is sought in order to provide an undue and oppressive advantage in negotiations for settlement of the personal injury action also appears to be without merit. How knowledge by the plaintiff in that action of facts which are known to defendants therein, concerning the policy or policies in which plaintiff will have an enforceable interest if she recovers, could give her an "undue and oppressive advantage" in negotiations for a settlement does not appear. And whether such knowledge by plaintiff would tend to benefit plaintiff or defendants might de-

pend to a material extent upon the relationship between the seriousness of the injuries which resulted from the accident and the amount of insurance coverage provided by the policy; conceivably, knowledge of low policy limits might constitute a benefit to defendants by tending to discourage a seriously injured plaintiff from holding out for a settlement commensurate with the extent of the injuries.

We have been cited to no authority and are aware of none which would support petitioners' offer to file the documents "as a sealed instrument" with the superior court clerk or which would permit them to avoid production of the policies on the promise to "preserve these records and make them available after any final judgment is obtained in any personal injury action." Such an offer, however, may be compared to the offer of any other witness seeking to escape questions on a deposition to confide his testimony under seal to the court, or his promise to reveal the facts on a subsequent date. No authority or substantial reason for innovating such a limitation in our statutory perpetuation proceeding as applied here has been suggested.

The alternative writ is discharged, and the peremptory writ denied.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

The conclusion that an injured person has a "discoverable interest" in the contract insuring the liability of the tortfeasor whenever an action is pending against the named insured, misconceives the relationship of the parties. The demand of Sally Hays to examine the policy by way of perpetuation of testimony is based upon the assertion that she expects to sue Superior Insurance Company and its insured in the event that she obtains a judgment against him. But such litigation will not be to "recover" a loss under the policy; properly classified, it is an action to be reimbursed for damages suffered. *Olds v. General Acc. F. & L. Assur. Corp.*, 67 Cal.App.2d 812, 155 P.2d 676.

The primary purpose of allowing an injured person to sue the insurer is to protect the judgment creditor against the bankruptcy or insolvency of the debtor. *Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13. The express terms of the policy, authorized by statute, § 11580, Ins. Code, provide that before commencing the action the injured person first must secure a judgment against the insured. He cannot join the insurer as a party defendant. *Corum v. Hartford Acc. & Indem. Co.*, 67 Cal.App.2d 891, 155 P.2d 710; *Van DerHoof v. Chambon*, 121 Cal.App. 118, 8 P.2d 925; see 32 Cal.L.Rev. 202.

As no liability accrues as an enforceable claim against the insurer until the judgment against the insured becomes final, *Levy v. Superior Court*, 74 Cal.App. 171, 239 P. 1100, Miss Hays has no present rights under the insurance policy. If she obtains a final judgment, she will have the right accorded by section 11581 of the Insurance Code which provides: "Upon any proceeding supplementary to execution, such judgment debtor may be required to exhibit any policy carried by him, insuring him against the liability for the loss or damage for which judgment was obtained."

In the present proceeding, the petitioner has admitted that a policy insuring Paul Witten, the defendant in the pending action, was in effect on the date of the accident. At the time the challenged order was made, the insurer stated that there were no known defenses to an action on the policy and none was anticipated. The contract is described by the insured as a standard automobile public liability and property damage policy approved by the Insurance Department, and it declares that all policy records will be preserved.

None of these statements is challenged, but Miss Hays claims to be entitled to know the amount of the maximum liability of the insurer and the premiums paid on the policy. These facts are not germane to any issue which may be presented in the action against the insured; obviously the sole purpose of the present proceeding is to obtain information which will aid in negotiating for a settlement. This is not within the legitimate purview of the statutes provid-

ing for the perpetuation of testimony and the issuance of a *subpoena duces tecum*.

Under the rules which have been stated, *Demaree v. Superior Court*, 10 Cal.2d 99, 73 P.2d 605, was improperly decided and should be overruled. Applying those rules to this proceeding, Miss Hays presently has no "discoverable interest in the policy" and the writ of mandate should issue.

TRAYNOR, J., concurs.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



106 Cal.App.2d 621

In re KENNEDY'S ESTATE.

STATE v. AMERICAN TRUST CO. et al.

No. 14898.

District Court of Appeal, First District,
Division 1, California.

Sept. 26, 1951.

Hearing Denied Nov. 19, 1951.

Proceeding in the matter of the estate of Mary B. Kennedy, also known as Mary Truss, wherein the State of California intervened. The Superior Court of the State of California, in and for the County of Contra Costa, Homer W. Patterson, J., distributed to the attorney in fact of Vasile Presecan, a resident and citizen of Romania, certain property of the estate of decedent, and the intervenor appealed and was opposed by the American Trust Co., executor of the estate of Mary B. Kennedy, deceased, and Vasile Presecan. The District Court of Appeal, Wood, J., held that since evidence established that Romania laws as late as the year 1943 permitted an American heir to take property under same terms and conditions as a Romanian citizen would take, that discriminatory decrees promulgated during German occupation of Romania were repealed, and that 1948 Constitution of communist Romania confirmed rights of inheritance, such rights of inheritance would be presumed to have continued, and recited governmental changes in Romania did not remove foundation for presumption.

Judgment affirmed.

1. Evidence ⇨67(4)

A statutory presumption that a thing once proved to exist continues as long as is usual with things of that nature applies to statute of sister state, and once proven to have existed the statute will be assumed to remain in force, in absence of evidence showing its repeal. Code Civ.Proc. § 1963, subd. 32.

2. Evidence ⇨11

Judicial notice may be taken of historical facts.

3. Evidence ⇨11

Judicial notice would be taken of fact that Romania was for a time under domination of Hitlerite Germany and later became a communistic state.

4. Evidence ⇨37

Judicial notice of Romanian legislative enactments cannot be taken.

5. Evidence ⇨67(4)

Where evidence established that Romanian law as late as the year 1943 permitted an American heir to take property under same terms and conditions as a Romanian citizen would take, that discriminatory decrees promulgated during German occupation of Romania were repealed, and that 1948 Constitution of communistic Romania confirmed rights of inheritance, such rights of inheritance would be presumed to have continued, and recited governmental changes in Romania did not remove foundation for presumption. Civ.Code Proc. § 1963, subd. 32.

6. Evidence ⇨53

A presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence.

7. Evidence ⇨83(1)

In absence of controverting evidence, that Romanian law of inheritance was being observed and carried out by judicial and other appropriate officials of communistic Romania would be presumed. Code Civ.Proc. §§ 1963, subs. 15, 33.

8. Evidence ⇨83(1)

A grant or concession made by a foreign government or its officers creates a

legal presumption that acts of such agents are within sphere of their duties until contrary appears.

9. Evidence ⇨26

It is common knowledge that there is scarcely a government in Europe that has not embarked upon a program of socialization of industry in greater or less degree.

Edmund G. Brown, Atty. Gen., W. R. Augustine and Wm. J. Power, Deputy Attys. Gen., for appellant.

E. Walter Lynch, Pittsburg, for respondents.

FRED B. WOOD, Justice.

Upon this appeal by the State of California, intervenor, from a judgment distributing to the attorney in fact of Vasile Presecan, a resident and citizen of Romania, certain described real and personal property, and all undiscovered property, of the estate of decedent, the question is: Does the evidence support the finding that "under the Romanian laws in effect at the time of the death" of the decedent, March 15, 1949, "citizens and residents of the United States had the right to receive real and personal property originating from the estates of persons dying in Romania on the same terms and conditions as citizens and residents of Romania, and that reciprocity as defined in Section 259 of the Probate Code of California existed under the laws of Romania"?

Dr. Desire Ratonitz, who qualified as an expert on Romanian law, expressed the opinion that according to the Romanian statutory law, according to the Romanian civic laws, there is full reciprocity as defined by section 259 of the Probate Code of California; that an American heir will take real or personal property under the same terms and conditions as a Romanian citizen could take; that the Romanian Civil Code does not differentiate between a foreign heir and a Romanian heir,—there is no discrimination.

He based his opinion in part upon certain portions of the Romanian Civil Code, as promulgated in 1864 with all amend-

ments enacted until July 1, 1943, in evidence both in the Romanian and in the English languages. That portion of the code deals with descent and succession, and contains no provision discriminatory of aliens. He based his opinion also upon the Constitution of communistic Romania, testifying that article 8 of title 2 of the Constitution of April 13, 1948, declares that "Private Property and the right of inheritance are acknowledged and guaranteed by law."

So far as the witness could ascertain, there was no change from 1942 to March 15, 1949, concerning the rules of the law of succession as contained in the Romanian Civil Code. He did not know if any laws relative to this matter had been passed since the Constitution of 1948. He said there was no possibility of ascertaining in any kind of universal law collection or of calling on any magazine to check on that question. He did know that certain decree laws enacted during the German occupation, which discriminated against Jews and prohibited an alien from holding agricultural land acquired by succession (required him to sell the land and allowed him to take the proceeds of the sale) were abolished after the war was over. Those decree laws are not in effect any more. As to whether a Catholic might inherit property in Romania, he knew of no discriminating provisions. He did not know, had not heard, of any case of an American who inherited anything from Romania since the war or had any benefit of it.

Romania, Dr. Ratonitz said, is one of the few countries which does not have with the United States a so-called Treaty of Friendship, which usually contains provisions pertaining to succession to real estate.

How far the statute laws are actually applied in Romania, the witness tried very hard to find out. Of how the law was working, he did not know. He had no information as to its actual operation as to any particular state.

He knew that Romania has exchange regulations but did not know the details of them, nor whether an American in-

heriting money there could bring it over here.

In his opinion there is no doubt that Romania is a communistic country and is under Russian domination, not a democratic country. He did not know about the program of nationalization in Romania.

Appellant introduced in evidence the text of a law of Romania, adopted in 1948, which provides for the nationalization of all resources of the subsoil which were not in the ownership of the State on the effective date of the Constitution of 1948, and 77 categories of industrial, banking, insurance, mining, transportation and telecommunication enterprises. It does not purport to nationalize any property, real or personal, except such property as is included in the assets of an enterprise which is nationalized. It provides for compensation to the owners and shareowners of each nationalized enterprise out of a state fund created for the purpose, compensation to be in the form of bonds, redeemable from the profits of the nationalized enterprise. Compensation to former owners is to be established by commissions operating with the courts, composed of three judges appointed by the Ministry of Justice. Their decisions are final, there being no hearing or appeal.

Appellant claims that respondent has failed to meet the burden of proving the existence of reciprocal rights of inheritance in Romania on March 15, 1949, because (1) the evidence concerning the applicable provisions of the Romanian Civil Code speaks as of July 1, 1943, and the confirmatory provisions of the Constitution speak as of April 13, 1948; (2) there is no evidence that the applicable provisions of the Romanian Code and Constitution are observed and carried out by the judicial and other appropriate officials of the Romanian government; and (3) the Nationalization Law of 1948 leaves in private ownership properties so inconsequential in character as to render insubstantial, and hence nonreciprocal, any rights of inheritance.

[1] (1) *As to the gap between 1943 or 1948 and March 15, 1949*, a presumption

serves to supply the proof. This presumption finds statutory expression in subdivision 32 of section 1963 of the Code of Civil Procedure, which lists among disputable presumptions the presumption "That a thing once proved to exist continues as long as is usual with things of that nature". This presumption applies to the statute of a sister state; once proven to have existed it will be assumed to remain in force, in the absence of evidence showing its repeal. *State ex rel. Grismer v. Merger Mines Corporation*, 1940, 3 Wash.2d 417, 101 P.2d 308, 310, involving an Arizona statute of 1935, Laws 1935, c. 63; *McGee v. Stark*, Tex.Civ.App., 1939, 127 S.W.2d 589, involving a Louisiana statute of 1882, Act No. 43 of 1882; *Walker Motor Exchange v. Lindberg*, 1930, 86 Mont. 513, 284 P. 270, 272, involving an Oklahoma statute of 1921, Comp.St.1921, § 7655, 46 O.S.1941 § 63. This presumption applies also to the law of a foreign state, *In re Huss*, 1891, 126 N.Y. 537, 27 N.E. 784, 12 L.R.A. 620, concerning a statute of the Grand Duchy of Baden, proven by means of an official publication of 1832. "A fact of a peculiar nature, to which the presumption against change is held to apply, is the existence of a rule of foreign law." *Zarate v. Villareal*, Tex.Civ.App. 1913, 155 S.W. 328, at page 337.

[2-5] In support of its claim that this presumption does not apply here, appellant invokes the principle of law that judicial notice may be taken of historical facts, including the fact that Romania was for a time under the domination of Hitlerite Germany and later became a communistic state. Appellant argues that those governmental changes remove the foundation for the presumption; i. e., that such governmental changes are inconsistent with any concept of continuity in the laws of inheritance of that country. We do not perceive the logic of that argument. The evidence shows that the Romanian statutes accorded reciprocity as late as 1943; that discriminatory decrees promulgated during the German occupation have been repealed; and that the new Constitution of 1948 confirms the rights of inheritance. That brings it down to less than a year from the

critical date. What basis would this court have for ruling out the presumption of continuity during that year? Appellant asserts that "The violent change in the form of the Roumanian Government" in April of 1948, when the Communist Constitution was adopted, furnishes such a basis. That, in effect, is to say that this court should take judicial notice of an asserted probability that Romania upon becoming a communistic state would change her law of inheritance to discriminate against citizens and residents of the United States. We do not see in the mere change of the form of government ground for invoking judicial notice of a probability that the "right of inheritance" which the new Constitution has guaranteed will be soon changed; that, too, in the face of our statutorily declared and judicially confirmed presumption of continuity. There is no greater reason or sounder basis for taking judicial notice of such a probability than there is for taking judicial notice of Romania's legislative enactments. The latter we cannot do, even though we may take judicial notice of the communist character of the Romanian government. Thus, in *Banco de Sonora v. Bankers' Mutual Casualty Co.*, Iowa 1903, 95 N.W. 232, one of the questions at issue was whether or not a certain person, at a certain time, was an adult under Mexican law. That had to be proven as a fact, even though the court might take judicial notice that the civil law was the foundation of Mexican jurisprudence. Said the court, 95 N.W. at pages 235-236: "As to whether the civil law is the foundation of Mexican jurisprudence, the histories are quite as accessible to the court as to the witness. Probably judicial notice should be taken of the fact as a matter of history. But this extends no farther than that the general system of civil jurisprudence prevails, without taking notice of details. The extent of its adoption we are not bound to know, for, in its adjustment to the situation and conditions of a people on this continent, doubtless many changes were made. Was the entire body of the Justinian Code adopted? Or this with modifications essential to meet the necessities and demands of modern

civilization? This was a matter for specific proof with respect to the particular issue." A similar distinction was drawn in *Barrielle v. Bettman*, D.C., 199 F. 838. "A court may take judicial notice of the historical fact that the civil law is the foundation of French jurisprudence, but not of its details. 5 Ency.Ev. 808, note. Nor is it bound to know the extent of its adoption, or its modifications, if any, to meet the necessities and demands of modern civilization or the changes in the form of government which have taken place in that country." 199 F. at page 840. Likewise, here, judicial notice, or evidence, that on March 15, 1949, Romania was a communistic state, though it supplies some information concerning the form of government of that nation, gives us knowledge of none of the "details" of the jurisprudence of that country, particularly as concerns discriminatory or nondiscriminatory laws of inheritance.

[6] Accordingly, the presumption of continuity applies to the evidence in this case. That presumption was not controverted by evidence offered by either party. The trier of the facts was "bound to find according to the presumption" Code Civ. Proc., § 1961. Even if appellant had introduced some controverting evidence, the presumption would have remained in the case, for consideration and weighing by the trier of the facts. As stated in *Westberg v. Willde*, 14 Cal.2d 360, at page 365, 94 P.2d 590, 593, "the rule is firmly established in this state that a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence." This is quite different from the situation in *Re Estate of Knutzen*, 31 Cal.2d 573, 579, 191 P.2d 747, where, in the absence of proof of the foreign law, a party ineffectively invoked the presumption that the foreign law was the same as the California law. Such a presumption could not obtain in the face of the requirement of section 259.1 of the Probate Code that the non-resident alien "establish the fact" of the existence of reciprocal rights. In the instant case, the alien's representative "es-

tablished the fact" of the existence of such rights in 1943 and 1948. That *fact*, in the absence of controverting evidence, is presumed to have continued to exist until March 15, 1949.

[7,8] (2) *That the Romanian law of inheritance was being observed and carried out on May 15, 1949*, by the judicial and other appropriate officials of the Romanian government, is presumed, in the absence of controverting evidence. The presumptions "That official duty has been regularly performed", and "That the law has been obeyed", Code Civ.Proc., § 1963, subds. 15, 33, are applicable to the provisions of a foreign law. A grant or concession made by a foreign government or its officers creates a legal presumption that the acts of such agents are within the sphere of their duties until the contrary appears. *Payne & Dewey v. Treadwell*, 16 Cal. 220, 227. Concerning the genuineness of documents and records, and signatures thereon, kept by Mexican officials prior to cession of the territorial area of this state to the United States, the court, in *Sill v. Reese*, 47 Cal. 294, at page 344, said: "These documents and records have remained continuously in official custody, and although it is not impossible that in some instances forged papers have been surreptitiously or corruptly placed among them, the presumption that officers have done their duty in preventing such frauds, applies equally to the public functionaries of Mexico, and to those of our own Government." In respect to a certain conciliation proceeding and the judgment rendered therein, and grants of land made pursuant thereto by officials of the Government of Mexico in 1833, our court, in *De Castro v. Fellom*, 135 Cal. 225, 67 P. 142, said: "* * * the presumption is in favor of the power of the governor and of the departmental assembly to make the grants. Nor does it appear they acted in any way irregularly (Code Civ.Proc., § 1963, subd. 15), and the contrary, especially in view of the confirmation of the grants, is to be presumed." 135 Cal. at page 231, 67 P. at page 144. In *Talbot v. Seeman* 1801, 1 Cranch 1, 5 U.S. 1, 2 L.Ed. 15, one of the parties con-

tended that a certain French decree of January 18, 1798, which declared as good prize any neutral ship found at sea carrying merchandise produced in England or her possessions, might have been merely *in terrorem* and might never have been executed, and that such a provision being in opposition to the law of nations the court ought to presume it never would have been executed. In overruling this contention, Chief Justice Marshall said: "But the court cannot presume the laws of any country to have been enacted *in terrorem*; nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete; and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government." 1 Cranch at page 40, 2 L.Ed. 15.

Likewise, in the instant case, evidence that the Romanian law accorded reciprocal rights of inheritance to citizens of the United States on March 15, 1949, gave rise under our statute to presumptions that that law was being obeyed and that the judicial and other appropriate officials of Romania regularly performed their duty of observing and carrying out the provisions of that law.

This conclusion is not inconsistent with the decisions in *Estate of Schluttig*, 36 Cal. 2d 416, 224 P.2d 695, and *In re Estate of Miller*, 104 Cal.App.2d 1, 230 P.2d 667. In each of those cases there was in evidence a German law which could have been interpreted by the German courts as meaning that inheritance by nonresident aliens did not exist as a matter of right but was subject to the arbitrary discretion of Nazi administrators acting in accordance with Nazi ideology. In each of those cases there was conflicting evidence concerning the interpretation of that law by the German courts, and the determination of the trial court thereon was sustained as a finding of fact upon conflicting evidence. In the instant case the Romanian laws in evi-

dence are not ambiguous. In the absence of controverting evidence, the presumption supplies the fact that the Romanian laws are observed and obeyed.

[9] (3) *The Romanian Nationalization Act of 1948*, in evidence, does not directly controvert any of the presumptions which we have discussed. It does not bear directly upon the law of wills or of descent and succession. It does withdraw from private ownership the resources of the subsoil and certain business enterprises. It leaves in private ownership, hence inheritable, property of every kind (other than the subsoil) not devoted to such an enterprise. Illustrative of this point is the fact that none of the properties involved herein, except resources of the subsoil, if any, would be nationalized by this statute, if located in Romania. It is not necessary to consider what the effect under our section 259 might be if Romania were to nationalize every conceivable kind of property. Short of such a measure of nationalization, it is not reasonable to ascribe to our Legislature an intent to deny the right of inheritance to a nonresident alien merely because his government has embarked upon a program of socialization of industry. It is common knowledge that there is scarcely a government in Europe that has not embarked upon a program of socialization of industry in greater or less degree. The pivotally important point in the instant case is that the Romanian Nationalization Law does not alter the law of inheritance of that country in respect to property, real or personal, which it leaves in private ownership. That law, therefore, does not render untenable, or unsupported by sufficient evidence, the trial court's finding that reciprocity as defined in section 259 of our Probate Code existed on March 15, 1949.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

106 Cal.App.2d 607

GIDDINGS et al. v. SUPERIOR OIL CO.

Civ. 18274.

District Court of Appeal, Second District,
Division 1, California.

Sept. 24, 1951.

Hearing Denied Nov. 19, 1951.

Action by Donald R. Giddings, a minor, by his Guardian ad litem Durvin C. Giddings, and Durvan C. Giddings against Superior Oil Company, a corporation, to recover damages for injuries sustained by minor plaintiff while playing on defendant's oil well and pump. The defendant moved for a directed verdict. The Superior Court of Los Angeles County, Fred Miller, J., sustained the motion and entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held 14 year old plaintiff who lived in vicinity of oil wells and pumps and who had been warned by danger of playing thereon could not recover under attractive nuisance doctrine.

Affirmed.

1. Trial $\hookrightarrow$ 178

In passing upon motion for a directed verdict, the court has no power to weigh the evidence, but must view it in the light most favorable to the party against whom the direction is asked and accept every inference and presumption in his favor that may legitimately be drawn therefrom, and the motion can be granted only when, on such a consideration of the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of that party if one were given.

2. Negligence $\hookrightarrow$ 33(1), 39

As a general rule the owner of property owes no duty to mere trespassers to keep property in a safe condition but the maintenance of an attractive nuisance with knowledge of owner, alluring to children but inherently dangerous to them, constitutes negligence out of which liability will arise for injuries resulting from such negligence.

3. Negligence $\hookrightarrow$ 136(19)

Whether device alleged to be an attractive nuisance constitutes a trap danger-

ous to children, and whether owner used ordinary care to maintain such device, are questions of fact to be determined by a jury.

4. Negligence $\hookrightarrow$ 23(1)

14 year old boy who lived in vicinity of oil wells and pumps and who had been warned about danger of playing thereon could not recover, under attractive nuisance doctrine, for injuries sustained while playing on pumps.

5. Negligence $\hookrightarrow$ 125

In action by 14 year old minor and father to recover for injuries sustained by minor while playing on unprotected oil well pump, evidence that seven year old child had been injured on oil pump of defendant situated in a different locality was properly excluded in absence of showing that conditions were similar.

Demler & Eckert, and William T. Dalesi, Long Beach, for appellants.

Moss, Lyon & Dunn, and Sidney A. Moss, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

The instant action is for damages because of injuries sustained by the minor plaintiff while playing on defendant's oil well and pump, known as Perham No. 7, located in the city of Torrance.

At the conclusion of the trial and upon motion made therefor, the court directed the jury to bring in a verdict in favor of defendant. From the judgment which followed, plaintiffs appeal.

[1] Regarding the propriety of a directed verdict, it was stated in *Kataoka v. May Department Stores Co.*, 60 Cal.App.2d 177, 181, 140 P.2d 467, 470, as follows: "The power of the court in passing upon such a motion is strictly limited. It has no power to weigh the evidence, but must view it in the light most favorable to the party against whom the direction is asked and accept every inference and presumption in his favor that may legitimately be drawn therefrom, and the motion can be granted

only when, on such a consideration of the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of that party if one were given. (*Gish v. Los Angeles Ry. Corp.*, (1939) 13 Cal.2d 570, 573, 90 P.2d 792; *Newson v. Hawley*, (1928) 205 Cal. 188, 190, 270 P. 364; *Wisswell v. Shinnors*, (1941) 47 Cal.App.2d 156, 159, 163, 117 P.2d 677; *Barty v. Collins*, (1930) 109 Cal.App. 94, 96, 292 P. 979.)"

On the afternoon of January 28, 1949, plaintiff Donald R. Giddings, a high school student aged fourteen years, was injured while playing on defendant's oil well pump. Donald lived about two blocks from the pump and for two years immediately preceding the accident had lived in the vicinity of oil wells and pumps, and had seen them in operation almost every day. He had never before thought of playing on them because his mother had warned him against doing so. On the afternoon in question Donald and his companion were playing in a nearby field and noticed defendant's pump about a block and a half away. They decided to go over as "it looked like it would be fun to play on it."

This pump was painted dark blue and was operated by an electric motor at a speed producing between five and seven revolutions per minute. One such revolution resulted in a complete turn of the crank and a corresponding see-saw motion of the walking beam or rocker arm, which was a horizontal bar at the top of the pump. The pump was partially surrounded by a railing. There was attached to one side a step ladder with a hoop at the top. The pump stood alone in a field some distance from the nearest highway, and about 300 or 350 feet from the nearest dwellings. It was visible from the Giddings home.

The two boys took a path through the field leading to the pump. They climbed up the ladder through the hoop and onto the walking beam, where they sat—one at either end, going up and down with the motion of the pump like a teeter-totter. They then dropped to a horizontal cross-bar where Donald hung with his hands see-sawing up and down, his feet resting on a solid

piece "right in the middle." While so playing, Donald's right leg caught in the revolving movement of the pump and was severely injured.

Donald testified that he saw the guard-rails around the pump and knew they were put there to keep people off; that he saw no warning signs of danger.

Donald's companion testified that after riding on top of the walking beam, they first sat and then hung on the crossbar which went up and down like a see-saw. At the time Donald was injured they were playing on the crank webbs, of which there were two, one on either side of the pump. Each boy stood on one webb as it slowly revolved and held onto the vertical connecting rods.

The witness Fariss testified that on several occasions he had seen boys riding see-saw on the rocker arm of defendant's pump.

Mrs. Ellis stated she saw the two boys on the pump on the day of the accident. Previously she had seen boys playing around the pump outside the guard rails, but never on the pump or inside the rails.

Defense witness Pegors, who was employed by another oil company which had a well 250 feet from defendant's pump, testified that he saw Donald walking on the revolving crank while he hung by his hands to the crossbar; that he knew the boys were in danger and was on his way to shut off the motor on the pump when the accident occurred.

Mr. Beauchamp, a safety engineer for the State of California administering the laws of the Labor Code, testified that it would be practicable for defendant to enclose its pump with a woven wire fence, six or seven feet high which could be done for a nominal sum; that such a fence would not interfere with the operation of the pump. Also, that guardrail around the pump is one of several recognized types complying with the law for the protection of workmen.

It is here contended that the facts proved at the trial were sufficient to bring the case within the doctrine of attractive nuisance; hence it was for the jury to deter-

mine (1) whether the pump was an attractive nuisance; and (2) whether plaintiffs were entitled to the Benefit of that doctrine.

The following language from the opinion in *Doyle v. Pacific Electric Ry. Co.*, 6 Cal.2d 550, 552, 59 P.2d 93, 94, appears applicable to the instant situation:

[2-4] "It is a general rule that the owner of property owes no duty to mere trespassers to keep the property in safe condition. To this rule the law has declared an exception, in this, that where an attractive contrivance is maintained with the knowledge of the owner, alluring to children but inherently dangerous to them, this constitutes neglect out of which liability will arise for injuries resulting from such neglect. It is want of ordinary care to maintain such premises, and the question as to whether the device complained of constitutes a trap dangerous to children is a question of fact ordinarily to be determined by the jury. *Faylor v. Great Eastern, etc., Co.*, 45 Cal.App. 194, 187 P. 101. But it is not every contrivance or apparatus that a jury will be entitled to treat as an 'attractive nuisance.' Before liability may be imposed, always there must be something in the evidence tending to show that the device was something of a new or uncommon nature with which children might be supposed to be unfamiliar, or not to know of its danger. Thus in *Loftus v. Dehail*, 133 Cal. 214, 218, 65 P. 379, 380, it was said by this court: 'But it by no means follows, as has been said, that anything or everything which a jury may find or a court may determine to be attractive as a playground or plaything for children casts a responsibility of guard and care upon the owner of that thing. Moving street cars and moving vehicles upon the street are irresistibly attractive to many children, and thousands daily imperil their lives by climbing on and off of them while in motion. Venturesome boys and even girls make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible merely because children were attracted, it would burden the ownership of property with a

most preposterous and unbearable weight.'"

Again in *Morse v. Douglas*, 107 Cal.App. 196, 201, 290 P. 465, 467, it was said: "The contrivance must be artificial and uncommon, as well as dangerous, and capable of being rendered safe with ease without destroying its usefulness, and of such a nature as to virtually constitute a trap into which children would be led on account of their ignorance and inexperience."

[5] An oil well pump is not an uncommon contrivance. It is very common and well known throughout Southern California, particularly to the minor appellant. That it is dangerous to play around moving machinery is a matter of general knowledge, and "certainly such danger is familiar to persons whose mental attainments are such that they are pupils in high school." *Walker v. Pacific Electric Ry. Co.*, 66 Cal. App.2d 290, 294, 152 P.2d 226, 228.

In the circumstances presented, the doctrine of attractive nuisance is not applicable herein.

[6] Appellants also urge that the trial court erred in excluding from evidence the fact that prior to the instant accident, a complaint had been filed on behalf of a seven year old child for alleged injuries received on an oil pump of respondent situated in a different locality. By this evidence, appellants "sought to prove that respondent had notice that an oil well pump of the type in question is an attraction to children and that it is a dangerous instrumentality."

Before evidence of this character may be received "it must first be shown, or an offer made to show, that the conditions were similar." *Thompson v. B. F. Goodrich Co.*, 48 Cal.App.2d 723, 729, 120 P.2d 693, 696. What might constitute an attractive nuisance to a seven year old child would be immaterial as applied to a fourteen year old high school student.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

106 Cal.App.2d 711

PEOPLE v. SKOV.

Cr. 2277.

District Court of Appeal, Third District,
California.

Oct. 5, 1951.

Hearing Denied Nov. 1, 1951.

Herman Skov was convicted in the Superior Court of Sonoma County, Hilliard Comstock, J., of a misdemeanor in that he acted as dealer in poultry products without first obtaining license as required, and he appealed. The District Court of Appeal, Van Dyke, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Licenses $\S$ 42(4)

Evidence sustained conviction for offense of acting as dealer in poultry products without first obtaining license required by statute. Agricultural Code, $\S$ 1273.

2. Criminal Law $\S$ 260(11)

Findings of trial court on conflicting but competent testimony will not be upset on appeal.

3. Criminal Law $\S$ 1144(13)

On appeal, conflict in evidence will be resolved in favor of judgment.

4. Indictment and Information $\S$ 59, 119

Where information, charging defendant with misdemeanor in that he violated poultry code provision requiring dealers to procure license, stated that defendant did wilfully, unlawfully and feloniously act as dealer in poultry products without license, information was not subject to an objection that offense charged was not sufficiently identified as misdemeanor, but word "feloniously" was mere surplusage. Agricultural Code, $\S$ 1273.

L. G. Hitchcock, Santa Rosa, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Appellant Skov was charged with the violation of Section 1273 of the Agricul-

tural Code, a misdemeanor, in that he acted as a dealer in poultry products without first obtaining a license as required. The information contained three counts, all charging violation of the same section, but having to do with separate transactions. Trial was had before the court without a jury and appellant was found guilty on two counts and not guilty on one.

It appears without conflict that appellant was licensed as a dealer under the code from May 1, 1948, to April 30, 1949, and that he was not licensed after the latter date.

The information alleged that on May 19, 1949, and again on June 1, 1949, appellant acted as a dealer without having a license. Although admitting that on those dates he did not have a license, appellant contends that his convictions must each be reversed for the following reasons: That during the period of his license he entered into a binding contract for the purchase of turkey poult; that under the law of sales title to the poult passed to him when the contract was made; that he did nothing on the dates on which he is charged with having acted as a dealer without a license, save only to accept delivery of the poult; that these acts of delivery and acceptance of property lawfully purchased during the license period did not constitute acting as a dealer and that therefore the evidence is insufficient to support the convictions.

Under the facts shown by the record, we find it unnecessary to decide whether appellant's contention that taking delivery of the poult after the expiration of the license period did not constitute a violation of the code could be sustained because the premise upon which it is based, that is, the assertion that he purchased the poult during the license period is itself the subject of conflicting testimony which the trial court resolved against appellant.

[1-3] The charges contained in the counts under which appellant was found guilty rest upon certain transactions had between appellant and one John Medica, a turkey farmer in Santa Rosa. During the license period appellant had a number of transactions with Medica concerning the

purchase of turkey poults. And in April of 1949 Medica did sell and deliver to appellant two lots of poults which were paid for. The negotiations leading up to these sales were generally to the effect that Medica would sell for appellant from time to time such poults as he did not need to use in filling prior orders. But Medica's testimony supports the conclusion drawn by the trial court, that these negotiations did not amount to an agreement to sell any specified number and that no sale or agreement for the sale was consummated except as surplus poults were produced by Medica and sold and delivered to appellant. Medica further testified that in May, 1949, and after appellant's license had expired, appellant ordered from him 3,500 poults, made a down payment of \$200, obtained a receipt showing the deposit and reciting the essentials of the agreement of sale and that two deliveries of poults were made under the agreement so entered into. From the evidence the court could conclude and did conclude that it was by these dealings that appellant acted as a dealer without license as charged in the information. The testimony of appellant contradicted that of Medica as above outlined and was generally to the effect that the agreement for the sale and future delivery of these poults was made during the license period, but such testimony raised no more than an issue of fact which the trial court resolved against him. Under the familiar rule we must accept the trial court's implied finding as to this factual matter. Resolving conflicts in the evidence in favor of the judgment, as we must, we hold that the evidence sustains the implied findings that the contracts, the making of which constituted the alleged violations of the code, were negotiated during the unlicensed period, and such being the state of the record the judgments of guilty find support.

[4] Appellant further contends that the offenses charged were not sufficiently identified as misdemeanors because the charging part of the information states that appellant "did wilfully, unlawfully and feloniously" act as a dealer in poultry products without a license. The contention is with-

out merit. The information states that appellant is accused of violating Section 1273 of the Agricultural Code, which section declares that the offense of acting without a license is a misdemeanor. No other offenses are charged in the information. It follows that the use of the word "feloniously" was mere surplusage. Appellant does not contend that he was confused or in any wise prejudiced by the use of the word or that the nature of the offense which he was charged with having committed was not clear to him on the face of the information.

The judgment appealed from is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.



106 Cal.App.2d 694

SPERRY v. TAMMANY et al.

Civ. 18362.

District Court of Appeal, Second District,
Division 2, California.

Oct. 2, 1951.

Rehearing Denied Oct. 17, 1951.

Hearing Denied Nov. 29, 1951.

Kenneth Sperry, as executor of last will and testament of Jean Sharon Tammany, deceased, brought action against Frank H. Tammany and another to recover certain property. The Superior Court, Los Angeles County, Percy Hight, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Wilson, J., held that the property in dispute was either held in joint tenancy or was community property, part of which rightfully belonged to defendant.

Affirmed.

1. Evidence 461(1)

For purpose of enabling court to interpret the words of an instrument, which on its face is ambiguous, evidence of intent of the parties is admissible to explain the document.

2. Evidence ⇨461(4)

Registration of an automobile in name of husband "and/or" wife was ambiguous and evidence indicating intent of parties to create a joint tenancy was admissible.

3. Husband and Wife ⇨264, 273(1)

In action by executor of deceased wife's estate against husband, evidence showed that cash balance remaining in decedent's separate account at time of death was community property, one-half of which was properly awarded to plaintiff.

4. Executors and Administrators ⇨217

Where defendant husband and deceased wife had executed an encumbrance on property belonging to decedent, defendant was individually obligated thereon and was entitled to reimbursement from decedent's estate for payments made on encumbrance after wife's death.

5. Executors and Administrators ⇨224

Where husband and wife had executed an encumbrance on property belonging to wife, husband, who was individually liable on encumbrance, was not required to present claim against wife's estate for payments made on encumbrance after death of wife. Probate Code, § 716.

6. Executors and Administrators ⇨224

When a liability arises after death of decedent, it does not constitute a claim against the estate which is required to be presented for allowance, except funeral expenses and other matters expressly provided in Probate Code. Probate Code, § 716.

7. Executors and Administrators ⇨451(4)

In action by executor of deceased wife's estate against husband, where husband denied executor's allegations that husband wrongfully removed and concealed certain articles of personalty from home previously occupied by the parties, and court found that certain items were community property and that any allegation in executor's complaint or husband's amended answer inconsistent with such finding was untrue, findings sufficiently disposed of issue of concealment.

Guthrie, Darling & Shattuck and Milo V. Olson, Los Angeles, for respondents.

WILSON, Justice.

This action involves the determination of the respective interests of decedent and defendant Frank H. Tammany in cash and personal effects. Judgment was rendered in favor of defendant and plaintiff has appealed.

1. Plaintiff assigns error in the determination of the court that a certain automobile was held in joint tenancy by decedent and defendant and in awarding the car to defendant. The automobile was first registered in Louisiana to "Lieutenant Commander Frank H. Tammany and/or Jean S. Tammany." After defendant was transferred to the Los Angeles area it was registered in California in the same manner.

The term "and/or" in this case is ambiguous and uncertain. In *re Bell*, 19 Cal. 2d 488, 500, 122 P.2d 22. Evidence was offered by defendant for the purpose of explaining the ambiguity, which was admitted over plaintiff's objection. He testified the car was originally caused to be registered by decedent and defendant in the manner described after discussion of the subject. It was his intent "to establish a situation under which the car could be disposed of by Mrs. Tammany in my absence or in the event of my death without complicated legal action of any kind." He stated he did not cause the car to be registered in California but his wife did so while he was absent. This evidence, which was not contradicted, shows that decedent acquiesced in the manner in which the car was registered in Louisiana and her assent is confirmed by her action in registering it in the same manner in California. Plaintiff contends that such evidence is inadmissible.

[1,2] Section 1636 of the Civil Code reads: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." For the purpose of enabling the court to interpret the words of an instrument, which on its face is ambigu-

Paul W. Westerlund, Kenneth Sperry, Long Beach, for appellant.

ous, evidence of the intent of the parties is admissible to explain the document. *Berry v. Kowalsky*, 95 Cal. 134, 138, 30 P. 202; *Mann v. Higgins*, 83 Cal. 66, 69, 23 P. 206; *Gibson v. De La Salle Institute*, 66 Cal. App.2d 609, 620, 152 P.2d 774. Although the registration certificate may not be construed to be an instrument in writing by which a person acquires title to an automobile, in this case the original certificate which was signed by both parties before a new certificate could be issued in California, coupled with the evidence received at the trial, is sufficient to indicate the intent of the parties to create a joint tenancy. There was no error in the admission of the testimony and the court, in accord with the uncontradicted evidence, correctly interpreted the registration certificate.

[3] 2. Plaintiff's next contention is that the court erred in awarding judgment against him for one-half the cash balance remaining in decedent's bank account at the time of her death. The cash in question was the balance standing in decedent's separate account. The parties had previously opened a joint account in another bank in which were deposited the proceeds of the sale of certain shares of stock which defendant had purchased and paid for by check drawn by him on the joint account. After the sale of the shares decedent obtained possession of the check for the proceeds, deposited it in their joint account and withdrew a like amount, some of which she deposited in her separate account. The parties had also deposited in their joint account the salary received by defendant from the United States Navy and possibly other funds. Defendant testified the joint account consisted of a mingling of all funds of himself and his deceased wife and there would be no possibility of differentiating between funds in the account. The uncontradicted evidence shows that the cash balance remaining in decedent's separate account at the time of her death was community property and the court properly awarded defendant one-half thereof.

[4-6] 3. Defendant and decedent had purchased real property upon which they

had executed an encumbrance to secure the balance of the purchase price. This property was shown to be the separate property of decedent. After her death defendant made several FHA payments on account of the encumbrance, for the total of which the court awarded him judgment. By reason of the fact that defendant had executed the encumbrance he was individually obligated thereon and made the payments because of his personal liability. Plaintiff objects to the allowance of the sum because defendant had not filed a claim against the estate as required by section 716 of the Probate Code. Since the indebtedness was not incurred by decedent in her lifetime it was a matter to be adjusted between defendant and the executor of her estate and the filing of a claim was not required. When a liability arises after the death of the decedent it does not constitute a claim against the estate which is required to be presented for allowance (except funeral expenses and other matters expressly provided in the Probate Code). *Miller & Lux, Inc. v. Katz*, 10 Cal.App. 576, 578, 102 P. 946.

[7] 4. For the purpose of recovering a judgment against defendant for double the value of the property, as provided in section 612 of the Probate Code, plaintiff alleged in his complaint that defendant without plaintiff's knowledge or consent wrongfully and unlawfully removed articles of personal property from the home previously occupied by the parties and concealed the same from plaintiff; that plaintiff demanded return of the property and that defendant disclose the whereabouts thereof but he refused either to return the property or to make known its location. These allegations were denied by defendant. Plaintiff contends that the court did not make a finding upon the issue of concealment. The court found that certain items of personal property were community property in possession of defendant, of which plaintiff was entitled to possession, and defendant owns a one-half interest therein. The court also found as follows: "Any allegation of plaintiff's complaint or defendant's amended answer inconsistent with the foregoing specific Findings of Fact are and

each is untrue." The latter finding is sufficient to cover the issue to which plaintiff refers. By the findings and judgment the court divided numerous items of community personal property between the litigants, specifically held that certain property belonged to decedent and made the general finding above quoted. The latter is a sufficient finding that defendant did not wrongfully remove any articles of personal property from the home or conceal them from plaintiff.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



PEOPLE v. LE BEAU.

Cr. 2741.

District Court of Appeal, First District,
Division 1, California.

Oct. 1, 1951.

Hearing Granted Oct. 29, 1951.*

Vernon LeBeau was convicted in the Superior Court, County of Alameda, Charles Wade Snook, J., of possession of cocaine, and he appealed. The District Court of Appeal, Bray, J., held that when defendant by his own testimony placed his good character in issue it was competent for prosecution to cross-examine on such issue and to introduce rebuttal evidence thereon.

Judgment affirmed.

1. Criminal Law ¶683(1)

In prosecution for possession of narcotics in which question of use of narcotics by defendant was first mentioned when defendant stated that he had never seen a narcotic and would not know what it looked like, prosecution was entitled to introduce rebuttal evidence tending to show use of narcotics by defendant.

2. Criminal Law ¶378

Witnesses ¶337(2)

Where defendant in criminal prosecution places his own good character in

evidence, state may inquire into defendant's character on cross-examination and may introduce rebuttal evidence on such issue.

3. Criminal Law ¶683(1)

Where defendant in prosecution for possession of narcotics had flatly denied that he had ever told anyone that he used cocaine, there was proper foundation for admission of rebuttal evidence through testimony of witness to whom defendant had allegedly made such representations, since such question and defendant's reply amply informed defendant of testimony to be offered.

4. Witnesses ¶255(9), 380(5)

Where rebuttal witness in prosecution for possession of narcotics had previously made statement that defendant had told her that he used cocaine, but witness denied any recollection of having made such statement when called to testify at trial, district attorney was entitled to attempt to refresh memory of witness by calling her attention to previous inconsistent statement, and upon failing to revive her recollection was entitled to show that witness had made previous contrary statements.

5. Criminal Law ¶627½

Prosecuting attorney was not required, in response to request by defendant, to disclose whether he expected to call certain person as witness, and if so, what he expected to prove by such witness.

6. Criminal Law ¶1036(2)

Where no objection to testimony tending to impeach testimony of defendant had been made at trial, alleged error in admission of such testimony could not be urged on appeal.

7. Criminal Law ¶661

Where two officers had been present at time cocaine had been found in defendant's room, fact that only one of such officers testified in prosecution against defendant for possession of narcotics was not error.

Thomas L. Berkley, Joseph G. Kennedy, Clinton Wayne White, Charles E. Wilson, Berkeley, for appellant.

* Subsequent opinion 245 P.2d 302.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty. of Alameda County, Vernon L. Goodin, Deputy Dist. Atty., Oakland, for respondent.

BRAY, Justice.

Defendant appeals from conviction by a jury of felony, to wit, possession of cocaine, and from an order denying a new trial.

Questions Presented.

The main questions are: (1) In a prosecution for possession of cocaine, is evidence of defendant's use of cocaine admissible? (2) Was the prosecution entitled to impeach its own witness?

Evidence.

Defendant makes no contention that the evidence is not sufficient to support the jury's verdict of guilty. A brief review will be given of the evidence relevant to the claimed error in the admission of testimony. The first witness was the state narcotic chemist who qualified as an expert on narcotics. He testified that each of the two capsules which the officers found in defendant's pocket contained one grain of cocaine. He stated, without objection, that in his opinion the average person could not tell by looking at the capsules what the substance contained therein was, but a narcotic peddler could. About midnight Officer Taylor, an Oakland police officer working the Narcotics Detail, went, with Police Sergeant Skelton, to defendant's room in the rooming house of the latter's mother. They knocked on the door and entered. Defendant and Mrs. Velma Miller were seated in the room. Taylor told defendant that they had information from a girl that defendant had narcotics there. Defendant denied it. After a search of defendant's person and Mrs. Miller's purse, finding nothing, Taylor searched clothing hanging in a closet. In a pocket of a coat which defendant admitted was his, Taylor found a piece of tissue paper in which was wrapped two capsules. Answering Taylor's question defendant stated that the contents of the wrapper were his and that

he had found the package on 7th Street. Defendant, at the police station, again claimed that he had found the package on 7th Street. On the stand, defendant denied making these statements. He stated that he had never seen the paper and its contents before the officer produced them in his room, and denied that they were his or that he had ever used narcotics; that while the coat was his he had not worn it for nearly a year. Mrs. Miller testified that while defendant was in the room she heard him deny two or three times that the package was his.

Use of Narcotics.

On direct examination, when asked by his own counsel if he had ever furnished narcotics to anybody, defendant denied that he had and stated: "I wouldn't know narcotics. That is the thing, I wouldn't know it if I saw it. I don't know narcotics, never been in contact with any of them. I never had it in my possession, don't even know what it looks like." On cross-examination defendant gave the following answers to the following questions, to none of which any objection was made:

"Q. Now, it is your testimony that you didn't know what a narcotic is, is that right? A. That's right.

"Q. Now, isn't it a fact that you had been using narcotics for a good many years prior to your arrest? A. No, that's not a fact at all; I have never used a narcotic.

"Q. You are acquainted with Nancy Teeple, known as Nancy McDowell? A. I know Nancy.

"Q. Do you know who I am referring to? A. Yes, I do.

"Q. Isn't it a fact that on several occasions you have told her that you used cocaine? A. No, I never told anybody I used cocaine."

On rebuttal Nancy Teeple McDowell was called. After stating that she had known defendant approximately two years, she was asked, again without objection, if on several occasions defendant had not told her that he used cocaine. She replied "No." The following then occurred:

"Q. Well, I will refresh your recollection, Mrs. McDowell. Do you remember talking to me—

"Mr. Berkley [counsel for defendant]: Objection; he is impeaching his own witness.

"Mr. Goodin [deputy district attorney]: If your Honor please, I can refresh her recollection and then certainly I am impeaching her.

"The Court: You may.

"Mr. Goodin: Q. Do you remember talking to me and Inspector Hansen of the District Attorney's office just yesterday about 11:30 in the morning in my office? A. Yes, I do.

"Q. Didn't you tell us at that time that the defendant had told you, that Mr. LeBeau told you on several occasions that he used cocaine? A. I don't believe that I stated anything that definite. I may have stated that from conversations that I have witnessed that the defendant talked about cocaine. Whether he used it, I would not know, and I have already told you that."

Counsel then claimed surprise, stating that he talked to the witness that very afternoon and asked permission to call Inspector Hansen. Defendant objected, saying: "If your Honor please, I think if he intends to impeach his witness it is all right, but I don't think he can go into any cross examination. This doesn't go to any evidence. It only goes at best as to whether or not—" The court overruled the objection. However, Inspector Hansen was out of the room, so counsel continued his examination of Mrs. McDowell.

"Mr. Goodin: Q. Now, you say that you have heard the defendant talking about cocaine during the time that you knew him? A. Yes, I have.

"Q. And in what manner did he talk about cocaine? A. I can't remember. You asked me if I ever, when I stated that you asked me—

"Q. Well now, this is something aside from what you stated yesterday. I want you to tell me the truth today. A. Well, your questions are rather hard to answer in the way that you put them.

"Q. All right. Well, what was the nature of the conversation that you had, that you had over here wherein the defendant was talking about cocaine?"

Defendant objected that there was no foundation laid. This objection was overruled, the court saying, "I think that's what he is trying to find out." Thereupon the witness said: "A. It'll only be a vague answer because I have had many conversations with him and I could not remember where it was, who was present or when it was, being as I do not know Mr. LeBeau that well.

"Q. But you do remember overhearing conversations wherein Mr. LeBeau was talking about cocaine, isn't that right? Is that your testimony now? A. Vaguely."

Defendant moved that "all" be stricken as immaterial. The motion was denied. Inspector Hansen was called by the district attorney and testified that Mrs. McDowell had told the district attorney and himself that defendant had told her he used cocaine.

Defendant now contends that the cross-examination of defendant concerning his use of narcotics, the admission of the testimony of Mrs. McDowell and that of Inspector Hansen in impeachment of Mrs. McDowell were erroneous. At no time did defendant object to the cross-examination of defendant on the subject of his use of narcotics, nor did he object to Mrs. McDowell being questioned on the subject, until it appeared that her testimony had taken the district attorney by surprise. Then, his objection was not to the subject matter, but to the manner of the district attorney's attempt to impeach her. Defendant stated: "* * * I think if he intends to impeach his witness it is all right, but I don't think he can go into any cross examination."

[1, 2] The question of the use of narcotics by defendant was first mentioned by him when (undoubtedly in an endeavor to influence the jury to believe that he did not know what was in the capsules, in the event that it should find against his claim that he did not know the narcotics were in his coat) he stated that he had never seen a narcotic and would not even know what it

looked like. The situation was similar to that in *People v. Westek*, 31 Cal.2d 469, 190 P.2d 9, where, in a prosecution for sodomy and lewd and lascivious conduct, defendant, in denying that he had mistreated the children mentioned in the charges, stated that he had never mistreated any children at all. Evidence that defendant had previously pleaded guilty to a charge of contributing to the delinquency of a minor other than any of the prosecuting witnesses was admitted. In holding this evidence properly admitted the court said, 31 Cal.2d at page 479, 190 P.2d at page 15: " * * * here appellant's voluntary declaration of his good character and unimpeachable moral status in relation to his prior conduct with boys was material to the issue involved, and the prosecution had the right to present responsive evidence which would 'tend to contradict' appellant's self-serving statement 'or weaken or modify its effect.' *People v. Turco*, supra, 29 Cal.App. 608, 610, 156 P. 1001, 1002. As the matter was considered in *People v. Buckley*, supra, 143 Cal. 375, at pages 389, 390, 77 P. 169, at page 175, in connection with the scope of cross-examination, it 'would be a harsh rule that would forbid the usual practice of allowing one on trial for a crime to testify, if he so desires, that he has led a decent * * * life * * *', for such evidence certainly tends to show good character,' but when he does so open 'voluntarily * * * the door to his past,' he cannot complain if the prosecution elects to subject him to further examination in regard thereto for the purpose of testing his credibility. The same reasoning applies in relation to rebuttal evidence offered by the prosecution. *People v. Hoffman*, supra, 199 Cal. 155, 162, 248 P. 504; *People v. Turco*, supra, 29 Cal.App. 608, 611, 156 P. 1001."

In *People v. Gin Hauk Jue*, 93 Cal.App.2d 72, 208 P.2d 717, defendant was charged with the possession of opium. In his room had been found, in addition to opium, some hypodermic needles. On direct examination defendant denied that the articles found belonged to him, and denied knowledge of the contents of the package. He then stated that he did not know what

Cal.Rep. 235-236 P.2d-23

hypodermic needles were. On cross-examination he was asked, over objection, if he were not a user of narcotics. He admitted that he was. In holding the cross-examination proper the court said, 93 Cal.App.2d at page 74, 208 P.2d at page 718: "It cannot be said, particularly in view of the testimony given by defendant on direct examination, that the ruling of the trial court was improper. Sec. 1323, Penal Code; *People v. Noland*, 61 Cal.App.2d 364, 143 P.2d 86." See also *People v. Casas*, 77 Cal.App.2d 255, 175 P.2d 19, where the court held that defendant's admissions that she had on several occasions used narcotics was a circumstance to be considered by the jury in determining that defendant knew the jar found in her possession contained opium. Nor is the evidence rendered inadmissible merely because it tended to prove the commission of another offense. *People v. Grayson*, 83 Cal.App.2d 516, 189 P.2d 285.

[3] Evidence of defendant's use of narcotics being admissible, it then was relevant and material to prove by the witness Mrs. McDowell that he had admitted using cocaine.

Defendant contends that the proper foundation for Mrs. McDowell's testimony was not laid in that "we have to know where the conversation, who was present * * *." Defendant had been asked if it was not a fact that on several occasions he had told Mrs. McDowell that he used cocaine. Defendant answered, "No, I never told anybody I used cocaine." The question and his flat denial were sufficient foundation for such rebuttal evidence and amply informed him of the testimony to be offered. See *People v. Hovermale*, 76 Cal.App. 91, at page 95, 243 P. 878, at page 880, where the court, in answer to a somewhat similar objection, pointed out that the objection was without merit as to time and persons, and said: "We cannot conceive how the witness could have been misled in any way in answering the question under consideration by the fact that the particular place where the conversation was claimed to have taken place was omitted from the question."

As stated in *People v. Ferrara*, 31 Cal.App. 1, 5, 159 P. 621, 623: "It was not necessary to fix time, place, and circumstances of alleged statements made by defendant by questioning him thereon before proving such statements. His declarations and statements were original evidence against him, and the rules as to impeachment of witnesses did not apply."

[4] At first the district attorney attempted to refresh the memory of his witness by calling attention to her previous statement to him inconsistent with her present testimony. This he was entitled to do. *People v. Durrant*, 116 Cal. 179, 214, 48 P. 75. Then the district attorney, who obviously was taken by surprise at the witness' conduct, was entitled to show that she had made contrary statements. The situation was identical with that in *People v. Gallagher*, 12 Cal.App.2d 434, at page 437, 55 P.2d 889, at page 891, where the court said: "The prosecution was taken by surprise by the refusal of the witnesses to identify appellant. The prosecution had a right to suppose the witnesses would adhere to the statements made to the officers and being taken by surprise at their refusal to do so, the district attorney had a right to show that they had made contrary statements."

In *People v. Newson*, 37 Cal.2d 34, 230 P.2d 618, it was held that a witness cannot be impeached unless he has given testimony against the impeaching party. There a witness, when asked if she saw anyone when she looked in the drug store where the murder occurred, replied "No." Over objection the district attorney, claiming surprise, was permitted to impeach her by prior inconsistent statements. This was held error as her answer attempted to be impeached had been entirely negative. It helped neither the district attorney nor the defendant. In our case the witness' answer helped the defendant. He had denied that he had told Mrs. McDowell he used cocaine. She supported his denial. Hence her testimony was positive and harmful to the party calling her. Moreover, on direct examination, defendant testified that the officers had told him at his room that Mrs.

McDowell had informed them that defendant had been supplying her with narcotics. In view of this voluntary testimony (the prosecution had offered no such evidence), the unexpected attitude of Mrs. McDowell was helpful to defendant. The court properly instructed the jury as to the effect of impeaching evidence.

Other Objections.

[5] At the beginning of the trial, out of the presence of the jury, defendant demanded that the district attorney be required to state whether he expected to call Mrs. McDowell as a witness and if so, what he expected to prove by her. The district attorney declined to do so, stating that whether she would be called depended upon the evidence adduced. The court refused the defendant's demand. There was no error in doing so. We know of no law, and counsel has cited none, requiring the prosecution to do as demanded.

[6] On cross-examination defendant, without objection, was asked concerning his employment following his statement on direct examination as to when he got out of the Army. In rebuttal the prosecution, again without objection, called defendant's employer in an attempt to impeach defendant concerning some statements made on this subject. No objection having been made at the trial it is now too late to raise the question. Moreover, the rebuttal evidence supported defendant's testimony.

[7] There were two police officers present at the time the cocaine was found in defendant's room. Only one of them testified at this trial. Defendant contends that it was unfair for the prosecution to call only one of these officers. (Apparently there had been a previous trial at which both officers testified and the jury disagreed.) We know of no law, and counsel has cited none, which requires a party to call all witnesses to a particular incident.

The judgment and the order denying the motion for a new trial are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

106 Cal.App.2d 703

**MIDDLETON et ux. v. POST TRANSP.
CO. et al.**
Civ. 18502.

District Court of Appeal, Second District,
Division 2, California.

Oct. 4, 1951.

Hearing Denied Nov. 29, 1951.

L. W. Middleton and wife brought action against the Post Transportation Company, a California corporation, and another, to recover for injuries sustained when defendant's truck was involved in intersection collision with drunken driver and truck ran into motel in which plaintiffs were sleeping. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment on verdict for defendants and plaintiffs appealed. The District Court of Appeal, McComb, J., held that where trial court gave instruction on doctrine of *res ipsa loquitur* and stated that doctrine was applicable, further instruction that mere fact of accident, considered alone, did not support inference that some party was negligent was proper.

Affirmed.

1. Negligence ⇨138(3)

The fact that doctrine of *res ipsa loquitur* is applicable in action for personal injury does not deprive defendant of right to an instruction that mere fact of injury is no evidence of defendant's negligence or liability.

2. Trial ⇨243

In action by occupants of motel against truck owner for injuries sustained when truck, after intersection collision with drunken motorist, ran into motel in which occupants were sleeping, where court gave instruction on doctrine of *res ipsa loquitur* and stated that doctrine was applicable, further instruction, which stated that mere fact that accident happened, considered alone, did not support inference of negligence, did not conflict with *res ipsa loquitur* instruction, and was proper.

3. Negligence ⇨121(2)

For doctrine of *res ipsa loquitur* to be applicable, defendant must have had exclusive control of injuring instrumentality, and accident must have been such as does not happen in ordinary course of events,

and defendant must be in a better position to explain the accident than plaintiff.

4. Trial ⇨260(8)

In personal injury action, where court instructed jury that doctrine of *res ipsa loquitur* was applicable, plaintiffs' requested instruction that if jury find that plaintiffs were injured when defendant's truck collided with motel which plaintiffs were occupying, then inference of negligence arose which threw upon defendant burden of showing that injuries were sustained without negligence on part of defendant, and in absence of such evidence verdict should be in favor of plaintiffs, was covered by *res ipsa loquitur* instruction, and court did not err in refusing requested instruction.

5. Trial ⇨260(1)

It is not error for trial court to refuse requested instruction if subject matter thereof is substantially incorporated in an instruction which was given.

6. Appeal and Error ⇨1053(2)

Where trial court struck improper answers of witness and instructed jury to disregard the stricken matter, plaintiffs were not prejudiced by such testimony.

Swaffield, Madden & McCarry, Long Beach, for appellants.

Harry E. Sackett, Los Angeles, Jennings & Belcher and Louis E. Kearney, all of Los Angeles, of counsel, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages resulting from a collision of automobiles, plaintiffs appeal.

The evidence being viewed in the light most favorable to defendants (respondents) the essential facts are:

About 11:00 p.m., December 7, 1949, plaintiffs, husband and wife, retired in their apartment at the Chace Motel on the northwest corner of Pacific Coast Highway and Pine Avenue in Long Beach. Pacific Coast Highway runs in a general easterly and westerly direction and is 76

feet wide, while Pine Avenue is 50 feet wide and runs in a general southerly and northerly direction.

Immediately after retiring plaintiffs fell asleep and were not awakened until the hereinafter described accident occurred. About 1:30 a.m., December 8, 1949, defendant Ogle was driving a tractor and trailer (owned by the corporate defendant) in a westerly direction on Pacific Coast Highway just east of its intersection with Pine Avenue at a speed of about 25 miles per hour. When his vehicle was 15 to 20 feet into the intersection he noticed an automobile coming from his left and driving north on Pine Avenue. This automobile was driving at a high rate of speed, and the driver was intoxicated. The car struck the left rear dual wheels of defendant's tractor with such force as to flatten out the car, killing the driver thereof and rendering defendant Ogle unconscious. Thereafter the truck crashed into the motel apartment in which plaintiffs were sleeping causing them serious injuries.

After a jury trial judgment was rendered in favor of defendants.

[1] *Questions: First: Did the trial court err, after giving an instruction on the doctrine of res ipsa loquitur and stating that it was applicable to the facts of the case, in giving the jury the following instruction?*

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this accident was negligent."

No. The fact that the doctrine of res ipsa loquitur is applicable in an action for personal injury does not deprive a defendant of his right to an instruction that the mere fact of injury is no evidence of his negligence or liability. (*Palmer v. Hygrade Water & Soda Co.*, 236 Mo.App. 247, 151 S.W.2d 548, 550 et seq. [3-5]; cf. *O'Neill v. City & County of San Francisco*, 209 Cal. 418, 420, 287 P. 449; *Seedborg v. Lakewood Gardens Ass'n*, Cal.App., 233 P.2d 943.)

[2,3] The complained of instruction is a correct statement of law; such instruc-

tion called the attention of the jury to the rule of law that the mere happening of an accident, that is, separated from everything else shown by the evidence, will not support an inference of negligence on the part of defendant. This instruction does not conflict with the res ipsa loquitur instruction, for such instruction does not become applicable to a case unless several factors concur in addition to the mere happening of the accident: (1) there must be exclusive control of the injuring instrumentality by defendant; (2) the accident must be such as does not happen in an ordinary course of events; and (3) the defendant must be in a better position to explain the accident than the plaintiff. In the present case the jury were entitled to find that certain elements of the doctrine of res ipsa loquitur were not present; therefore such doctrine became inapplicable and the jury were properly advised that they could not draw an inference of negligence on the part of defendant merely because an accident had happened.

[4] *Second: Did the trial court err in not instructing the jury as follows?*

"If you find that while the plaintiffs were in their apartment in the Chace Motel they were injured through the truck owned by the defendant Post Transportation Company and operated by the defendant Benny Ogle colliding with the motel and the apartment which plaintiffs were occupying, then an inference of negligence arises which throws upon these defendants the burden of showing that the injuries were sustained without any negligence on their part, and in the absence of such evidence your verdict should be in favor of the plaintiffs for such sum as will compensate them for the damages they sustained."

No. The requested instruction was merely an instruction upon the doctrine of res ipsa loquitur and the substance thereof was covered by the instruction previously given by the court.

[5] It is settled that it is not error for the trial court to refuse a requested instruction if the subject matter thereof is substantially incorporated in an instruction which was given. (*Luis v. Cavin*, 88 Cal. App.2d 107, 115[7], 198 P.2d 563.)

[6] Third: *Did the trial court err in refusing to strike certain testimony of the witness Marie Wagner?*

No, for the reason that plaintiffs admitted in their brief that the improper statements of the witness were stricken. They say, "We must hasten to admit that the improper statements made by the witness were on motion ordered stricken by the Court, but as a practical matter we know that such testimony cannot be stricken from the minds of the jurors." The court also instructed the jury to disregard the stricken evidence.

It is established that when the trial court strikes answers of a witness which are improper and instructs the jury to disregard the stricken matter no prejudice results. (*Downey v. Bay Cities Transit Co.*, 94 Cal. App.2d 373, 375, 210 P.2d 713.)

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.



106 Cal.App.2d 650

PHILLIPS et al. v. OGLE ALUMINUM FURNITURE, Inc., et al.

Civ. 4249.

District Court of Appeal, Fourth District, California.

Sept. 26, 1951.

Rehearing Denied Oct. 22, 1951.

Hearing Denied Nov. 19, 1951.

Action by Simone Irene Phillips and George Phillips, husband and wife, against Ogle Aluminum Furniture, Inc., and others, and H. L. Benbough Company, Ltd., for personal injuries and damages alleged to have occurred as the result of certain defective workmanship in assembling an aluminum tubular kitchen chair sold by defendant H. L. Benbough Company, Ltd., to the plaintiffs. The Superior Court of San Diego County, Dean Sherry, J., gave judgment for the plaintiffs, and the defendant H. L. Benbough Company, Ltd., appealed. The District Court of Appeal, Griffin, Acting P. J., held that whether it could be reasonably anticipated that an aluminum kitchen chair would

be used for the purpose of standing upon it, and whether the negligence of the defendant was the proximate cause of plaintiff's injuries sustained in fall therefrom, were properly questions of fact for the jury under instructions fully covering the issues.

Judgment affirmed.

1. Negligence ⇨136(18)

Whether it could be reasonably anticipated that aluminum tubular kitchen chair would be used for purpose of standing upon it, and whether negligence of corporation operating retail store which sold chair to woman was proximate cause of her injuries sustained in fall therefrom, were questions of fact for jury.

2. Negligence ⇨136(26, 31)

Where it appeared from evidence that no particular inspection by purchasers of aluminum tubular kitchen chair, short of taking it apart, would have divulged that the back was attached by inadequate screws, the question whether woman was negligent in standing upon chair, and whether such negligence contributed proximately to the cause of her injuries sustained in fall therefrom, were questions of fact for jury.

3. Trial ⇨193(3)

An instruction that if retailer assembled parts of an article that was either inherently dangerous or reasonably certain to be dangerous if negligently assembled the retailer owed duty to public to exercise ordinary care with reference to work done so that article might be safely used for any purpose for which its use was invited by the manufacturer or retailer, and that failure to fulfill duty was negligence, was not objectionable as disclosing opinion of court that aluminum tubular kitchen chair sold by defendant retailer to woman who fell while standing thereon was an article which was either inherently dangerous or reasonably certain to be dangerous if negligently assembled.

4. Negligence ⇨27

If manufacturer who puts finished product on market to be used without inspection by customers is negligent where danger is to be foreseen, a liability will follow, and the manufacturer has duty to

see probable results of normal use of commodity or use which can reasonably be anticipated.

5. Appeal and Error ⇨1064(4)
Negligence ⇨27

A retail store was bound by same rule of liability as to buyers as a manufacturer, pertaining to particular part it played in assembling manufactured article, and giving of instruction to that effect in customer's action against store for injuries while using the article, although unnecessarily repetitious, was not prejudicial error.

6. Appeal and Error ⇨1067

The failure to give an instruction which had not been requested was not prejudicial error.

7. Damages ⇨132(5), 133

Verdict in favor of woman for \$25,000 for traumatic vesicovaginal fistula, permanently decreased bladder due to two operations, inadvisability of further natural births, mental anxiety, nervousness, pain and suffering, medical and hospital expenses, arising out of fall from chair while three months pregnant, and in favor of husband for \$3,500 for loss of services of wife during one year period she was a semi-invalid, and special damages in excess of \$1,500 incurred by him, was not excessive.

Gray, Cary, Ames & Driscoll, Ward W. Waddell, Jr., and H. Pitts Mack, all of San Diego, for appellant.

Brooks Crabtree and Charles B. Provence, San Diego, for respondents.

GRIFFIN, Acting Presiding Justice.

Plaintiffs and respondents obtained a judgment against defendant and appellant H. L. Benbough Company, Ltd., a corporation, the operator of a retail store, for personal injuries and damages alleged to have occurred as the result of certain defective workmanship in assembling an aluminum tubular kitchen chair sold by it to respondents. Defendant Ogle Aluminum Furniture, Inc., manufacturer of the chair, sold it to appellant in a "knocked down" condition. This particular defendant went bankrupt and was not served with process.

Respondents' evidence shows that they rented an unfurnished apartment, went to appellant company's store, discussed their problem with the sales agent and decorator, and accordingly purchased considerable furniture, including a kitchen table and four chairs, (which chairs were made of one-inch aluminum tubing, so bent as to form a "U" at the base, running thence upward in front and across to the rear of the chair parallel to the floor, forming the base for the seat, thence continuing upward, forming the support for the back. The two ends of the tubing were beveled and terminated about 12 inches above the seat. The seat and back consisted of one-half inch plywood with about one-fourth inch of leatherette upholstery. Each was laid across and fastened by means of screws which penetrated through holes drilled through the tubing and into the plywood.) There were two screws on each end of the seat as well as each end of the back. According to the testimony of the factory representative, these chairs were shipped to the retailer "knocked down". Eight or nine 1-3/8 inch cadmium plated oval head wood screws were contained in an envelope tied to the tubing for each chair. The plywood seat and back were not attached but had "starter holes" punched in the back so the retailer could assemble them with proper alignment by inserting the attached screws through the tubular punch holes and by screwing them into the plywood. Due to the curvature of the tubing there was no direct support for the back part of the seat. Accordingly, the chair tended to sag toward the back when weight was placed upon it. The chair weighed about six pounds, and due to the curvature of the tubing as it left the floor, the chair did have a tendency to tip forward if weight was placed upon it near the front.

About thirty days after the furniture was delivered to respondents, Mrs. Phillips, who weighed about 98 pounds, used the chair to stand on to put a sugar bowl in a cupboard above her refrigerator. According to her story she had on her house slippers, stood up on the seat of the chair, put the sugar bowl in its place, and when she

placed her hand on the back of the chair to get down the back fell off and caused her to fall on one of the sharp uprights, which went into her body, piercing her vaginal wall and her bladder and causing her serious injuries. She was about three months pregnant at the time. The chair remained standing and it was necessary for Mrs. Phillips to pull the upright out of her body. The injury was claimed to have been due to the improper and negligent manner in which appellant attached the plywood back to the uprights by putting in shorter screws than those furnished by the factory.

Appellant, in its answer, denied that it had assembled the chair, denied negligence on its part, and alleged contributory negligence on the part of respondents. The jury returned a verdict in favor of Mrs. Phillips for \$25,000, and in favor of Mr. Phillips for \$3500.

On this appeal appellant first argues that the evidence was insufficient to justify the verdict, but concedes that the evidence was sufficient to support a finding that the back of the chair was not fastened as securely as it might have been to the uprights because the four screws found in the home of respondents, after the accident, were shorter by at least a quarter of an inch than the ones the agent of the factory testified were sent with the chairs supplied by it. It is respondents' argument that the appellant company substituted shorter screws of its own and as a result they pulled out of the plywood back with much more ease. There is evidence that appellant did assemble different types of such chairs and had extra screws of a shorter length in its stock, but it denied using any screws not sent by the factory with the chairs. Appellant contends that this evidence "came a long way" from proving that appellant was negligent or that its acts were a proximate cause of the injuries. In this connection it is also argued that there was no evidence that the chair was not perfectly safe for the sole purpose for which it was constructed, i. e., for sitting on it, and that it was not designed to be used as a substitute for a step-ladder, citing such cases as *Waterman v. Liederman*, 16 Cal.App.2d 483, 60 P.2d 881,

62 P.2d 142; *Schfranek v. Benjamin Moore & Co.*, D.C., 54 F.2d 76; and *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696. In this connection the court gave the following instruction: " * * * that if a retailer takes part in the manufacturing of an article, or assembles the component parts of an article that is either inherently dangerous or reasonably certain to be dangerous if negligently made or assembled, such retailer owes a duty to the public generally and to each member thereof who will become a purchaser or a user of the article. That duty is to exercise ordinary care with reference to the work done by such retailer to the end that the article may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly or impliedly invited by the manufacturer or such retailer. Failure to fulfill that duty is negligence."

In reply, respondents point out that it is a matter of common knowledge that people regularly and habitually use chairs to stand on in their homes which is an exceptable vicissitude, and that such use is lawfully allowed; that when chairs are sold to the public the seller is charged with such knowledge; that there is an implied invitation to so use it; and that the standard of negligence is measured by the common experience of mankind. In this connection counsel for respondents asked each juror, on voir dire, whether he or she ever stood on a chair in their home and the great majority answered in the affirmative. However, a number stated that they had not stood on chairs of this type. It is further pointed out that respondents told the decorator the plans of their kitchen; that the refrigerator had to be of a certain height because there was a cupboard above it; that he pointed out these chairs and table and made no recommendation as to additional furniture in the kitchen. Mr. Phillips testified the chairs looked "good and sturdy" so he bought them.

[1] Although the ordinary use of a chair is to sit on it, it cannot be said, as a matter of law, that it could not be reasonably anticipated that the described chairs would be used for the purpose of standing upon

them. *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481; *Sheward v. Virtue*, 20 Cal.2d 410, 412, 126 P.2d 345; *Leenders v. California Hawaiian, etc., Corp.*, 59 Cal.App.2d 752, 139 P.2d 987. This question, as well as the question of whether the negligence of appellant was a proximate cause of plaintiff's injuries, were factual questions for the jury to determine, and it did so under instructions fully covering those issues.

[2] We will next discuss the contention that standing on a chair of this design was contributory negligence as a matter of law on the part of respondents. Appellant argues that ordinarily the question of contributory negligence is one largely of fact for the jury, but in the instant case the conduct of the respondents was so plainly negligent that the question became one of law, citing such cases as *Jones v. Southern Pacific Co.*, 34 Cal.App. 629, 168 P. 586; and *Kauffman v. Machin Shirt Co.*, 167 Cal. 506, 140 P. 15.

It appears from the evidence that no particular inspection by respondents, short of taking the chair apart, would have divulged that the back was attached by short or inadequate screws. We conclude that the question whether Mrs. Phillips was negligent in standing upon this particular chair, under the circumstances, and whether such negligence, if any, contributed proximately to the cause of her injuries, was a factual question for the jury to determine. *Dobbie v. Pacific Gas & Electric Co.*, 95 Cal.App. 781, 273 P. 630; *Buckingham v. San Joaquin Cotton Oil Co.*, 128 Cal.App. 94, 101, 16 P.2d 807.

[3] The next claimed error involves the instruction set out above and was in reference to the duty required of a retailer who assembles the component parts of an article sold by it. This instruction was offered by the respondents and given by the court. It is claimed that it is misleading because, by its wording, it repetitiously gave the jury the impression that it was the opinion of the court that the chair was an article which was either inherently dangerous or "reasonably certain" to be dan-

gerous if negligently assembled. We see no merit to this claim.

[4,5] The next argument is that the instruction "insinuates" that there was an invitation, either express or implied, to use the chair for some other purpose than that for which it was intended, and that there was no evidence supporting such an invitation. We do not so construe the instruction. This was a general instruction and patterned, to a degree, after *B. A. J. I. No. 218*, p. 425, relating to liability of a manufacturer of an article. In *MacPherson v. Buick Motor Co.*, supra, 111 N.E. at page 1053, the court discusses the rule pertaining to the liability of a manufacturer to his customers, who puts the finished product on the market, to be used without inspection by its customers. It says: "If he (the manufacturer) is negligent, where danger is to be foreseen, a liability will follow." It has likewise been held that a manufacturer of a commodity has the duty to see the probable results of the normal use of a commodity or of a use which can reasonably be anticipated. *Restatement of the Law of Torts*, p. 1073, sec. 395; *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345; *Waterman v. Liederman*, supra; *Gorman v. Murphy Diesel Co.*, 3 Terry 149, 42 Del. 149, 29 A.2d 145; *Zesch v. Abrasive Co. of Philadelphia*, 353 Mo. 558, 183 S.W.2d 140, 156 A.L.R. 469; *Schfranek v. Benjamin Moore & Co.*, supra; *White Sewing Machine Co. v. Feisel*, 28 Ohio App. 152, 162 N.E. 633; 65 C.J.S., Negligence, § 100 pages 629-633. Appellant cannot be heard to complain because it, under the instruction, was bound by the same rule of liability as a manufacturer, pertaining to the particular part appellant played in assembling the manufactured article, before a recovery could be had. Unnecessary repetition of a rule of law is condemned as an unwholesome practice. We do not, however, believe prejudicial error resulted in this respect. *Paulos v. Market Street Ry. Co.*, 136 Cal.App. 163, 28 P.2d 94.

[6] Another instruction criticized is one given to the effect that one who herself is exercising ordinary care should assume others have performed their duty

under the law. The argument is that the court should have given a similar instruction applying to appellant. No instruction was offered by appellant in this respect and accordingly no prejudicial error can now be claimed. *Mauchle v. Panama-Pacific International Exposition Co.*, 37 Cal. App. 715, 174 P. 400.

[7] The claim that the verdict was excessive, under the evidence, is without merit. As a result of the accident Mrs. Phillips suffered a traumatic vesicovaginal fistula. She was at the time three months pregnant. Emergency surgery was performed and she was on the hospital "serious list" for 18 days following the operation. She spent 27 days in the hospital, and suffered considerable pain. She was highly nervous and concerned about the future birth of her baby and, according to the doctor's testimony, they could not tell whether she would have to have an abortion, whether she would have the child naturally, or whether the child would be normal when it arrived. She was confined to her bed for about three weeks after she returned home and spent a portion of her time in bed for one year thereafter. Five weeks after returning from the hospital the scar tissue broke down and caused considerable difficulty for a period of nine months. Her child was born about five weeks prematurely and his diminutive size worried her. A second operation was performed to repair the vesicovaginal fistula, at which time she spent 17 days in the hospital. According to the testimony of the doctor her bladder was permanently decreased in size due to the two operations and will cause her considerable inconvenience the rest of her life. The doctor also testified that it would be unwise for her to have another natural birth of a child due to the possibility of the scar-tissue breaking down, and recommended that any future children be delivered by Caesarean section. Respondents claim that all of this knowledge which was imparted to her is causing and in the future will cause her great mental suffering and anxiety.

As to Mr. Phillips, he testified that he lost the services of his wife during the period of one year after the accident, since

she was a semi-invalid during that time and that he incurred special damages in excess of \$1500. The trial court considered all of these questions on a motion for a new trial which was denied. No abuse of discretion appears. The judgment rendered, under the circumstances, cannot be held to be excessive. *Holmes v. Southern California Edison Co.*, 78 Cal.App.2d 43, 177 P.2d 32; *Johnston v. Long*, 30 Cal.2d 54, 181 P.2d 645.

Judgment affirmed.

MUSSELL, J., concurs.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



KELLEY v. UPSHAW et al.

Civ. 18266.

District Court of Appeal, Second District,
Division 1, California.

Oct. 3, 1951.

Hearing Granted Nov. 20, 1951.*

Action by Alexander R. Kelley against William A. Upshaw, Othelia A. Upshaw, and Cody W. Howarth, on a note extension agreement. The Superior Court of Los Angeles County, Leo Freund, J., rendered judgment for plaintiff and the last named defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence was insufficient to sustain finding that payee's agreement to surrender obligation for less than fixed amount was an option rather than an irrevocable 30 day option contract supported by consideration.

Judgment reversed.

I. Judgment ⇨ 205

Where note extension agreement provided that if \$8,800 was not paid on or before a date certain, entire indebtedness with interest shall be due and shall be paid on a weekly basis of \$50 per week plus interest, judgment against party to extension agreement providing that \$2,297.26 shall be payable forthwith, and balance of

* Subsequent opinion 246 P.2d 23.

\$10,899.94 at rate of \$50 per week plus interest at six per cent per annum and commencing certain date and continuing until paid, was not improper on ground that judgment should have been limited to amount of installments due at time action was commenced.

2. Action $\Rightarrow$ 61

An action may not be maintained until a cause of action accrues.

3. Contracts $\Rightarrow$ 88

Usury $\Rightarrow$ 113

It is within province of trial court to draw inferences as to consideration and usury.

4. Contracts $\Rightarrow$ 172

An option which is not supported by consideration may be revoked at any time.

5. Contracts $\Rightarrow$ 172

An option which is supported by consideration cannot be revoked within period of time expressed in the option.

6. Contracts $\Rightarrow$ 175(3)

In action by payee of note on extension agreement, evidence was insufficient to sustain finding that payee's agreement to surrender obligation for less than fixed amount was an option rather than an irrevocable 30 day option contract supported by consideration.

John M. Davenport, Los Angeles, for appellant.

Sampson & Dryden and Jacob Swartz, all of Los Angeles, for respondent.

DRAPEAU, Justice.

February 5, 1947 defendants William A. Upshaw and Othelia A. Upshaw made, executed and delivered their promissory note to plaintiff. The principal amount was \$17,900.00, due and payable in installments of \$200.00 a week.

December 1, 1947, payments on the note were in default. On that date defendants above named, together with the remaining defendant, Cody W. Howarth, entered into an extension agreement with plaintiff. The agreement provided:

1. For payment by defendants of \$1,200 on the note, receipt of which was acknowledged.

2. To pay \$50.00 weekly on the note, together with interest computed and payable monthly.

3. If \$8,800 was paid by defendants on or before June 1, 1948, such payment would be accepted in full payment of the note.

4. If \$8,800 was not paid on or before June 1, 1948, "the entire sum of \$17,600, plus 6% interest from February 5, 1947 shall be due and shall be paid on the weekly basis of \$50 per week, plus interest."

\$8,800 was not paid, the note was still in default, and plaintiff brought his action. Defendants Upshaw do not appeal from the judgment which followed.

Judgment was against defendant Howarth and the other two defendants for immediate recovery of \$2,694.16 interest; also against the same defendants for \$13,197.20 "principal damages," with the following proviso: "provided, however, that as to defendant Cody W. Howarth only said sum shall be payable as follows: \$2,297.26 forthwith, and the balance of \$10,899.94 at the rate of \$50.00 per week, plus interest at 6% per annum, commencing July 1, 1950 and continuing until paid; that execution shall issue as against said defendant Cody W. Howarth only in accordance herewith." The computation of \$13,197.20 was made by crediting \$4,402.74 paid on account of the \$17,600 referred to in the extension agreement.

An answer on behalf of defendant Howarth was prepared and filed by a member of the bar. Before trial this lawyer retired from the case. Upon the trial defendant Howarth appeared and attempted to defend himself without benefit of counsel, with the usual results: The trial judge tried to help defendant, without much success; defendant tried to express himself with still less success; and this Court finds an unsatisfactory record.

[1] After judgment defendant retained counsel, and perfected his appeal. First, defendant contends that it was error to render judgment for the entire balance due

on the agreement, the agreement providing that payments on the balance due were to be in installments of \$50.00 weekly. Defendant argues that if plaintiff is entitled to a judgment at all, such judgment must be limited to the amount of installments due at the time the action was commenced.

[2] It is, of course, true that an action may not be maintained until a cause of action accrues. *Gardner v. Shreve*, 89 Cal. App.2d 804, 202 P.2d 322. But in this case the rights of the parties are measured by their contract. Defendant agreed that if \$8,800 was not paid on or before a date certain, \$17,600, with interest "*shall be due* and shall be paid on the weekly basis of \$50.00 per week, plus interest." (Emphasis added.)

Defendant next contends that the findings of fact are not supported by the evidence, in that the consideration for the note was inadequate, because the maker received only \$15,000 instead of \$17,900 which he agreed to pay; also that the note was usurious for the same reason.

[3] Mr. Upshaw, the maker, testified that \$15,000 in money was put up at the time the note was made, and "The other was prior to the \$15,000 loan." It is the province of the trial court to draw inferences as to consideration and usury. *Bank of America Nat. Trust & Savings Ass'n v. McRae*, 81 Cal.App.2d 1, 183 P.2d 385.

Defendant next contends that the evidence does not support the findings or the judgment. Defendant argues that upon a new trial it could well be found that plaintiff agreed with defendant to accept \$2,500 for defendant's obligation.

The facts upon which defendant's argument that a different result might follow a new trial may be summarized as follows:

The money received from plaintiff was put into an enameling business called Coast Enameling Company, carried on by Mr. Upshaw. The business was running at a loss, its liabilities exceeded its assets, and bankruptcy was imminent, when a third party was brought into the picture—Mr. John Goodwin.

Mr. Goodwin, Mr. Howarth, and Mr. Upshaw agreed that Mr. Goodwin would operate the business for a time and endeavor to work out a reorganization which would put it in good shape. Pursuant to this agreement, a meeting was held at the company's office at which Mr. Kelley, the plaintiff, was present. Also present were Mr. Goodwin and Mr. Howarth. Mr. Goodwin's attorney was also there.

At that time and place the attorney prepared a document by which Mr. Kelley granted to Mr. Goodwin an option to purchase for \$2,500 the chattel mortgage securing the note here in question. The document was in the attorney's handwriting and was signed by Mr. Kelley.

The attorney testified to the terms of the document from memory, the original having disappeared under the following circumstances: The original was taken by the attorney to his office to have typewritten copies made of it. He testified that shortly after arriving at his office, "in walked Mr. Kelley and Mrs. Kelley. Mrs. Kelley said, 'I would like to see the agreement that Mr. Kelley signed this morning.'"

So the lawyer handed it to her. Then she said: "Well, I don't like to do this, but I am going to take this agreement with me." "And," said the lawyer, "she stuffed it down her neck, turned around and walked out."

Mr. Howarth testified that Mr. Goodwin was his agent, and that they were working together to save the business; that he called Mr. Kelley on the telephone within a few days after the document was written, signed, and recaptured, and told him \$2,500 was available, and that Mr. Kelley said he would not accept it. This testimony was corroborated by Mr. Upshaw.

Plaintiff argues that the option agreement was for the chattel mortgage and was not for defendant's obligation. However, this technical construction may not be put upon the document, as testified to by the attorney who prepared it. The record shows that the chattel mortgage had been released and assigned to Mr. Howarth a

year or two before the meeting which resulted in the option agreement.

The vital point to consider centers upon the effect of the testimony as to the nature of the document. Was it a continuing offer, or was it an option? Was it supported by a consideration?

[4, 5] If it was an option, plaintiff could revoke it at any time, and did. *Thomas v. Birch*, 178 Cal. 483, 173 P. 1102; *Podesta v. Mehrten*, 57 Cal.App.2d 66, 134 P.2d 38. If there was a consideration for the agreement and it was an option contract, plaintiff had no right to revoke it for thirty days after it was made. *Warner Bros. Pictures v. Brodel*, 31 Cal.2d 766, 192 P.2d 949, 3 A.L.R.2d 691.

All of the testimony in the record as to the nature of the document is by the attorney, and is as follows:

"Q. (By the Court) To the best of your recollection what is your recollection of it?

A. Well, the document was in the nature of an option executed by Mr. Kelley wherein he granted to John Goodwin an option to purchase the chattel mortgage then existing against the equipment at Coast Enameling for \$2500 cash. He gave thirty-days' time in which to raise the \$2500, and that was the option; that was the agreement."

[6] This testimony does not support the finding that the agreement was an option only. It would rather, as it stands in the record, compel a finding that for a consideration plaintiff granted defendant's agent an option contract which he could not revoke for thirty days. Other testimony would support a finding that defendant Howarth himself made a formal tender unnecessary. And consideration appears from the attorney's use of the word "granted" in describing the agreement, and when he said "that was the agreement."

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

PEOPLE v. RAMOS.

Cr. 4647.

District Court of Appeal, Second District,
Division 2, California.

Oct. 4, 1951.

The People of the State of California filed an information against William Ramos charging him with violating statute prohibiting a person from wilfully assisting an inmate of a public training school or reformatory to escape, and statute prohibiting a person from assisting a person to escape from prison or jail, or custody. The Superior Court of Ventura County, Walter J. Fourt, J., granted defendant's motion to set aside the information and the People appealed. The District Court of Appeal, McComb, J., held that evidence did not justify committing defendant to answer such charge.

Affirmed.

Criminal Law ⇐238

Evidence did not justify committing defendant to answer charge of violating statute prohibiting a person from wilfully assisting an inmate of a public training school or reformatory to escape, and statute prohibiting a person from assisting a person to escape from prison or jail. Pen. Code, §§ 109, 4534.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., Roy A. Gustafson, Dist. Atty. Ventura County, Oxnard, and Donald L. Benton, Deputy Dist. Atty. Ventura County, Ventura, for appellant.

M. Arthur Waite, Ventura, for respondent.

McCOMB, Justice.

From an order granting defendant's motion to set aside and information charging him with violating (1) section 109 of the Penal Code,¹ and (2) section 4534 of the Penal Code,² the People appeal.

1. Section 109 of the Penal Code reads: "Any person who wilfully assists any inmate of any public training school or reformatory to escape, or in an attempt to escape from such public training school or reformatory is punishable by

imprisonment in the State prison not exceeding 10 years, and fine not exceeding ten thousand dollars (\$10,000)."

2. Section 4534 of the Penal Code reads: "Any person who wilfully assists any

Facts: After having been so charged, defendant was arraigned and a preliminary examination was conducted at the conclusion of which the justice's court held defendant to answer the charges in the superior court. Thereupon the information above described was filed.

Defendant moved to set aside the information under the provisions of section 995 of the Penal Code on the ground that he had been illegally committed by the magistrate, in that he had been committed without reasonable or probable cause. This motion was granted by the superior court.

Question: Was there sufficient evidence before the trial court to show reasonable or probable cause that (1) a public offense had been committed, or (2) defendant was guilty thereof?

No. The only evidence taken before the committing magistrate was that of the Superintendent of the Ventura School for Girls, in which she testified relative to the history and commitment of Shirley Sylvester through the Youth Authority, and of Bill Ray Welch, who testified in substance that he and defendant met Shirley Sylvester in front of a garage in Ojai on

December 23, 1950, approximately 13 miles from the Ventura School for Girls. His testimony further disclosed that they invited her to go for a ride with them which she accepted; that while riding she told them that she was from the Ventura Girl's School; also that he and defendant stayed all night with her at a ranch house in Ojai and saw her several times thereafter.

Clearly such evidence fails to give rise to any inference that defendant knew the girl had escaped from the Ventura School for Girls and that he with knowledge of such fact aided, abetted or assisted her in escaping, or concealed her with the intent of enabling her to elude pursuit.

Hence there is no reasonable or probable cause to sustain the commitment (In re Schubert, 68 Cal.App.2d 424, 425, 156 P.2d 944), and the trial court properly quashed the information.

In view of our conclusion it is unnecessary to discuss other points raised by counsel.

Affirmed.

MOORE, P. J., concurs.

paroled prisoner whose parole has been revoked, any escape, any prisoner confined in any prison or jail, or any person in the lawful custody of any officer or

235 P.2d—55

person, to escape, or in an attempt to escape from such prison or jail, or custody, is punishable as provided in Section 4533 of the Penal Code."



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236 PACIFIC REPORTER

SECOND SERIES

106 Cal.App.2d 735

CHARACH et al. v. LANSING et al.

Civ. 18510.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1951.

Rehearing Denied Oct. 30, 1951.

Hearing Denied Dec. 6, 1951.

Action by Solomon G. Charach and Gladys E. Charach against Mitcheal Lansing and Viola Lansing to recover damages for alleged rent charged in excess of legal maximum permitted under the Housing and Rent Act. The Superior Court, Los Angeles County, William S. Baird, J., gave judgment for the plaintiffs and the defendants appealed. The District Court of Appeal, Moore, P. J., held that the plaintiffs had the burden of proving that the premises were subject to rent control during the period involved, and as they introduced no evidence on the matter they could not recover.

Judgment reversed.

1. Landlord and Tenant ⇨200(1½)

War and National Defense ⇨220

Tenant has burden of proving that premises are subject to rent control in action to recover damages for landlord's alleged rent overcharges. Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq.

2. Stipulations ⇨14(10)

Where landlords failed to deny allegation in tenants' complaint for recovery of damages for rent overcharges, as to maximum allowable rental, such allegation was not deemed admitted in view of fact that at outset of trial attorneys for both sides entered into stipulation as to ceiling rental for premises if the property were subject to control, and such matter was specifically reserved as issue for trial. Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq.; Code Civ.Proc. § 462.

3. Landlord and Tenant ⇨200(1½)

War and National Defense ⇨220

Where tenants introduced no evidence on matter of premises being subject to rent control, they could not recover damages from landlords for alleged rent overcharges. Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq.

Jones & Wiener, Los Angeles, by Edward Clayton Jones, Los Angeles, for appellants.

Edward Mosk, Hollywood, for respondents.

MOORE, Presiding Justice.

Respondents recovered treble damages on their complaint that appellants charged rent in excess of the legal maximum permitted under the Housing and Rent Act of 1947. 50 U.S.C.A.Appendix, § 1881 et seq.

Appellants were the owners of certain premises on Saturn street in Los Angeles which they leased to respondents for housing purposes pursuant to written lease for the period from October 1, 1948, to September 30, 1950. They concede that if the accommodations were subject to rent control during the period of the tenancy, the maximum lawful rental charge until March 7, 1950 would have been \$40 per month. However, respondents testified that they agreed with appellants' agent to lease the premises at a rental of \$100 per month; that prior to the execution of the lease they paid \$606 in cash and thereafter, commencing in October, 1948 made monthly payments of \$74.75. The sum of \$606 was an advance payment of rent for 24 months at a rate of \$24.25 per month. Mr. Charach testified that appellant had originally asked for \$125 per month as rental but consented

to make it \$100 monthly when respondents agreed to make the advance payment.

The trial court found in accordance with the above facts and that there had been an overcharge of \$60 per month.

[1] Appellants seek a reversal of the judgment on the ground that plaintiffs failed to meet their burden of proof since it was not established that the premises involved were subject to rent control during the period involved in this suit.

Although the authorities are in dispute as to whether the plaintiff has the burden of proof of such issue, the Supreme Court of this state in *Heesy v. Vaughn*, 31 Cal.2d 701, 192 P.2d 753, 757, has held that such burden must be borne by the plaintiff. The latter decision involved a price violation arising from the sale of an automobile under the original Emergency Price Control Act of 1942 (50 U.S.C.A. Appendix, §§ 901-946), but the principle is applicable to the case at bar since the 1947 act is but a continuation of the 1942 law, limited to control of rents only. In referring to the act, the court therein stated explicitly, "This act is highly penal in nature, and the burden is upon the plaintiff to plead and prove a violation, *even to the extent of negating the statutory exceptions.*"

[2, 3] Respondents argue that appellants cannot now raise the issue of whether or not the premises were subject to control inasmuch as the answer failed to deny the allegation in the complaint as to a maximum allowable rental. It is true that normally such allegation would thereby be deemed admitted (Code Civ. Proc. sec. 462) but this is not the rule when the imperfect or defective denial has been acted upon as sufficient at the trial. *Loftus v. Fischer*, 106 Cal. 616, 618, 39 P. 1064. This exception is applicable here for the record reveals that at the outset of the trial attorneys for both sides entered into a stipulation that the ceiling rental for the premises was \$40 *if the property were subject to control and a ceiling did apply*. This latter point was specifically reserved as an issue for the trial. Respondents cannot now claim that the matter of control was not in controversy

when all parties and the court proceeded upon a theory that such issue was presented for adjudication. *Miller v. Peters*, 37 Cal.2d 89, 230 P.2d 803.

Since plaintiffs introduced no evidence on the matter of the property's being subject to control, they cannot recover.

Judgment reversed.

McCOMB, J., concurs.

Hearing denied; CARTER, J., dissenting.



106 Cal.App.2d 714

In re MARTIN'S ESTATE.
COXE v. MARTIN et al.

Civ. 4422.

District Court of Appeal, Fourth District,
California.

Oct. 8, 1951.

Rehearing Denied Oct. 22, 1951.

Proceeding in the matter of the estate of William M. Martin, deceased, wherein the Superior Court of Riverside County entered order on December 12, 1950, fixing fees of Gerald A. Coxé, former attorney for executors. Coxé filed motion to vacate and set aside the order on February 5, 1951, indicating that motion to vacate would be heard on February 19, and on March 19, the motion was made and heard and denied by the Superior Court, Riverside County, and on March 25, Coxé appealed from the order of December 12 and that of March 19. Russell S. Waite, and O. K. Morton, JJ. Harold R. Martin and Dorothy A. Wolslau, executors, moved to dismiss the appeal. The District Court of Appeal held that appeal from order of December 12 was not timely, and the order of March 19 was not appealable.

Appeal dismissed.

I. Courts ⇐202(5)

Where court, in probate proceedings, fixed fees of executors' former attorney on December 12, 1950, and on February 5, 1951, attorney filed notice of motion to vacate and set aside the order indicating that motion would be made on February 19,

but motion was made and heard and denied on March 19, and on March 25, attorney filed notice of appeal from order of December 12, appeal was not timely within rule extending time for appeal when motion to vacate an order is made within 60 days after entry thereof. Rules on Appeal, rule 3(b).

2. Courts ⇐202(5)

Where court, in probate proceeding, fixed fees of executors' former attorney on December 12, 1950, and attorney did not discover that order had been entered until February 1, 1951, because of alleged fraud, he should have moved to vacate the order within 10 days of February 1.

3. Courts ⇐202(5)

Order denying a motion to vacate a former order which was made in a probate proceeding was not appealable.

Gerald A. Coxe, in pro. per.

Best, Best & Krieger and Thompson & Colegate, all of Riverside, for respondents.

PER CURIAM.

This is an appeal from two orders entered in a probate proceeding.

On December 12, 1950, the court made its order fixing and allowing statutory and extraordinary attorney's fees and fixing the amounts that should be paid to Gerald A. Coxe, the former attorney for the executors, and to the attorneys currently representing the executors, respectively. On February 5, 1951, Coxe filed a notice of motion to vacate and set aside this order of December 12, on the ground that in connection with the entry of said order he had been taken "by surprise, accident, mistake and excusable neglect." This notice stated that the motion to vacate would be made on February 19, 1951, or as soon thereafter as counsel could be heard. On March 19, 1951, an order was entered denying the motion to vacate and set aside the order of December 12, 1950. On March 25, 1951, Coxe filed notice of appeal from the order of December 12, 1950, and from the order of March 19, 1951, denying his motion to vacate the former order.

The respondents have moved to dismiss the appeal on the grounds that the appeal from the order of December 12, 1950, was not taken within the time allowed; and that the order of March 19, 1951, is not an appealable order.

[1] Admittedly, the appeal from the order of December 12, 1950, was not taken within sixty days from the time that order was entered. The appellant contends that his time for appeal from that order was extended by Rule 3(b) of the Rules on Appeal, giving him time to file such notice of appeal after entry of the order denying his motion to vacate that order. Rule 3(b) applies when a motion to vacate a judgment or order is made within sixty days after entry thereof. While written notice of motion to vacate the prior order was filed within this sixty-day period, it specified that the motion would be made in court on February 19, after that period had expired. The court denied the motion on March 19, and the affidavits in the record indicate that the motion was made and heard on that date. In any event, there is nothing in the record to indicate or suggest that the motion was "made" within the sixty-day period. The situation here appearing is precisely similar to the one existing in *Re Estate of Corcofingas*, 24 Cal.2d 517, 150 P.2d 194. Upon the authority of that case it must be held that the appeal from the order of December 12, 1950, was not taken in time.

[2] The appellant argues that he was told on December 11 that the motion to fix and allow attorney's fees had gone off calendar; that the subsequent conduct of the other attorneys misled him, and amounted to fraud; and that he did not discover that the order of December 12 had been entered until February 1, 1951. Aside from other considerations, see *In re Estate of Hanley*, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250, he then had ten days in which he might have made his motion to vacate.

[3] It seems to be now settled that an order denying a motion to vacate a former order which was made in a probate proceeding is not an appealable order. *In re Estate of O'Dea*, 15 Cal.2d 637, 104 P.2d

368; *In re Estate of Corcofingas*, 24 Cal.2d 517, 150 P.2d 194; *Socol v. King*, 34 Cal.2d 292, 209 P.2d 577.

The motion to dismiss the appeal is granted and the appeal is dismissed.



106 Cal.App.2d 699

REESE v. DARDEN.

Clv. 18435.

District Court of Appeal, Second District,
Division 2, California.

Oct. 4, 1951.

Action by Arthur L. Reese against Charles S. Darden and the Lake Shore Beach Company for declaratory relief, for an accounting, for specific performance of contract to convey realty, and for dissolution of defendant corporation. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., entered order granting stay of dissolution of defendant corporation on condition that defendant convey certain parcel of realty to plaintiff, and defendant Charles S. Darden appealed. The District Court of Appeal, McComb, J., held that by virtue of statutory provision allowing holders of 50 per cent or more of outstanding shares of corporation to purchase shares of stock owned by minority stockholders at their fair cash value and thereby avert receivership or dissolution, when defendant majority stockholder indicated desire and intention to purchase stock of plaintiff, court exceeded its power in imposing condition to granting of stay of dissolution, but was required to issue stay of proceedings and proceed to ascertain and fix value of shares of stock.

Order modified and affirmed.

1. Corporations Ⓒ607, 621(6)

Under statute providing that holders of 50 per cent or more of outstanding shares of corporation may avoid appointment of receiver or dissolution on suit by shareholder by purchasing shares of stock owned by such shareholder at their fair cash value, when defendant who was holder of

more than 50 per cent of outstanding shares sought to stay dissolution and buy plaintiff's shares, court exceeded its power when it imposed condition to granting stay of dissolution that corporation convey certain property to plaintiff, but it was mandatory for court to issue stay of proceedings and to proceed to ascertain and fix value of shares of stock to be purchased by defendant. Corporations Code, §§ 4658, 4659.

2. Corporations Ⓒ607

Where minority stockholder had waived right to specific performance of contract by which corporation had agreed to convey certain realty and had obtained judgment for dissolution of corporation with stay on condition that corporation convey lot and declaration that such lot was part of corporate assets, minority stockholder was presumed to know that majority stockholder could, by purchase of outstanding shares at their fair cash value, stay dissolution without imposition of any condition and equitable considerations did not require retention of conditions. Corporations Code, §§ 4658, 4659.

Edward Carter Maddox and Charles S. Darden, Los Angeles, John D. Home, Los Angeles, of counsel, for appellant.

Harold B. Pool, Los Angeles, for respondent.

McCOMB, Justice.

Defendant Darden, hereinafter referred to as defendant, appeals from (1) an order of the trial court entered October 30, 1950, providing for a stay of dissolution of defendant corporation pursuant to the provisions of sections 4658-59 of the Corporations Code upon defendant's filing a bond in the sum of \$12,000, and particularly from the portion of such order providing that defendants convey to plaintiff a certain parcel of real property as a condition precedent to staying dissolution of defendant corporation, and (2) an order entered November 21, 1950, vacating the order entered October 30, 1950, because of the failure of defendant to convey the parcel of real property described in the order of October 30, 1950, to plaintiff.

Facts: Plaintiff filed a complaint containing four alleged causes of action, one for declaratory relief, the second for an accounting, the third for specific performance of a contract whereby defendant corporation agreed to sell a parcel of land known as Lot 1 to plaintiff, and the fourth for dissolution of defendant corporation. After trial the court found (a) with reference to the first cause of action which sought to have the parties' rights declared with reference to a lease and promissory note that an indebtedness which defendant Darden claimed against the defendant corporation had been paid and ordered cancellation of the note evidencing such indebtedness; (b) that the second cause of action seeking an accounting should be dismissed without prejudice; (c) that the third cause of action should be dismissed without prejudice because plaintiff "in open court, agreed not to enforce the specific performance of" his "contract if other proper relief were granted plaintiff in plaintiff's fourth cause of action;" and (d) on the fourth cause of action judgment was given in favor of plaintiff ordering dissolution of defendant corporation and providing that in the event of the dissolution of the corporation there should "be distributed to" plaintiff "as a part of his share, the real property described in plaintiff's third cause of action in plaintiff's complaint," to wit, the parcel of land known as Lot 1. This judgment has become final, plaintiff not having appealed therefrom and defendant's appeal having been dismissed upon plaintiff's motion.

[1] *Questions:* First: *Did the trial court in making its order of October 30, 1950, staying dissolution of defendant corporation, exceed its power in requiring, as a condition precedent to the granting of the stay of dissolution, that defendant Darden convey to plaintiff Lot 1?*

Yes. Section 4658 of the Corporations Code reads as follows:

"In any such suit the holders of 50 percent or more of the outstanding shares of the corporation may avoid the appointment of a receiver or the dissolution of the corporation by purchasing the shares

of stock owned by the plaintiffs at their fair cash value.

"If the holders of 50 percent or more of the outstanding shares of the corporation (a) elect to purchase the shares owned by the plaintiffs, and (b) are unable to agree with the plaintiffs upon the fair cash value of such shares, and (c) give bond with sufficient security to protect the interests and rights of the plaintiffs and to assure to the plaintiffs the payment of the value of their shares, the court shall stay the proceeding and shall proceed to ascertain and fix the value of the shares owned by the plaintiffs."

Section 4659 of the Corporations Code provides for the appointment of commissioners to appraise the value of the shares of stock owned by the plaintiff and for the award, decree, enforcement, appeal, and payment for and transfer of the shares. In the present case defendant's affidavit disclosed that he met the requirements of section 4658 of the Corporations Code, supra, in that he owned more than 50 percent of the outstanding shares of stock of defendant corporation; that he elected to purchase plaintiff's shares of stock and that he and plaintiff were unable to agree on the fair value of the shares.

Under such conditions it is mandatory for the court to issue a stay of proceedings and to proceed to ascertain and fix the value of the shares of stock to be purchased by defendant. (*Merlino v. Fresno Macaroni Mfg. Co.*, 64 Cal.App.2d 462, 463 et seq., 148 P.2d 884). In addition, defendant filed the bond required by the court. The other condition prescribed by the order was erroneous because beyond the power of the court whose jurisdiction was limited by the cited sections of the Corporations Code.

[2] Second: *Were there equitable considerations which justified the condition prescribed relative to the transfer of Lot 1 in the order of October 30, 1950?*

No. The case of *Richman v. Bank of Perris*, 102 Cal.App. 71, 282 P. 801, relied on by plaintiff, is clearly distinguishable on its facts from those which obtain in the present case. In the *Richman* case the

president of the bank had absconded with over \$40,000 of the bank's capital. At a special meeting of the board of directors an assessment was levied upon the stockholders, and the absconding president having failed to pay his assessment his stock was sold and enough money realized to replace the impaired capital of the bank. A third party, after the transaction had been completed and the stock transferred on the books of the bank, levied an attachment on the interest of the president in the stock and obtained a judgment against him. His interest in the stock was sold under an execution issued pursuant to the judgment. The purchaser of the stock then attacked the validity of the assessment claiming that under his execution sale he was the owner of the stock, but he made no offer to do equity by tendering to the purchasers who had purchased the stock at the assessment sale the amount they had paid.

The appellate court, after holding that the assessment as levied was invalid due to faulty proceedings, then decided that the absconding president could not have recovered his stock on account of the illegality of the assessment sale unless he did equity by paying to the persons who purchased the stock at the assessment sale the amount they had paid for it, and that the president's execution creditor stood in no better position than he. Therefore, since no offer to do equity had been made, the plaintiff was not entitled to the relief prayed for.

Such case clearly is not applicable in the present situation. Here plaintiff voluntarily waived any right to specific performance which he could have obtained in the action that he had filed. He permitted the trial court to determine that Lot 1 was part of the assets of the corporation and obtained a judgment for dissolution thereof. He was presumed to have known the law that defendant Darden, who was a majority stockholder in the corporation, could avail himself of the provisions of sections 4658 and 4659 of the Corporations Code. He made no effort to correct any error in the judgment by moving for a new trial, appealing, or filing a counter appeal. On the contrary he moved for and obtained

a dismissal of the appeal taken by defendants from the judgment. Therefore plaintiff is bound by the judgment and equitably so since the appraisers, in taking into consideration the value of plaintiff's shares of stock, will undoubtedly include as an asset of the corporation Lot 1 and he will indirectly receive all the benefit that he is entitled to under the judgment as originally entered.

It is ordered:

(1) That the order entered November 21, 1950, dissolving the order entered October 30, 1950, be and it is hereby reversed;

(2) That Paragraph V of the order of October 30, 1950, with the exception of the words "Dated: October 30, 1950." at the end thereof, be stricken, and as thus amended such order is affirmed.

MOORE, P. J., concurs.



106 Cal.App.2d 725

DRIVER v. NORMAN.

Civ. 18329.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1951.

Hearing Denied Dec. 6, 1951.

Retta Driver brought an action against Harold Frederic Norman for injuries plaintiff received when plaintiff was struck by defendant's automobile when plaintiff was crossing street at intersection and was walking within unmarked-cross-walk. The Superior Court, Los Angeles County, Harold B. Jeffery, J., rendered a judgment adverse to defendant and defendant appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that whether defendant was guilty of negligence in failing to yield the right of way to plaintiff was for jury.

Order reversed.

I. Automobiles ⇨246(57)

In action for injuries sustained by pedestrian when struck by automobile, giving

of instruction on unavoidable accident is proper unless defendant motorist was negligent as a matter of law.

2. Negligence ⇨6

Violation of a statute imposing a standard of care may be negligence as a matter of law, but circumstances may be shown in excuse or in justification of such conduct.

3. Automobiles ⇨160(4)

In action for injuries plaintiff sustained when plaintiff was crossing street at intersection and was walking within unmarked crosswalk and plaintiff was struck by defendant's automobile which was traveling through intersection from plaintiff's left, defendant was prima facie negligent in violating statute in failing to yield right of way to plaintiff. Vehicle Code, § 560.

4. Automobiles ⇨245(6)

In action for injuries plaintiff sustained when plaintiff was crossing street at intersection and was walking within unmarked crosswalk and plaintiff was struck by defendant's automobile which was traveling through intersection from plaintiff's left, whether defendant was negligent in failing to yield right of way to plaintiff was for jury under evidence. Vehicle Code, § 560.

5. Automobiles ⇨245(6, 55)

Where evidence was not such that court was compelled to say reasonable men would be required to draw only inference of negligence on part of motorist who struck pedestrian with automobile, violation by motorist of statute requiring motorist to yield right of way to pedestrian was not negligence per se proximately contributing to accident.

6. Automobiles ⇨245(6)

In action for injuries plaintiff sustained when plaintiff was crossing street at intersection and was walking within unmarked crosswalk and plaintiff was struck by defendant's automobile which was traveling through intersection from plaintiff's left, whether defendant was negligent in too closely following an automobile which was traveling in same direction as defendant's automobile was for jury.

7. Automobiles ⇨245(42)

In action for injuries plaintiff sustained when plaintiff was crossing street at intersection and was walking within unmarked crosswalk and plaintiff was struck by defendant's automobile which was traveling through intersection from plaintiff's left, proof of defendant's excess speed would not constitute negligence as a matter of law. Vehicle Code, § 513.

Parker, Stanbury, Reese & McGee and Wm. C. Wetherbee, Los Angeles, for appellant.

Royal M. Galvin, Beverly Hills, for respondent.

MOORE, Presiding Justice.

Defendant appeals from the trial court's order granting plaintiff a new trial after a verdict in favor of the defendant. Such new trial was granted solely on the ground that the court erred in giving an instruction on unavoidable accident.

Respondent commenced this action to recover damages for injuries received when she was struck by appellant's automobile at the intersection of Seventh and New Hampshire streets in the city of Los Angeles on April 16, 1949, at about 7:30 p. m. Seventh street is an east-west thoroughfare and is approximately fifty-five feet wide at the point of impact. New Hampshire runs north and south and is about 40 feet in width. Respondent was walking north across Seventh street within the easterly unmarked crosswalk and appellant was driving east on Seventh street at the time his vehicle encountered respondent. This intersection was in a residential area and was well lighted by street lights at each corner.

Appellant's testimony reveals briefly the following: He was driving east on Seventh at a speed of 20 to 30 miles per hour and following behind a Cadillac at a distance of about 15 feet. The latter car was proceeding in the second lane from the curb adjacent to parked vehicles along Seventh street. Appellant's car was partly in the same lane and partly in the lane next to the

center of Seventh street. When appellant reached the center of New Hampshire the Cadillac suddenly slowed down and swerved five feet to the right. It was then that appellant saw plaintiff for the first time. He immediately applied the brakes, swerved to the right but struck the unfortunate woman with the left front headlight. Appellant testified that she stepped from in front of the Cadillac into the path of his car, and that although the Cadillac did not strike respondent, her coat brushed along its side.

The 62-year-old pedestrian testified that before she stepped off the curb, she observed two cars coming toward her from the west but both were well back of the intersection; one was to the rear of the other and a little to its left; she immediately proceeded across the street at a normal pace; she observed the rear car after she had arrived at approximately the center of Seventh street, was startled by its proximity, turned to face it and was struck. She did not otherwise hesitate or stop after leaving the curb. She never formed an estimate as to the speed of the vehicle and never looked toward it again until the moment of impact.

Appellant now seeks a reversal of the order granting the new trial, contending that no error resulted from the giving of the instruction on unavoidable accident.

[1] Although the law on this question was somewhat befogged at the time of the trial, since that date the Supreme Court has decided *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823, which clears away the former mist. It is there held that the giving of an instruction on unavoidable accident is proper unless the defendant is negligent as a matter of law. Accordingly, respondent seeking to uphold the trial court's determination argues that appellant was guilty of negligence as a matter of law in failing to yield the right-of-way to a pedestrian in a crosswalk as is required by Vehicle Code, § 560, citing *Nicholas v. Leslie*, 7 Cal.App. 2d 590, 46 P.2d 761; *Fischer v. Keen*, 43 Cal.App.2d 244, 110 P.2d 693; *People v. Lett*, 77 Cal.App.2d 917, 177 P.2d 47; *Ducat v. Goldner*, 77 Cal.App.2d 332, 175 P.2d 914. She contends also that appellant's failure to

maintain a proper lookout and his following a vehicle too closely at an excessive rate of speed establish negligence per se.

[2,3] However, though violation of a statute imposing a standard of care may be negligence as a matter of law, circumstances still may be shown in excuse or in justification of such conduct. *Satterlee v. Orange Glen School District*, 29 Cal.2d 581, 588-589, 177 P.2d 279; *Combs v. Los Angeles Railway Company*, 29 Cal.2d 606, 609, 177 P.2d 293. Prima facie, appellant herein was negligent in violating Vehicle Code section 560 but from the evidence introduced it was still a question for the trier of fact as to whether his conduct in failing to yield the right of way was not that of any ordinarily prudent person. *Satterlee v. Orange Glen School District*, supra, 29 Cal.2d at page 590, 177 P.2d at page 279.

[4,5] Under all the circumstances the jury could properly have determined that appellant was not negligent in failing to yield the right of way since his vision was obscured by the Cadillac which preceded him. For the same reason, his failure to see respondent might be excused since she appeared suddenly from in front of the other vehicle. At the least, the evidence is not such that the court is impelled to say reasonable men could and must draw only the inference of negligence. Under such circumstances, violation of a statute is not negligence per se proximately contributing to the accident. *Satterlee v. Orange Glen School District*, supra, 29 Cal.2d at page 590, 177 P.2d at page 279.

The evidence further reveals that appellant first saw respondent when his car had reached the center of New Hampshire, about 20 feet from the crosswalk. He immediately applied the brakes, but seemed to strike respondent at that instant. Assuming his speed to have been approximately twenty-five miles per hour—slightly over 36 feet per second—such testimony is in accord with the normal reaction time of three-fourths' second required from the time a person sees danger until he can get his foot on the brake.

[6,7] The question of appellant's negligence in following the Cadillac too close-

ly was also for the trier of fact. *Elford v. Hiltabrand*, 63 Cal.App.2d 65, 74, 146 P.2d 510; *Donahue v. Mazzoli*, 27 Cal.App.2d 102, 106, 80 P.2d 743. Similarly, it is specifically provided in Vehicle Code, section 513, that proof of appellant's excessive speed would not constitute negligence as a matter of law.

Order reversed.

McCOMB, J., concurs.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



106 Cal.App.2d 716

PEOPLE v. WILSON.

Cr. 2767.

District Court of Appeal, First District,
Division 1, California.
Oct. 10, 1951.

Rehearing Denied Oct. 25, 1951.

Hearing Denied Nov. 7, 1951.

Motion by James Wilson to vacate several judgments of conviction was denied by the Superior Court, City and County of San Francisco, Twain Michelsen, J., and he appealed. The District Court of Appeal, Peters, P. J., held that the claim of unlawful arrest was immaterial to validity of the convictions and that defendant's motion for appointment of a referee, made after appeal, was of no avail.

Motion for appointment of referee denied and order appealed from affirmed.

1. Criminal Law ⇨997

Writ of error coram nobis is available only to vacated judgment because of facts which existed at time of trial but were unknown to the court and to defendant at time of trial.

2. Criminal Law ⇨997

Where defendant knew at time of trial of alleged fact that he had been arrested without a warrant and failed to raise issue at that time he thereby waived such invalidity in procedure and unlawfulness of his arrest was an immaterial factor following conviction and writ of error coram nobis was unavailable.

236 P.2d—1½

3. Criminal Law ⇨99

Jurisdiction over the person of an accused is not affected by the way it is acquired, or the manner by which the accused is brought into court.

4. Criminal Law ⇨245

When a person is illegally incarcerated he must take proper steps in trial court, before trial, to correct the situation and if he proceeds to trial without objection, any invalidity in proceedings prior to commitment is waived.

5. Criminal Law ⇨1139

Motion for appellate court to take evidence through a referee would not be granted where allegation of petition, if true, would not entitle him to relief sought.

James Wilson, in pro per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Winslow Christian, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The defendant appeals from an order denying his motion to vacate several judgments of conviction. The motion was predicated upon the claim that the trial court had no jurisdiction of his person at the time such judgments were rendered. Based on this premise, it is urged that such judgments were void and that, for this reason, the further incarceration of defendant, under such void judgments, violates due process of law.

The record shows that in 1947 in San Francisco defendant was charged with four robberies; that after hearings in the Municipal Court he was held to answer in the Superior Court; that thereafter four informations were filed by the district attorney charging the commission by defendant of four armed robberies; that defendant pleaded not guilty to all charges; that the four charges were consolidated for trial; that the jury found defendant guilty on all four charges, and found that defendant was armed with a deadly weapon when such offenses were committed; that on March 24, 1947, defendant was sen-

tenced, three of the sentences to run consecutively, and one concurrently; that such judgments of conviction have long since become final, no appeal having been taken therefrom. No contention is made that the evidence introduced on his trial did not sustain the judgments of conviction.

In May of 1951 defendant moved the Superior Court to annul and vacate the judgments on the claimed ground that at no time did the court that tried him have jurisdiction of his person. In support of this claim the affidavit of defendant avers that in January of 1947 he was arrested in Stockton without a warrant and without any offense having been committed in the presence of the arresting officers; that he was booked in the city jail for "investigation," and "held for the United States Marshal"; that the next day three San Francisco officers interrogated him at the Stockton jail; that without a warrant and without taking defendant before a magistrate in San Joaquin County on a fugitive warrant, and without defendant's consent, these three officers drove defendant to the San Francisco jail; that thereafter, in San Francisco, he was charged with and convicted of the four armed robberies heretofore mentioned. There is no denial of the truth of these allegations. Admittedly, although represented by counsel, these facts were never called to the attention of the Municipal Court or of the Superior Court. It is defendant's theory that, because of these circumstances, the courts of San Francisco at no time had jurisdiction of his person, and that, for this reason, the judgments are void and should be set aside.

It should be mentioned that since 1948 defendant has filed six applications for habeas corpus, five with the Supreme Court of this state, and one with the United States District Court, urging, in one form or another, this same point. All such applications were denied without opinion.

[1,2] This motion to annul and vacate the judgment is in the nature of a writ of error coram nobis, and governed by the principles applicable to such writ. *People v. Gilbert*, 25 Cal.2d 422, 439, 154 P.2d

657; *People v. James*, 99 Cal.App.2d 476, 479, 222 P.2d 117; *People v. Adamson*, 33 Cal.2d 286, 287, 201 P.2d 537; *People v. Adamson*, 34 Cal.2d 320, 324, 210 P.2d 13. The remedy is available only to vacate a judgment because of facts which existed at the time of trial but were unknown to the court and to the defendant at the time of trial. *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13. Obviously, the facts here charged must have been known to defendant and to his counsel before and during his trial. For this reason alone, the trial court properly denied the motion.

[3,4] Moreover, assuming the facts to be as averred by petitioner, the Superior Court nevertheless had jurisdiction of his person. Jurisdiction over the person of an accused is not affected by the way it is acquired, or the manner by which the accused is brought into court. When a person is illegally incarcerated he must take proper steps in the trial court, before trial, to correct the situation. If he proceeds to trial without objection, as he did here, any invalidity in the proceedings prior to commitment is waived. In *re Tedford*, 31 Cal.2d 693, 694, 192 P.2d 3; *People v. Youders*, 96 Cal.App.2d 562, 568, 215 P.2d 743; In *re Edwards*, 99 Cal.App. 541, 544, 278 P. 910, 290 P. 591; see cases collected 7 Cal.Jur. p. 906, § 51. This is the rule in practically all jurisdictions. See cases collected in 96 A.L.R. page 982. At this late date the claim of the unlawfulness of the arrest is an immaterial factor so far as the validity of the convictions is concerned.

[5] After this appeal was submitted, the petitioner filed a "Motion for Appointment of Referee," which is in reality a motion to take evidence by this court through a referee. All of the evidence which petitioner seeks to have produced relates to his claimed unlawful arrest. There is no necessity for the taking of evidence on this issue. As already pointed out, petitioner's allegations in reference to these factual issues stand uncontradicted. The point is that, admitting the facts to be as alleged by petitioner, nevertheless they do not entitle petitioner to the relief he seeks.

The motion for the appointment of a referee is denied; the order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



**BROCK v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO et al.**

**WEST LOS ANGELES MILLING CO. et al.
v. BROCK.**
Civ. 15052.

District Court of Appeal, First District,
Division 1, California.
Oct. 3, 1951.

Rehearing Granted Nov. 2, 1951.*

West Los Angeles Milling Co., a corporation, and others, brought an action against A. A. Brock, Director of Agriculture of the State of California, for review of a marketing order issued by respondent. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., issued a peremptory writ of mandate commanding director to call a hearing and permit introduction of evidence of facts coming into existence after administrative hearing had been held, and to reconsider his decision. Pending appeal by director, A. A. Brock, as Director of Agriculture, filed petition for writ of prohibition and writ of supersedeas against the Superior Court of the State of California, in and for the City and County of San Francisco, and Clarence W. Morris, Judge thereof, seeking to stay enforcement of the court's orders. The District Court of Appeal, Bray, J., held that the writ of mandate, issued without any review of the administrative hearing or without any finding of abuse of discretion, was improper.

Peremptory writ of prohibition and writ of supersedeas issued.

I. Administrative Law and Procedure
⌋106, 108

Agriculture ⌋2

Action of director of agriculture under California Marketing Act of 1937 au-

* Subsequent opinion 241 P.2d 283.

thorizing director to call public hearing and to execute and issue marketing order for standard agricultural products was "quasi legislative," and not quasi judicial. Agricultural Code, §§ 1300.10 to 1300.29, 1300.16.

See publication Words and Phrases, for other judicial constructions and definitions of "Quasi Legislative Action".

2. Agriculture ⌋1

California Marketing Act of 1937 is not a price fixing statute. Agricultural Code, §§ 1300.10 to 1300.29, 1300.16.

**3. Administrative Law and Procedure ⌋704
Agriculture ⌋2**

Order of director of agriculture for standard agricultural product after hearing thereon under California Marketing Act of 1937 was a "final order" within Code of Civil Procedure authorizing judicial review of a final administrative order made as result of a proceeding in which by law a hearing is required. Agricultural Code, §§ 1300.10 to 1300.29, 1300.16; Code Civ.Proc. § 1094.5; Government Code, § 11500 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Order".

4. Administrative Law and Procedure ⌋701

Provision of Code of Civil Procedure authorizing judicial review of any final administrative order made as result of a proceeding in which by law a hearing is required, evidence is required to be taken and discretion in determination of facts is vested in the inferior tribunal, board or officer, applies to quasi legislative hearings. Code Civ.Proc. § 1094.5.

**5. Administrative Law and Procedure ⌋660
Agriculture ⌋2**

Fact that persons aggrieved by marketing order of director of agriculture for standard agricultural product, issued after hearing, might have remedy by action for declaratory relief and might in a proper case obtain injunction did not preclude persons from seeking review of the order under provision of Code of Civil Procedure for judicial review of a final administrative order. Agricultural Code, §§ 1300.10 to

1300.29, 1300.16; Code Civ.Proc. § 1094.5; Government Code, § 11440.

6. Administrative Law and Procedure ⇨653

Purpose of Code of Civil Procedure provision for judicial review of action of administrative officer is to determine if there has been any prejudicial abuse of discretion by action not based upon weight of evidence produced before such officer, and while court may consider evidence not put before officer, the evidence must be of matters in existence at time of decision and which with exercise of reasonable diligence could not have been produced. Code Civ. Proc. § 1094.5.

7. Administrative Law and Procedure ⇨489

While change of conditions subsequent to administrative officer's order might require change in order, it does not make hearing or order unfair or show abuse of discretion by officer at time order was made. Code Civ.Proc. § 1094.5.

8. Administrative Law and Procedure ⇨492

Where subsequent change in conditions might require change in order of administrative officer, application should be made to officer to consider order in light of such circumstances and an opportunity should be given him to determine whether such circumstances do require a change. Code Civ.Proc. § 1094.5.

9. New trial ⇨108(2)

In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts not in existence at time of trial, such as evidence which was not available at time of trial but rather was result of changed conditions since trial, is not generally regarded as constituting grounds for new trial because of newly discovered evidence, except where acts or events occurring subsequent to trial are proof of a condition which existed prior to trial and probative effect of the evidence is to explain such condition.

10. Mandamus ⇨174

Where director of agriculture under California Marketing Act of 1937 held hearing and issued marketing order for

standard agricultural product, and on review of order by court under Code of Civil Procedure, evidence of facts coming into existence subsequent to administrative hearing was offered but not as proof of a condition existing prior to hearing nor to explain evidence therein given, writ of mandate, issued by court without any review of the hearing and without finding of abuse of discretion, directing the director to hold another hearing and consider the new evidence and reconsider order, was improper. Agricultural Code, §§ 1300.10 to 1300.29, 1300.16; Code Civ.Proc. § 1094.5.

11. Administrative Law and Procedure

⇨229

Agriculture ⇨2

Where director of agriculture under California Marketing Act of 1937 held hearing and issued marketing order for standard agricultural product, and thereafter new facts allegedly came into existence which might require change of order, persons allegedly aggrieved by order should have applied to director to amend order before invoking action of the court. Agricultural Code, §§ 1300.10 to 1300.29, 1300.16(c, d); Code Civ.Proc. § 1094.5.

12. Administrative Law and Procedure

⇨229

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before a court will act.

13. Administrative Law and Procedure

⇨229

Agriculture ⇨2

Where marketing order for standard agricultural product issued by director of agriculture after hearing pursuant to California Marketing Act of 1937 provided that director shall, if facts show reasonable grounds, grant petition to review the order and may review or revise the order in any manner whatsoever, persons allegedly aggrieved should have sought relief pursuant to express provisions of the order before bringing court action, notwithstanding that validity of the order itself was attacked. Agricultural Code, §§

1300.10 to 1300.29, 1300.16(c, d); Code Civ.Proc. § 1094.5.

Edmund G. Brown, Atty. Gen. of California, W. R. Augustine, Deputy, for petitioner & appellant.

Doyle & Clecak, and Tom F. Chapman, all of San Francisco, for respondents.

BRAY, Justice.

This petition for a writ of prohibition and a writ of supersedeas raises the questions (1) whether section 1094.5 of the Code of Civil Procedure provides for a review by the courts of quasi legislative acts of administrative agencies, and (2) the extent of that review.

Record.

On the 14th day of September, 1950, petitioner, the Director of Agriculture, acting pursuant to the California Marketing Act of 1937, Chapter 10, Division 6 of the Agricultural Code, comprising sections 1300.10 to 1300.29, upon the written request of a committee of lima bean producers, processors and handlers, called a public hearing to consider a proposed marketing order for standard lima beans. It is conceded that said hearing was called, held and conducted in all respects as required by law. Thereafter, and on or about the 3rd day of October, 1950, petitioner executed and issued a marketing order for standard lima beans to be submitted to producers and handlers for written assent as required by section 1300.16 of the Agricultural Code. Thereafter and on the 2nd day of March, 1951, a finding was made that said marketing order for standard lima beans had been assented to in writing by the requisite number of producers and handlers of lima beans, and petitioner issued an order making said marketing order for standard lima beans effective as of March 10, 1951. Pursuant to said California Marketing Act of 1937 and said marketing order for standard lima beans, and after nominations were received from the industry, the Director of Agriculture, on or about March 19, 1951, appointed the members and alternate mem-

bers of the advisory board provided by the act. All of the members so appointed have qualified and accepted such appointments and are now members of said advisory board.

Thereafter a mandate proceeding was filed in the San Francisco Superior Court for a review of the marketing order on the ground that the findings of the Director of Agriculture are not supported by the weight of, or substantial, evidence. Petitioners therein (referred to here as respondents) include dealers in and growers of lima beans. Several are members of the advisory board. A restraining order was issued restraining the enforcement of the marketing order pendente lite. At the hearing respondents offered, in addition to the record of the proceedings upon which the marketing order was based, certain new evidence. The court refused to admit such evidence but issued a peremptory writ of mandate, commanding the director to call a hearing pursuant to the provisions of Division 6, Chapter 10 of the Agricultural Code and at such hearing to permit the introduction of said evidence, to reconsider his decision issuing the marketing order in the light of such evidence, and to make due return of his actions to the court. The restraining order was continued in force. The director appealed and the appeal is now pending. Thereafter the director filed this petition to prohibit the superior court from further proceedings other than to annul its previous actions. He also seeks a writ of supersedeas staying the enforcement of the superior court orders. A stay pending determination of the issues has been granted.

1. Does Section 1094.5 of the Code of Civil Procedure Apply?

[1,2] Although respondents contend that the action of the director in issuing a marketing order under the procedure provided in the Agricultural Code is quasi judicial and not quasi legislative, it is obvious that it is in the latter category. See *Ray v. Parker*, 15 Cal.2d 275, 101 P.2d 665. Pertinent sections of the Agricultural Code are known as "The California Marketing Act of 1937." The purposes of the act are

declared to be: to enable agricultural producers, with the aid of the state, to correlate more effectively their commodities with marketing demands therefor; to establish their orderly marketing, uniform grading, and proper preparation; to provide means for maintenance of present, and development of new or larger, markets, and to prevent, modify or eliminate trade barriers in agricultural commodities; to eliminate or reduce economic waste in the marketing thereof, and to restore and maintain adequate purchasing power for California agricultural producers. It is not a price fixing statute. It provides for the promulgation of marketing orders after a public hearing. It sets forth the facts to be considered by the director at the hearing, the circumstances authorizing the issuance of a marketing order, the findings required to be made by him, and the provisions that may be contained in such order. It provides for the appointment of an advisory board of members of the industry to be appointed by the director. This board is to assist in the administration of the order. The order must be assented to in writing by 65 per cent of persons affected thereby. The act provides for administration, finances, enforcement, etc., in connection with the order.

[3] A reading of section 1094.5 of the Code of Civil Procedure demonstrates that its language is broad enough to include the acts of the director in making the findings and marketing order. It reads: "Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. * * *" Undoubtedly the marketing order was a final order or decision. It was the result of a hearing required by law where evidence was required to be, and was, taken, and where discretion in the determination of the facts was vested in the director. If it is to be held that the section does not ap-

ply, such holding must be based upon something other than the language of the section itself. We have been unable to find any authority justifying an interpretation contrary to the plain language of the section itself. Petitioner states that the section is merely the procedural section which sets up the method of reviewing proceedings conducted pursuant to the Administrative Procedure Act, Government Code, § 11500 et seq., and hence does not apply to the kind of hearing held by the director in promulgating a marketing order. However, there appears to be no authority for this statement.

Petitioner contends that because of the involved and expensive public hearing requirements of the Marketing Act and because of the contention that the director does not determine whether the particular industry should or should not have a marketing order but merely refers the matter to the industry for written assents, section 1094.5 can have no application to the director's orders resulting from such hearing. While these arguments are persuasive they do not meet the plain language of the section.

[4] Petitioner refers to the cases which have arisen under the Administrative Procedure Act and section 1094.5, citing many of them, and points out that all involved quasi judicial hearings only. While this is true, they cannot be authority for the proposition that the section does not apply to quasi legislative hearings. There are no cases holding that it does not so apply.

[5] Again, the fact that an action in declaratory relief lies, Gov.Code, § 11440, and there is some indication that in a proper case injunction will lie, see *Brock v. Superior Court*, 11 Cal.2d 682, 81 P.2d 931; *Challenge Cream & Butter Ass'n v. Parker*, 23 Cal.2d 137, 142 P.2d 737, 149 A.L.R. 1203; *Agricultural Prorate Comm. v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495, is not authority for the proposition that they are the exclusive remedies.

Section 1094.5 and the Administrative Procedure Act were drafted by the Judicial Council, submitted to the Legislature and adopted by it as submitted. In its Tenth

Biennial Report the Judicial Council states: "Until recent years the writ of mandate was not widely used in this State as a means of challenging administrative action. * * * Where discretion, either *quasi-legislative* or *quasi-judicial* in nature, had been vested in the administrative officer, the writ could not be used as a means of controlling the exercise of that discretion." P. 139; emphasis added. It then points out that "the use of the writ of mandate for the purpose of reviewing administrative action was greatly expanded in California", p. 139 and that "The nature and precise limits of this expanded use of the writ are not clear." P. 139. It does state: "The courts have given no indication that the new mandate procedure is available where *quasi-legislative* administrative action is involved", p. 140; emphasis added. In support of this latter statement the report refers to *Rible v. Hughes*, 24 Cal.2d 437, 150 P.2d 455, 154 A.L.R. 137 and *Allen v. Bowron*, 64 Cal. App.2d 311, 148 P.2d 673, neither of which cases discusses that particular subject.

2. Extent of the Review.

At the hearing in the trial court respondents stated that they wished to introduce the evidence hereafter mentioned. A discussion ensued in which the court stated that, as the proposed evidence was not in existence at the time of the director's hearing and the promulgation of the marketing order, and hence had not been before the director, it would not hear such evidence. The court then ordered that the case be sent back to the director to consider that evidence. The court did not review the proceedings which were had before the director, nor did it make any finding of any of the matters set forth in section 1094.5. Neither did it exercise its independent judgment on the facts. This, then, raises the question as to whether, in proceedings under section 1094.5, the court, without any review of the proceeding before the director and without any finding of any of the bases for review set forth in section 1094.5, may, merely upon the representation that matters which might affect that order have occurred subsequently to the di-

rector's order, issue a writ of mandate directing the director to reconsider his order, hold another hearing and consider those subsequent matters.

Section 1094.5 provides, in part:

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Not only was there no finding that any of the above conditions existed, but the court did not examine the proceedings to determine whether they did. While the petition for writ of mandate alleged that the findings were not supported by the evidence, no effort was made to point out to the trial court any such insufficiency. Respondents contend that they brought themselves within the provisions of subdivision (d): "Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case."

The evidence sought to be introduced and which the court ordered the director to hear was the following, none of which, excepting No. 5, was in existence or had been ascertained prior to the promulgation of the marketing order. 1. The fixing by the United States government of the 1951 support price for large lima beans and the fact that such price assures the grower a fair profit. 2. The limited warehouse and cleaning facilities in the industry assure orderly marketing and prevent the dumping of the crop in a short period of time. 3. No carryover from the 1950 crop plus a prospective 1951 short crop. 4. The initiation by the National Dried Bean Council of an extensive sales and marketing program. 5. The change in the voting procedure in the course of the adoption of the marketing order was illegal and prejudicial to the petitioners.

No. 5, of course, was in existence prior to the marketing order, but no effort was made to point out on what facts such contention was based nor why the evidence in relation thereto could not, in the exercise of reasonable diligence, have been produced. An examination of the proceedings at the hearing in the trial court shows that no particular reliance was placed on No. 5. The stress was placed on the first ground. When asked by the court as to whether the proposed evidence (all five) was improperly excluded or even was offered, respondents stated that it was not. It was evidence which could not have been produced before the director "because it wasn't in existence." The support price was not fixed by the government until April 23, 1951, approximately one and a half months after the promulgation of the marketing order and more than 40 days after its effective date. As said by respondents, the fixing of the support price by the government "is the crux of the entire matter."

[6-8] Section 1094.5 never contemplated that solely because of evidence coming into existence subsequently to the proceedings before the administrative officer, his order or decision should be set aside and a new hearing ordered. Nor does the

language "Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent" contemplate evidence of matters which occurred subsequently to the action of the officer. The purpose of section 1094.5 is to provide a review by the courts of the action of an administrative officer to determine if there has been any prejudicial abuse of discretion, by action not based upon the weight of the evidence produced before such officer. This necessarily requires a limitation of the evidence to matters existing at or prior to the time the decision is made. While evidence which was not before the officer may be considered, it necessarily must be of matters in existence at the time of the decision and which with exercise of reasonable diligence could not have been produced. Otherwise, the proceeding is not a review of the director's action, but a complete setting aside of it, based upon facts which were not and *could not have been before him*. In *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, at page 799, 136 P.2d 304, at page 309, the court discussed at length the scope of the proceedings to review the actions of an administrative order, as to the evidence additional to the record of the proceedings before the officer, and it said: "If it should appear from that record that incompetent evidence had been received by the board, the complaining party should not be foreclosed from objecting on the trial to its admissibility. Also if the board had improperly refused to entertain admissible evidence the litigant should not be foreclosed from offering it at the trial. If additional evidence not included in either category be sought to be introduced by a party, the court has the right to receive it *upon a showing that, in the exercise of reasonable diligence, it could not have been introduced before the board.*" (Emphasis added.) While subsequent conditions may require a change in the order, they in no wise make the hearing or order unfair nor cause any abuse of discretion in the officer at the time the order was made. To hold other-

wise would cause section 1094.5 to be completely unworkable. Every time an order might be made, a petition could be made to the superior court to hold up the application of the order because of subsequent changes in conditions, and no order could ever go into effect. At least, an application should be made to the tribunal or officer to consider the order in the light of subsequent circumstances and an opportunity be given to determine whether such circumstances require a change in the order.

[9] So far as consideration of additional evidence under subdivision (d) of section 1094.5 is concerned, the situation is somewhat analogous to that on motions for new trial. In the latter case evidence such as is offered here could not be considered. The general rule is set forth in 66 C.J.S., New Trial, § 101, page 294; "In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts not in existence at the time of trial, such as evidence which was not available at the time of the trial but rather was the result of changed conditions since the trial, is not generally regarded as constituting a ground for new trial because of newly discovered evidence * * *." There are exceptions to this rule but they apply only where the acts or events occurring subsequently to the trial are proof of a condition which existed prior to the trial and where the probative effect of the evidence is to explain such condition. 39 Am.Jur. p. 180, § 175; 20 R.C.L. p. 299, § 80. In *State, by Youngquist v. Watrous*, 177 Minn. 25, 224 N.W. 257, a motion for new trial in a condemnation action was denied. At the trial the State had contended that the construction of the proposed highway for which the land was being condemned would give valuable drainage to defendant's land. This was denied by defendant. The motion for new trial was based upon the State's offer to produce evidence that the construction which by then had taken place, fully demonstrated that the drainage had actually benefitted the land. The court stated that "In any but a very extraordinary case the evidence at the trial must

end the controversy", 224 N.W. at page 258, and then followed the general rule. In *Wagner v. Loup River Public Power Dist.*, 150 Neb. 7, 33 N.W.2d 300, it was held that evidence that more than one year after the trial the improvement which defendants' experts had testified at the trial would result to plaintiff's land from the diversion of a river had not come about, did not constitute newly discovered evidence authorizing a new trial.

In *Nebelung v. Norman*, 14 Cal.2d 647, at page 655, 96 P.2d 327, at page 331, in denying a motion for a new trial on the ground of newly discovered evidence, the court said: "'When a new trial is asked upon the ground of newly discovered evidence, 'the moving party must make a strong case' (*Smith v. Schwartz*, 14 Cal. App.2d 160, 166, 57 P.2d 1386), and this is particularly true when the alleged newly discovered evidence relates to facts occurring after the conclusion of the trial.'"

[10] Applying the analogy of the rule on motions for new trial to our case, the evidence offered was of conditions coming into existence after the director's order was issued and was neither proof of a condition existing prior to the hearing nor to explain the evidence there given.

In the Tenth Biennial Report of the Judicial Council appears the statement (p. 140): "The scope of review where administrative action is challenged by the writ of mandate may be stated generally to consist of the correction of abuse of discretion." How can an abuse of discretion be determined by events not in existence at the time of the determination? The very wording of section 1094.5, "evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing", demonstrates that the new evidence which can be introduced at the court hearing must be facts in existence at the time of the hearing which, if then known, would or should have affected the director's finding.

[11,12] Section 1300.16, subdivision (d), of the Marketing Act provides: "The director may amend any marketing order

if such amendment or amendments have been considered at a public hearing * * * and if such amendments are assented to in writing in accordance with the provisions of the section. Before invoking the action of the courts respondents are required to exhaust this administrative remedy by applying to the director to proceed to amend. " * * * the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 949, 132 A.L.R. 715. Had respondents in the trial court pursued their charges in the petition that the evidence did not support the director's findings, it would not have been necessary for them to seek an amendment of the order for the reason that they would be attacking the very validity of the order itself. But they did not do so. They elected to stand on the proposition that events occurring subsequently to the effective date of the order require a change or an elimination of the order. There is a provision, § 1300.16(c), for suspension or termination (by the director) of the marketing order. However, it could not become effective until the end of the current marketing season and hence would be an inadequate remedy. But the amendment process has no such limitation and would give respondents adequate relief.

[13] The marketing order itself provides: "Section E. [Article VIII] Appeals. Any person subject to the provisions of this Marketing Order may petition the Director to review any order or decision of the Advisory Board. * * * The Director shall, if the facts stated show reasonable grounds, grant any such petition and may review or revise in any manner whatsoever any order or decision upon which an appeal is taken." Respondents did not avail themselves of this remedy.

A somewhat similar situation is found in *United States v. Superior Court*, 19 Cal.2d 189, 120 P.2d 26. There a marketing order as to oranges was issued by the United States Secretary of Agriculture under the provisions of the Federal Agricultural Adjustment Act of 1933, as amended, 7 U.S.C.A. § 601 et seq. Certain shippers sought in the superior court to enjoin the enforcement of the order. Thereupon the United States of America brought in the Supreme Court a proceeding in prohibition to prevent the superior court from hearing the case on the ground that the shippers had not exhausted the administrative remedies provided by the act. The Supreme Court upheld this contention. While the federal act provides for different remedies than are provided in our statute, the principle is the same. Respondents here contend that the requirement of exhaustion of administrative remedies does not apply where the validity of the order is being attacked. In the United States case the court said, 19 Cal.2d at page 194, 120 P.2d at page 29: "The respondents apparently contend that the requirement of exhaustion of administrative remedies applies only to erroneous orders and does not preclude judicial interference where, as here, an order is assailed as a nullity because illegally adopted and where the agents for enforcement appointed thereunder are charged with being mere pretenders claiming powers which they do not lawfully possess. But there is no substantial difference, in so far as the necessity for resort to administrative review is concerned, between an erroneous order and one which, it is claimed, is being executed in violation of statutory authority."

Let a peremptory writ of prohibition and a writ of supersedeas issue.

PETERS, P. J., and FRED B. WOOD, J., concur.

106 Cal.App.2d 707

SANDERS v. WARDEN.

Civ. 18562.

District Court of Appeal, Second District,
Division 2, California.

Oct. 4, 1951.

Ida L. Sanders brought an action against Joann Warden, administratrix with will annexed of the estate of Francis E. Sanders, deceased, to recover for services rendered to decedent during the lifetime of decedent. The Superior Court of Los Angeles County, Kurtz Kauffman, J., granted a judgment of nonsuit against plaintiff and plaintiff appealed. The District Court of Appeal, McComb, J., held that it had lost jurisdiction to hear the appeal on its merits and that a purported order attempting to set aside order dismissing appeal was void.

Order in accordance with opinion.

1. Appeal and Error ⇐807

After an appeal has been dismissed for failure of appellant to file brief within time required by rule, appeal may be reinstated only by court for good cause shown by affidavit and after notice to the opposite party pursuant to provisions of Code of Civil Procedure. Rules on Appeal, rule 17(a); Code Civ.Proc. § 473.

2. Appeal and Error ⇐807

Where appeal was dismissed for failure of appellant to file brief within time required by rule, and appeal was not reinstated by court for good cause shown by affidavit and after notice to opposite party pursuant to provisions of Code of Civil Procedure, District Court of Appeal had no jurisdiction to hear appeal and purport-

ed order attempting to set aside order dismissing appeal was void. Rules on Appeal, rule 17(a); Code Civ.Proc. § 473.

Emmett E. Patten and Glen A. Duke, Monrovia, for appellant.

Paul R. Matthews, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appealed from a judgment of nonsuit granted against her in an action to recover for services rendered to Francis E. Sanders during his lifetime.

The record in this court discloses the following:

1. May 12, 1951, the record on appeal was filed.

2. June 13, 1951, plaintiff was notified that unless an "opening brief is * * * filed within 30 days after this notice, the appeal * * * will be dismissed unless good cause is shown for relief from default. (Rule 17a)"*

3. July 16, 1951, plaintiff applied for relief from default which application was denied.

4. July 17, 1951, a brief not having been filed by plaintiff, the appeal was dismissed by the court.

5. July 27, 1951, on plaintiff's ex parte application, the Presiding Justice directed that appellant's opening brief be filed and the order of dismissal vacated.

6. Defendant has filed a brief to which plaintiff has replied and both parties have stipulated that the cause may be submitted.

* Rule 17(a), Rules on Appeal, 36 Cal.2d 17, reads:

"If the appellant's opening brief is not filed within the time prescribed in subdivision (a) of Rule 16, the clerk of the reviewing court shall notify the parties by mail that if the brief is not filed within 30 days after the date of mailing of the notification, the appeal will be dismissed, unless good cause is shown for relief. If a sufficient written showing of excuse is made within such 30-day period, the Chief Justice or Presiding Justice may grant additional time

to file the brief subject to such conditions as he may deem proper to impose; otherwise the appeal may be dismissed forthwith.

"If the brief is not filed within the time granted by the Chief Justice or Presiding Justice, the appeal may be dismissed forthwith. If the notification is not mailed by the clerk or the appeal is not dismissed on the court's own motion, the respondent may move to dismiss the appeal. [As amended, effective Jan. 1, 1951.]"

Defendant questions the jurisdiction of this court to hear the appeal upon its merits, contending that since the appeal was dismissed on July 17, 1951, pursuant to the provisions of Rule 17(a), Rules on Appeal, *supra*, this court lost jurisdiction to hear the appeal on its merits, and that the purported order of July 27, 1951, attempting to set aside the order dismissing the appeal was void.

[1] This objection is sound. After an appeal has been dismissed by the court it may be reinstated only *by the court* (1) for good cause shown by affidavit, and (2) after notice to the opposite party, pursuant to the provisions of section 473 of the Code of Civil Procedure. (Cf. *Drummond v. West*, 212 Cal. 766, 768 et seq., 300 P. 823; *Hagar v. Mead*, 25 Cal. 598, 599 et seq.; *Dorland v. McGlynn*, 45 Cal. 18.)

[2] Applying the foregoing rule to the record in the instant case it is apparent that there is no showing in the record that plaintiff met any requirement of the rule. Therefore the purported order of July 27, 1951, is void, the cause is ordered off calendar, and the clerk is directed to issue a remittitur forthwith.

MOORE, P. J., and WILSON, J., concur.



106 Cal.App.2d 744

**DOCKWEILER et al. v. SUPERIOR COURT
IN AND FOR LOS ANGELES
COUNTY.**
Civ. 18709.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1951.

Rehearing Denied Oct. 17, 1951.

Hearing Denied Dec. 6, 1951.

Alice M. Dockweiler and another filed a petition for peremptory writ of mandate commanding the Superior Court of the State of California in and for the County of Los Angeles to proceed with the hearing and determination of a petition for ratable dis-

tribution. The District Court of Appeal, Moore, P. J., held that where superior court, indicating that petition was not properly one for ratable distribution but could be treated as a petition for partial distribution, took the matter under submission, mandamus would not lie to compel action by superior court, since it had not refused to exercise its jurisdiction to determine the issues raised by petition and answer and any decision thereof would be appealable.

Alternative writ discharged and peremptory writ denied.

1. Mandamus ⇨28

A writ of mandate will issue to compel action by an inferior court where it refused to act in a matter properly before it, but mandamus will not lie to compel an inferior court to act in a particular manner, unless the situation presented is one in which court can exercise its discretion in but one way.

2. Mandamus ⇨4(3), 31

Where superior court, while indicating that petition for distribution of specified asset of intestate's estate to petitioners and another pursuant to contract between heirs of intestate was not properly a petition for ratable distribution but could be treated as a petition for partial distribution, took the matter under submission until specified future date, mandamus would not lie to compel action by superior court, since it had not refused to exercise its jurisdiction to determine the issues raised by petition and answer and any decision thereof would be appealable. Probate Code, § 1240.

3. Mandamus ⇨31

Mandamus will not lie to compel action by an inferior court if such court is willing to exercise its jurisdiction to decide the issues and make some definitive order in a matter properly before it, regardless of whether such issues are properly decided, since "jurisdiction" is the power to act either correctly or erroneously.

See publication Words and Phrases, for other judicial constructions and definitions of "Jurisdiction".

William K. Young, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, John B. Anson, Deputy County Counsel and Guy Richards Crump, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Petitioners demand a peremptory writ of mandate commanding respondent to proceed with the hearing and determination of a petition for ratable distribution. The alternative writ was granted on the representation that the respondent had, in the course of the hearing of the petition, announced that it was without authority to determine the issues raised by the petition and answer and had "declined to proceed further with respect to the hearing and determination thereof."

It appears that in the Estate of Herbert R. Macmillan, deceased, a matter pending before respondent court, a petition for ratable distribution alleged that the estate owned 47 per cent of the lessee's interest in the Thrash lease for oil and gas; that by virtue of a contract between the heirs at law of the intestate decedent such interest was to be distributed to petitioners and Malcolm R. Macmillan, share and share alike; that time for filing claims had expired and that following a ratable distribution adequate assets would remain with which to pay unpaid claims and costs of administration and that an indebtedness incurred by the administrator had been paid or could be offset. After Malcolm R. Macmillan had declined to file a petition for ratable distribution or to participate in the proceedings therefor the administrator filed his answer disclaiming any objection to petitioners' request except that if it be granted it be subject to petitioners' assuming an indebtedness to Gordon Macmillan in the sum of \$37,000 loaned by him to the administrator.

In the course of the hearing of the petition the judge stated that he was convinced that the petition was not properly one for ratable distribution but that it could be treated as a petition for partial distribution and that such distribution might be ordered, on condition that a bond commensurate with the value of the property to be

distributed be executed and delivered to the administrator; that the petition "is not really a petition for ratable distribution for the reason that ratable distribution means proportionate distribution to all the heirs and not to just those who seek to get their portion of the estate * * * ratable distribution contemplates that all of the heirs will get a proportionate share of what they are entitled to, and this petition seeks distribution to two heirs who are interested in this forty-seven per cent of the Thrash lease. So it cannot be granted as a ratable distribution * * * this petition could be treated as one for partial distribution * * * to these heirs, provided they will put up a bond in an amount which the Court deems appropriate under the circumstances. If the petitioners do not desire to put up a bond, I will have to deny the petition because it is not a proper statutory proceeding. * * * I will give you both the opportunity to do some research on the subject, so the court will be advised as to whether or not it can make an order for partial distribution * * * and I will take the matter under submission until a week from today. In the meantime you may submit such authorities as you wish to. * * * The matter is under submission and you may submit such authorities, both of you, as you deem are appropriate. * * * The matter will be submitted."

Three days later the petition herein was filed.

[1-3] From the record of the hearing on the petition it is established that the court did not refuse to exercise its jurisdiction. Although the judge indicated that he was not overwhelmed with the conviction that the petition could be treated as one for ratable distribution because in order to make such a distribution it must be shown that all the debts are fully paid or secured by mortgage, still he gave no indication that he would not act upon the petition. While it is true that he displayed an unfriendliness toward the idea of making a ratable distribution to all three heirs on a petition which sought distribution to only two of them, yet such expressions do not constitute a denial of jurisdiction. As

long as the court was willing to make some definitive order in the matter, it was exercising its power to decide the issue. Because jurisdiction is the power to act either correctly or erroneously, this court cannot interfere with respondent in either granting a partial distribution or in denying distribution of any kind. If a trial court acts upon and denies a petition for ratable distribution, mandamus will not lie; but if it refuses to act where a matter is properly before it, a writ of mandate will issue to compel action. But mandamus will not compel an inferior court to act in a particular manner "unless the situation presented is one in which the court can exercise its discretion in but one way." *Lissner v. Superior Court*, 23 Cal.2d 711, 714, 146 P.2d 232, 235. In the cited decision, *Lissner* had been appointed receiver in the Baldwin divorce action and was ordered to reduce a claim of Baldwin to possession. He thereupon petitioned the Probate Court for a ratable distribution of Baldwin's legacy. The probate court declined to take jurisdiction while laboring under the misconception that the judge who had tried the divorce action in which *Lissner* was appointed receiver should make a determination. The court having "declined to assume jurisdiction over the matter * * * of ratable distribution," established a "proper factual base * * * for the intervention of mandamus."

The court requested counsel to file points and authorities and took the matter under submission. Any decision that might have been rendered could have been appealed, Probate Code, sec. 1240, thereby obviating the resort to an extraordinary remedy. That the instant petition was destined to be a fruitless venture is shown by the court's decision in *Lissner v. Superior Court* wherein it is held that the only direction that could go down to respondent would be "to hear and determine the issues raised by the pleadings filed in connection with the petitioner's application for ratable distribution * * * and to render *such judgment or order thereon as it may be advised.*" *Id.*, 23 Cal.2d at page 719, 146 P.2d at page 237.

It is ordered that the alternative writ be and is discharged, and that a peremptory writ is denied.

McCOMB, J., concurs.



106 Cal.App.2d 748

PEOPLE v. CHEELEY.

Cr. 4618.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1951.

Rehearing Denied Oct. 25, 1951.

Hearing Denied Nov. 7, 1951.

Inslee Cheeley was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of theft on theory of false pretenses, and she appealed from the order denying her motion for new trial. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction.

Affirmed.

1. False Pretenses ☞49(1)

Evidence sustained conviction of theft on theory of false pretenses. Pen.Code, § 1110.

2. False Pretenses ☞11

Fact that defendant did not herself gain possession of money, did not preclude conviction for theft on theory of false pretenses, since one is guilty of theft, if, as result of his false pretenses, money or property of value is delivered to a third person who is not the rightful owner. Pen. Code, § 1110.

3. False Pretenses ☞49(3)

In prosecution for theft on theory of false pretenses, evidence was sufficient to corroborate statement of defendant where-by money was obtained. Pen.Code, § 1110.

4. Criminal Law ☞410

Where sales manager of corporation was directed by executive secretary to act for executive secretary with reference to transactions, statements of sales manager in

course of the transaction were competent evidence in prosecution of executive secretary for theft on theory of false pretenses. Pen.Code, § 1110.

5. Criminal Law ⇨1036(1)

Where no objection was made to offer of certain proof, defendant could not urge successfully on appeal that the admission of such proof was prejudicial error.

6. Criminal Law ⇨1036(3)

Where defendant failed to state the purpose of certain testimony sought to be introduced by defendant, trial court's ruling excluding such testimony could not be disturbed on appeal.

7. False Pretenses ⇨48

In prosecution for theft on theory of false pretenses, trial court properly excluded defendant's evidence relating to restoration, since it is not a defense to a charge of theft, that after the thief is caught, he attempts restoration of stolen goods. Pen.Code, § 1110.

8. Criminal Law ⇨413(1)

Question calling for self-serving testimony was properly excluded.

9. False Pretenses ⇨52

In prosecution for theft on theory of false pretenses, instruction that to constitute the offense, it is not necessary that accused shall have himself or herself received the money or property involved, but it is sufficient, the other elements of the offense existing, if the property is delivered to another person or to a corporation, was not erroneous. Pen.Code, § 1110.

10. False Pretenses ⇨52

In prosecution for theft on theory of false pretenses, instruction that a "false token" is a thing or an object or document which is used as a means to defraud and which is of such character that, were it not false, it would commonly be accepted as what it obviously appears and purports to be, and, which though false, is apparently what it purports to be, was not erroneous. Pen.Code, § 1110.

See publication Words and Phrases, for other judicial constructions and definitions of "False Token".

11. False Pretenses ⇨6

A conditional sales contract can constitute a "false token" or writing within meaning of statute dealing with false pretenses. Pen.Code, § 1110.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been convicted of theft on the theory of false pretenses, appellant applied for and was granted probation on specified conditions. This is an appeal from the order denying her motion for a new trial on the grounds of insufficiency of the evidence to justify conviction; errors in the admission and rejection of testimony, and in instructions given.

Facts Established

On May 7, 1949, the Automatic Launderall Engineering Company, a corporation herein referred to as "company," was engaged in the business of installing automatic laundries in Southern California. Appellant was its executive secretary and one Watson was its sales manager. After extended negotiations, the company executed a written contract on that date with David L. Baker for the purchase and installation of 20 Launderall machines for the sum of \$10,450. The machines were to be installed in the city of Burbank. The contract price was payable in installments as the construction and installation work proceeded. The final payment of \$4,950 became payable when "machines are ready for delivery." The installation was to be completed within 30 days from the date of Baker's possession of the premises. Prior to the execution of the contract it developed that the capital for investment in the new enterprise was limited. Acting upon the advice of appellant, Watson advised the Bakers that if they could borrow as much as \$7,200 from the bank, the \$4,200 they then had would cover the remainder and provide a reasonable working capital. Ap-

pellant authorized Watson to work out the financial arrangements and to write the necessary contract. She advised Mrs. Baker that she had a warehouse full of Launderalls; that she bought them by car-load lots; that she had bought the first car-load of the new model LS-3 on the Pacific Coast.

As negotiations for the lease on the Burbank property commenced, Watson applied to a bank for a loan of \$7,200. The bank refused to consider a loan of such amount but agreed to lend \$5,500. When the Bakers hesitated to proceed without an additional \$2,000, appellant agreed that the company would carry \$1,750.

Four days after the signing of the contract, appellant ordered the Ray Thomas Company, factory representative, to set aside twenty Launderalls for the company. Thereupon, the serial numbers of the 20 machines were procured and appellant entered the serial numbers on the back of the purchase order issued by the Ray Thomas Company. On May 14th the Bakers executed a "conditional sale contract," on a form prepared by the bank, with the company by appellant as secretary-treasurer. In it were included the serial numbers of the machines, the net cash selling price as \$8,700; down payment of \$3,200; unpaid cash balance of \$5,500. Appellant assigned the conditional sale contract to the bank and received its check for \$5,500 which she deposited in the account of company. Incidentally, at the time of such deposit, company's balance was \$42.21. Appellant was the only person authorized to withdraw funds from the company's bank account.

On the reverse side of the conditional sale contract is a form for transferring the contract. It was executed by appellant on behalf of the company and is as follows:

"Assignment by Dealer with Recourse.

"To California Bank: For the purpose of inducing you to purchase the within contract signed by the within named Buyer, the undersigned submits the above statement which he certifies to be substantially true, and certifies that the said contract arose

from the sale of the within described property, warranting to you that the down payment was made by the Buyer in cash and not its equivalent, that no part thereof was loaned directly or indirectly by the undersigned to the Buyer; *that title of the aforesaid property is vested in the undersigned free and clear of all liens and encumbrances whatsoever*,¹ except the within contract; that the Buyer was at least 21 years of age at the time of the execution of said contract; that the undersigned has the right to assign said contract; and that there is now owing thereon the amount as set forth therein.

"For value received, the undersigned does hereby sell, assign and transfer to California Bank his, its or their right, title and interest in and to the within contract and the property covered thereby and authorizes said California Bank to do every act and thing necessary to collect and discharge the same.

"All the warranties, terms and provisions of an agreement, if any, between the undersigned and California Bank are made a part hereof by reference, and upon which California Bank relies in making this purchase. Neither the repossession of the within described property from the Buyer for any cause, nor failure to file or record this contract when required by law (it being the duty of the undersigned to file or record the contract) shall release the undersigned from the obligations herein and in any such agreement between it and California Bank.

"May 14, 1949

"Seller Automatic Laundry
Engineering Co. Inc.

"By Inslee Cheeley"

On May 20 the Launderalls had not been delivered. Upon inquiry by the bank's representative, appellant made promises of an early delivery and finally confessed that she lacked the funds necessary to pay for the 20 machines she had ordered. Notwithstanding her statements that the machines were in the company warehouse and would soon be delivered, no delivery of any part of them was ever made and ownership of

1. Emphasis added.

the 20 machines continued in the Ray Thomas Company. While appellant admitted that at the time she received the bank's check, the company did not have title to any Launderall machines, yet she intended that the 20 machines should be covered by the sale contract and she understood that they were to be part of the security for the loan.

Proof is Sufficient.

[1] The proof of appellant's guilt is wanting in no respect. She represented in writing that her company owned the 20 Launderall machines and that there was no debt against them, while at the same time the company had not the slightest right to their possession and could not have obtained them without first paying the factory representative the purchase price agreed upon. She dispersed the \$5500 received from the bank through the company's bank account. That sum was never repaid to the bank.

[2] Appellant contends that she cannot be guilty of theft by reason of the fact that she did not herself gain possession of the money. The authority cited in support of such contention is not the law. One is guilty of theft, if as a result of his false pretenses, money or property of value is delivered to another person for the benefit of anyone other than the rightful owner. *People v. Jones*, 36 Cal.2d 373, 379, 224 P.2d 353. The crime of thieving is not limited to the appropriation of the property of another for the thief's benefit. The unlawful appropriator is just as guilty of theft when he takes it for the benefit of a church as when he takes it for his own use. From the founding of the Mosaic law to the present time stealing has been forbidden without regard to the character of the victim or of the beneficiary of the theft. In *People*

v. Leaverton, 107 Cal.App. 51, 289 P. 890, the conditional sales contracts for refrigerating equipment were assigned to a finance company. While the contracts were genuine, the items described in them had never been ordered from the distributor. Such proof warranted conviction of grand theft.

The facts disclosed by the record herein abundantly warranted the jury's finding that appellant never intended to make delivery of the washing machines which she contracted to sell to the Bakers.

[3] Appellant argues that the proof is insufficient for the reason that there was no corroboration of any statement of appellant whereby the money was obtained, citing Penal Code, section 1110.² The answer to this contention is first, that appellant's false pretense was her misrepresentation that the title to the 20 Launderalls was vested in the company, and second, the deceptive statement was included in appellant's assignment on the contract. Moreover, she admitted that when she signed the "Conditional Sale Contract" and the "Assignment" to the bank, the company did not have title to the 20 machines although it was contemplated that they should be included in the property to be thereby transferred.

[4] Appellant contends that reversible error was committed in allowing proof of Watson's conversations had with Mrs. Baker and with the bank official on the ground that they were hearsay. Such evidence was properly admitted. Mr. Watson was given explicit authority by appellant to act for her in making the contract with the Bakers and in making a sale of the contract to the bank. Not only did appellant authorize Watson to work out the final arrangements and to write the contracts, but she advised

2. Section 1110, Penal Code. "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pre-

tense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section does not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property."

Mrs. Baker that she could rely upon Watson's answers as being right. Since Watson was directed to act for appellant his statements made in the course of his labors concerning the transaction were competent evidence. *People v. Jones*, 61 Cal.App.2d 608, 627, 143 P.2d 726.

[5] Appellant contends that it was prejudicial to admit the ledger sheet of the company's bank account and to investigate the company's expenditures. The answer to such assignment is that no objection was made to the offer of such proof and that failure to object disposes of the contention. *People v. Munoz*, 97 Cal.App.2d 432, 436, 218 P.2d 122; *People v. Garnier*, 95 Cal.App.2d 489, 502, 213 P.2d 111; *People v. Cucco*, 85 Cal.App.2d 448, 453, 193 P.2d 86.

The assignment is made that the court prejudiced appellant by refusing the offer to prove that appellant tried to sell the Bakers' business for them to prevent their loss and to recover the \$5,500 for the bank.

[6-8] Having failed to state the purpose of such testimony, the court's ruling cannot now be disturbed. *People v. Brown*, 43 Cal.App.2d 430, 433, 110 P.2d 1059. But if appellant had stated the purpose of her offer, the objection would have been properly sustained for the reason that it is not a defense to a charge of theft that after the thief is caught, he attempts restoration of the stolen goods. *People v. Wynn*, 44 Cal. App.2d 723, 729, 112 P.2d 979. On the cross-examination of Mr. Jennings, the banker, he was asked whether Mrs. Cheeley stated that if the Bakers would pay the \$1,950, she would install the machines. The question called for self-serving testimony which was properly excluded. But if the evidence had any virtue, she already had

the benefit of it by having testified to the same matter herself.

[9] Assignment is made of the court's instruction on theft by false pretenses as follows: "To constitute this offense it is not necessary that the accused shall have himself or herself received the money or property involved but it is sufficient, the other elements of this offense existing, if the property is delivered to another person or to a corporation." That there was no error in such instruction has already been demonstrated by the language of the Supreme Court in *People v. Jones*, 36 Cal.2d 373, 379, 224 P.2d 353.

[10,11] Assignment is made that the following instruction was prejudicial to appellant. "A false token is a thing or an object or document which is used as a means to defraud and which is of such character that, were it not false, it would commonly be accepted as what it obviously appears and purports to be, and which though false, is apparently what it purports to be." Such instruction is a substantial copy of an approved instruction. (See CALJIC, California Jury Instructions, Criminal, 229-A.) She argues that the instruction erroneously led the jury to believe that the conditional sale contract could furnish the corroboration required by section 1110, Penal Code. Whatever the court may have intended, it is certainly true that the conditional sale contract could constitute a false token or writing within the meaning of section 1110. *People v. Wynn*, 44 Cal.App.2d 723, 728, 112 P.2d 979.

Order denying motion for a new trial is affirmed.

McCOMB, J., concurs.

106 Cal.App.2d 738

SEABOARD FINANCE CO. v. CARTER.

Civ. 18536.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1951.

Hearing Denied Dec. 6, 1951.

Seaboard Finance Company, a corporation, brought an action against Austin Carter to recover a deficiency remaining after the sale of movables made pursuant to a chattel mortgage. The Superior Court, Los Angeles County, J. T. B. Warne, Judge of the Superior Court of Tuolumne County, rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Moore, P. J., held, *inter alia*, that a prior judgment was not *res judicata*.

Judgment affirmed.

1. Judgment ⇨713(2)

Where holder of chattel mortgage notified mortgagor that mortgaged vehicles would be sold unless sums due on note were paid, and mortgagor filed action to recover money paid, damages, and for cancellation of note and mortgage on ground of fraud in their procurement, and to enjoin foreclosure of mortgage and exercise of power of sale, and mortgagor knew of subsequently alleged vices, of notice of sale when mortgagor filed such action, and permanent injunction could have been obtained if mortgagor's subsequent contentions relative to vices of notice were sound, but mortgagor did not in such action make such contentions a leading issue, judgment entered was *res judicata* on issue of insufficiency of notice of sale.

2. Judgment ⇨713(2)

Whatever grievance a litigant may have when he is involved in legal contest must be included in his pleadings then, and if he neglects or chooses not to do so the judgment entered will be deemed final as to such question as may have been a potential issue.

3. Judgment ⇨739

Where District Court of Appeal held that holder of chattel mortgage on vehicles had no right to litigate its claim for a deficiency in action brought by mortgagor

to recover money, damages and for cancellation of note and mortgage on ground of fraud in their procurement, deficiency subsequently sued for by holder of mortgage was not *res judicata* by virtue of judgment in action by mortgagor.

4. Chattel Mortgages ⇨260

Where defendant's partner, without objection by defendant, voluntarily delivered to mortgagee mortgaged vehicles belonging to partnership, when mortgagee demanded possession of vehicles, and mortgagee promptly notified defendant in writing that unless sums due under note were paid mortgagee would sell vehicles, and defendant sued for cancellation of note and procured restraining order against sale, thereby delaying sale for a year, and defendant did not thereafter hint that he did not have notice of sale until defendant answered in mortgagee's action for deficiency remaining after sale, defendant waived further notice of sale.

5. Estoppel ⇨95

Where defendant's partner, without objection by defendant, voluntarily delivered to mortgagee mortgaged vehicles belonging to partnership when mortgagee demanded possession of vehicles and neither defendant nor defendant's partner could make delinquent payments, and mortgagee promptly notified defendant in writing that unless sums due under note were paid mortgagee would sell vehicles, and defendant saw that vehicles were offered for sale, and while defendant endeavored to annul mortgage by judicial proceedings defendant took no steps to protect his interests if he should lose in judicial proceedings, thereby leading mortgagee to believe that satisfactory notice of sale was served, defendant was estopped to deny that defendant had sufficient notice of foreclosure. Code Civ. Proc. § 1962, subd. 3.

A. W. Brunton and Lauren M. Handley,
Los Angeles, for appellant.

Bromley, Ritter & Lindersmith, Los Angeles, by Frank E. Carleton, Los Angeles, for respondent.

MOORE, Presiding Judge.

Respondent sued to recover a deficiency remaining after the sale of movables made pursuant to a chattel mortgage.

On March 11, 1946, respondent loaned appellant \$15,658 on a note and chattel mortgage to pay the balance of the purchase price of four vehicles, to wit, a GMC truck and Weber trailer and a Sterling truck and a Fruehauf trailer. They were acquired for the partnership of Carter and Spurgeon which had theretofore engaged in the fishing business. Carter made the down payment of \$4700 and alone executed the note and the mortgage. By agreement they were to share the profits equally in their new enterprise of transporting goods for hire. On July 2, 1946, there was a default in the payments on the note. Demand was made for possession of the chattels as provided by the mortgage. Thereupon Mr. Spurgeon, without objection on the part of appellant, voluntarily delivered the mortgaged chattels to respondent. The latter promptly forwarded to appellant a notice in writing that unless all sums due under the note be paid, it would sell the chattels on or after five days following the notice. That document was received by appellant. However, no sale was made for over a year for reasons about to be related.

Within a week after the vehicles were delivered to respondent, appellant filed action No. 516539 to recover moneys paid, damages, and for cancellation of the note and mortgage on the ground of fraud in their procurement, and for injunction against respondent's foreclosing the mortgage or exercising the power of sale. He procured a restraining order against such sale which was not dissolved until February, 1947. The sale of the vehicles took place July 2, 1947, exactly one year after they came into respondent's possession. At the foreclosure sale the sum of \$10,000 was received for all four vehicles. During that period the chattels were kept on vacant lots and at all times prior to the sale their whereabouts were known to appellant.

In the meantime the judgment on his action, No. 516539, had gone against Carter

and he had appealed. The Supreme Court annulled the mortgage in so far as it affected the Sterling truck and Fruehauf trailer by reason of respondent's failure to comply with sections 2981 and 2982 of the Civil Code relating to conditional sales but affirmed the validity of the mortgage lien on the GMC and Weber vehicles. All other demands of Carter were rejected and the court ordered the trial court "to determine the sums due to the plaintiff on the unenforceable portion of the contract relating to the Sterling and Fruehauf vehicles and enter judgment accordingly." *Carter v. Seaboard Finance Company*, 33 Cal.2d 564, 588, 203 P.2d 758, 773. Pursuant to such directive further proceedings were had in the court below and judgment was entered in action No. 516539 in favor of Carter for $\frac{2}{45}$ of the amount loaned on the mortgage, to wit, the sum of \$4,314.20. Immediately following the award of such judgment, the same court tried the instant action for the deficiency claimed and held that the loan as to the GMC truck and Weber trailer was valid and awarded respondent \$5,034.65. That judgment was credited with the amount recovered by appellant in action No. 516539 leaving respondent's net recovery \$570.75.

The court made findings that appellant did not pay as provided by the note; that his partner without objection delivered the truck and trailer to respondent; that on July 2, 1947, the truck and trailer, having been continually advertised and inspected by prospective purchasers, was sold by respondent for \$5,000, the reasonable market value thereof; that after crediting that sum to the balance of principal and interest due on appellant's obligation there remained a deficiency balance due from defendant to plaintiff on July 2, 1947.

Appellant now demands that such judgment be reversed and that he be awarded the full value of the last above mentioned truck and trailer. He grounds his contention upon the asserted insufficiency of the notice of sale.

Notice of Sale is Res Judicata.

[1,2] The issue of insufficiency of the notice of sale is not a legal basis for re-

versal. It was adjudicated in action No. 516539. Appellant made no allegation in his several pleadings there with respect to the notice save and except the declaration that "defendant notified plaintiff that it intends to sell said trucks on or after five days following the third day of July, 1946."¹ The vices, if any, of the notice of sale were known to appellant when he filed his action to enjoin the sale of the vehicles. While he alleged then that notice had been given of the intended sale he evidently chose not to make it a leading issue in a contest wherein he hoped to gain an annulment of the entire mortgage and note. But since a permanent injunction could have been obtained against the alleged sale, if appellant's present contentions are sound, the judgment he obtained in action 516539 is an adjudication of the issue of the insufficiency of the notice of sale. *Sutphin v. Speik*, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497. Whatever grievance a litigant may have at the time he is involved in a legal contest must be included in his pleadings then. If he neglects or chooses not to do so the judgment entered will be deemed final as to such question as may have been a potential issue. (*Ibid.*)

The "notice of foreclosure" which was served on appellant on July 3, 1946, complied with the terms of the chattel mortgage which provided "upon a breach of the mortgage then the entire balance may be declared due and payable forthwith, and mortgagee * * * without previous notice or demand, may * * * take posses-

sion of the property according to law * * * it may be sold at public or private sale, anytime not less than five days after notice is mailed * * * advising him said property has been repossessed and will be sold at a time and place designated in said notice * * *. The property need not be present at place of sale."

[3] Appellant contends that the deficiency sued for in the instant action could have been pleaded in appellant's action No. 516539 and therefore the right to a deficiency is *res judicata*. By such contention appellant ignores the fact that judgment was entered on February 17, 1947, in No. 516539, whereas respondent did not sell the vehicles until July 3, 1947. Moreover, while appellant's action No. 516539 was in the judicial process, after reversal by the Supreme Court, respondent filed a supplemental answer alleging the deficiency resulting from the sale of the chattels. This court (Division III) issued a writ of mandate requiring the Superior Court to disregard respondent's counterclaim for a deficiency and to proceed as directed by the Supreme Court. *Carter v. Superior Court*, 96 Cal.App.2d 388, 391, 215 P.2d 491. Since it has been finally decided that respondent had no right to litigate its claim for a deficiency in action No. 516539, appellant's asserted plea of *res judicata* with respect to the deficiency is without merit.

Appellant Waived Notice.

[4] If appellant had been entitled to any further notice than that which he admits

I. "Notice of Foreclosure (Under Chattel Mortgage)

"To Austin Carter, Mortgagor.

Address 1653 W. 12th St., Los Angeles 15, California. You are hereby notified that the undersigned has foreclosed under provisions of that certain Chattel Mortgage executed by you on the 11th day of March, 1946, whereby you mortgaged to Seaboard Finance Company 1938 Sterling Stake, Motor No. BEFF8682

1940 Cummins Diesel, GMC 3 axle truck

1936 Freuhauf 3 axle trailer BE13882

1936 Weber 3 axle pull trailer, Ser. No. 1307

as security for the payment of indebtedness, and you are hereby further notified

that the said Automobile is now in possession of the undersigned and unless you pay to the undersigned, as holder and owner of the said Mortgage, at this office located at 959 S. Flower Street, Los Angeles 15, California, within five days from the date of this notice the sum of \$18,721.29, all of which said sum is now due and payable pursuant to the conditions of said Mortgage, the said Automobile will thereafter be sold pursuant to terms of said Chattel Mortgage. Dated at Los Angeles, this 3rd day of July, 1946

"Seaboard Finance Company,
Mortgagee

"By Hal F. Overlin"

was received, his behavior shows an intentional waiver thereof. He sued for a cancellation of the mortgage in July, 1946, and procured a restraining order against the sale, which fact delayed the sale for a year. He never thereafter, until his answer herein, hinted that he did not have notice of the sale. To his partner's delivery of the vehicles to respondent in July, 1946, appellant made no objection. By his acquiescence in respondent's possession and notice of foreclosure and by his suit to annul the mortgage in its entirety on the ground that it was void, he clearly waived any further notice of sale under the mortgage. He had ample opportunity to assert his right to another notice from July 3, 1946, to date of sale, July 2, 1947. Also, he might have asserted his grievance by appropriate action prior to the filing of the complaint herein, March 8, 1950. That he did not do so must be deemed to have been a waiver of further notice.

[5] Appellant is estopped to deny that he had a sufficient notice of foreclosure. He admitted that Spurgeon was his partner who delivered the vehicles to respondent after it developed that neither of them could make the delinquent payments. He saw that they were offered for sale. He saw them on the lot of Temple and Maloney where he and Spurgeon had bought them. While he was endeavoring to annul the mortgage by judicial proceeding over the course of a year he took no steps to protect his interests in the event he should lose in the contest. In neither negotiation nor pleading did he ever suggest the inadequacy of the notice. Such inaction was reasonably calculated to induce respondent to conclude that its proceedings had been in accordance with the mortgage and that its only remaining duty was to obtain the best available price for the property. While appellant suffered no loss by reason of having received no additional notice, solely by his course of conduct he has led respondent to believe no further notice was essential, and a contrary holding would require expensive delays and other sale proceedings. Having by his own acts and omissions deliberately led respondent to

believe that satisfactory notice of sale had been served he will not now be permitted to falsify the conclusion created by his behavior. (Code Civ.Proc. sec. 1962, subd. 3.)

Respondent performed its duty to appellant by procuring the highest price possible for the trucks and trailers. The proof was complete that every reasonable effort was made to get more money and that respondent did obtain \$5,000—the reasonable market value of the GMC truck and Weber trailer.

Judgment affirmed.

McCOMB, J., concurs.



106 Cal.App.2d 755

PEOPLE v. TOPPIN.

Cr. 4673.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1951.

Hearing Denied Nov. 7, 1951.

Clifford I. Toppin was convicted in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., of illegally issuing corporate stock and the defendant appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained the conviction.

Affirmed.

Licenses ⇐42(4)

Evidence sustained conviction for illegally issuing and selling corporate stock. Corporation Code, §§ 25500-25505.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Los Angeles County, Robert Wheeler, Deputy Dist. Atty., Los Angeles, for respondent.

Claud B. Andrews, Glendale, for appellant.

MOORE, Presiding Justice.

Appellant was convicted by the court without a jury on two counts of violating the Corporate Securities Act¹ on September 1 and 2, 1950. One judgment was entered that he "be punished by imprisonment in the County Jail of the County of Los Angeles for the term of one year. Sentences * * * to run Concurrently." Appellant demands a reversal of the judgment and the order denying his motion for a new trial on the ground that the evidence does not support the judgment.

In the summer of 1950 appellant visited Dorothy Pells, a retired graduate nurse, the prosecutrix, at her home where she loaned him \$300 for which he gave her his promissory note for \$350, payable in ten days. On September 1, 1950, he telephoned her that "he had a surprise for me and that he wanted me to come down." She met him at a popular street intersection of Los Angeles where he showed her a paper "that he had invested my money * * * the \$300 I had loaned him, instead of paying it back to me he had invested it in this * * * National Service Corporation * * * he hadn't asked me if I wanted to invest it in stocks or anything, but he had simply invested it * * *. He said I was going to get in on the ground floor with all the other investors that had invested thousands of dollars in this corporation * * * he wanted me to put in more money * * *. He said other members of the corporation wanted me to invest—make it \$500 if I was going to get in on the ground floor where they were * * * he had a paper he showed me there in the restaurant that I was going to get wonderful returns for my money * * * when we got out home he wanted me to get \$200 more and put it up * * * I gave him the \$200. He gave me a note but I didn't see it * * * he put them in an envelope and sealed it up and told me to put it in a vault box * * *. He wasn't satisfied. He knew I got my check from my Old Age Pension * * * and then he wanted that. And he never gave

1. Corporation Code §§ 25500-25505.

up until he got it * * * in the amount of \$75 which I endorsed over to him."

After he left she opened the envelope. It had a promissory note for \$500 dated Las Vegas, Nevada, and a stock certificate of National Service Corporation for 1500 shares. On finding no security for the \$75 she telephoned him and he told her to come down. She called at his office in the Story Building on Broadway. On her arrival he escorted her to a cafeteria for breakfast where he told her "that he had the man that was in his office make me out a security for my \$75." When they returned to his office, appellant had his assistant make out a certificate for 100 shares in favor of Mrs. Pells, in the National Service Corporation for the \$75 pension check taken the night before.

No part of the money received by appellant from the prosecutrix has ever been repaid her. No permit has ever been issued by the Division of Corporations to the National Service Corporation or to appellant.

Was It His Personal Stock?

Appellant contends that while the evidence might justify a prosecution for another crime there was no proof that the shares issued to Mrs. Pells were the capital stock of the National Service Corporation or were sold or issued for its benefit; that they were owned solely by appellant. This requires an inspection and consideration of the corporate records.

The corporation was chartered by the State of Nevada for a total capitalization of 250,000 shares. On July 14, 1950, at Las Vegas, Nevada, certificates 1 to 4 of the corporation were signed in blank by the officers, Darrell R. Abbott as president and B. L. Smith as secretary. The latter was soon to become the bride of appellant. Neither the name of shareholder nor the number of shares, nor place or date of issuance appeared. On the next day, certificate No. 1 was filled in for B. L. Smith in the amount of 25,000 shares. On the same day she assigned that certificate to appellant and married him. No other events worthy of mention occurred at Las

Vegas but on September 1, 1950, Toppin inserted in certificate 2 the name of Mrs. Pells, 1500 shares, and Las Vegas, Nevada, as the place of issuance. On September 2 he inscribed "Dorothy W. Pells" in certificate No. 3 for 100 shares and "Las Vegas, Nevada," as the place of issue. On September 3, "B. L. Smith" wrote appellant's name in certificate No. 4 for 23,400 shares. The stubs of such certificates contain corresponding data. Certificate No. 1 bears on its reverse side an "assignment" by B. L. Smith to C. I. Toppin. Certificates 5 to 8 inclusive, though signed by B. L. Smith and Darrell R. Abbott, are "cancelled" with ink and remain in the certificate book, but certificates 9 to 48 inclusive are unsigned and attached. Certificates 49 and 50 are detached.

The minutes of the corporation under date 15 July 1950 contain a recital of B. L. Smith's proposition to transfer certain mining properties in Yuma County to the corporation for 250,000 shares of its stock, and the resolution that the property "was well worth the said amount of stock and had great potential value"; the proposition was accepted and the officers were directed to issue to B. L. Smith or order shares of stock "in such amounts as may be requested."

The corporate records and the conduct of appellant and his wife clearly disclose a carefully contrived scheme, plan and subterfuge to evade the provisions of the California Corporate Securities statute. Among the records, minutes and papers of the company there was no document or minute showing an appraisal of the Yuma County mining properties; no affidavit or statement by any disinterested person to show an existing potential value of the mines acquired. No money was paid into the treasury on any account and no property situate in Nevada or California was transferred and not even a deed of the so-called mining property in Arizona is shown to have been received by the corporation. Not only did the corporation have no assets in which a shareholder could acquire an interest through stock owner-

ship but promptly upon receipt of a stock certificate book, appellant proceeded to issue 25,000 shares to himself and race into California to commence his operations. Whether the stock sold and pledged by appellant was his in fact and not a corporate asset was for the trial court's determination and if the facts proved and the inferences reasonably deducible therefrom justify the court's implied finding the judgment will not be disturbed. The trial court alone could determine whether the method and manner of appellant's procedure in effecting the sales to the prosecutrix prove that he did so in order to evade the penalties of the statute requiring a permit before corporate shares may be issued. In deriving its finding that appellant was acting for the corporation in issuing the shares to Mrs. Pells, the court was not confined to appellant's testimony, but it was obliged to consider the surrounding circumstances in determining whether he was owner or was acting for the corporation and whether the sales were made in the manner chosen by appellant to evade the force of the statute. *People v. Smith*, 111 Cal.App. 177, 179, 295 P. 105. If appellant was not selling for the corporation, why did he say to his victim that she was going to get in on the ground floor? that the other investors who had "invested thousands of dollars in the corporation wanted her to put in more money," that "other members wanted her to invest \$500"? Appellant is the author of those statements and thereby he put forth the corporate wish for the retired nurse's investment. Such statements forcefully indicate that appellant intended to convey the impression that he was acting on behalf of the corporation.

Appellant conceived and brought into being his corporation. He maintains it as sole owner. In view of all the circumstances, the court was amply supported in finding that in issuing certificates 2 and 3 to Mrs. Pells, appellant sold the stock in violation of law; that he issued the stock in pursuance of his fraudulent plan "for the direct or indirect promotion of a scheme and enterprise with intent to violate and

evade the act"; that since he was sole owner of the corporation which was fraudulently conducted to evade the law, the corporation may be deemed to be the alter ego of appellant and for the purpose of maintaining a compliance with the statute, he may be considered as issuer of the stock.

Judgment and order denying his motion for a new trial are affirmed.

McCOMB, J., concurs.

PEOPLE v. MILLER.

Cr. 5228.

Supreme Court of California, in Bank.

Oct. 15, 1951.

Rehearing Denied Nov. 7, 1951.

Doll Miller and Alfred Dusseldorf were convicted in the Superior Court of Alameda County, Charles Wade Snook, J., of murder, and they appealed. The Supreme Court, Spence, J., held that evidence sustained conviction of Doll Miller.

Affirmed.

1. Homicide ⇨253(1)

Evidence sustained first degree murder conviction.

2. Homicide ⇨18(5)

Killing of deceased during attempt to perpetrate a robbery, constituted first degree murder. Pen.Code, § 189.

3. Homicide ⇨29

Where confederates acted jointly in robbery, one who did not fire fatal shot during robbery was as accountable to the law as though he fired the shot. Pen.Code, § 189.

4. Criminal Law ⇨412(1)

In prosecution for murder committed in connection with robbery, prosecution was not bound to establish by independent evidence the corpus delicti of the crime of attempted robbery as well as the corpus delicti of the crime of murder before extrajudicial statements concerning the planning and execution of the attempted robbery could be used to prove the degree of the murder which was admittedly committed. Pen.Code, § 189.

5. Criminal Law ⇨412(1)

Where corpus delicti of crime of murder was established by independent evidence, circumstances surrounding commission of murder could be shown by extrajudicial statements of defendant, and such evidence could be used to establish the degree of the crime committed.

6. Criminal Law ⇨938(1)

A motion for new trial on ground of newly discovered evidence is looked on with disfavor.

7. Criminal Law ⇨1156(3)

Trial court's ruling in denying motion for new trial on ground of newly discovered evidence will not be disturbed on appeal except on a clear showing of an abuse of discretion.

8. Criminal Law ⇨938(3)

Facts that are within knowledge of a defendant at time of trial, are not newly discovered so as to entitle him to a new trial on ground of newly discovered evidence.

9. Criminal Law ⇨938(3)

Trial court did not abuse its discretion in denying motion for new trial, on ground of newly discovered evidence that at time of commission of murder defendant was allegedly with his wife.

Milner J. Anderson, Oakland, for appellant Miller.

Joseph F. Rankin, Oakland, under appointment by the Supreme Court, for appellant Dusseldorf.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., J. F. Coakley, Dist. Atty., Alameda, and Folger Emerson, Asst. Dist. Atty., Oakland, for respondent.

SPENCE, Justice.

Defendants Weathers, Miller and Dusseldorf were accused jointly of the murder of George Gaertner on October 14, 1949, in the County of Alameda. Dusseldorf was also charged with three prior felony convictions. Upon arraignment, all three defendants entered separate pleas of not guilty. Dusseldorf then stood mute as to the alleged priors but he admitted them at the time of trial. After a joint trial before a jury, verdicts were returned acquitting Weathers of the crime charged but convicting Miller and Dusseldorf of murder of the first degree, without recommendation. Thereafter Miller and Dusseldorf made separate motions for a new trial, and each was denied. Judgments imposing the death penalty were thereupon imposed as to Miller and Dusseldorf. The cause is before this court upon an automatic appeal. Pen.Code, § 1239 (b).

Appellants present different grounds for reversal. Miller challenges the sufficiency of the evidence to sustain his conviction of murder of the first degree. Dusseldorf maintains that the trial court erred in denying his motion for a new trial on the ground of newly discovered evidence. Neither appellant attacks the rulings of the court during the trial nor the instructions. Careful examination of the record compels the conclusion that appellants' contentions lack merit, and that the judgments of conviction should be affirmed.

On October 14, 1949, at about 1:30 in the afternoon, George Gaertner was found lying on the floor, mortally wounded in Bloomheart's Tavern on San Pablo Avenue in Emeryville, where he was employed as a bartender. Irvin Condre, working at the time at a service station across the street from Bloomheart's, heard the firing of some shots. As he looked in the direction of the noise, he saw three colored men, wearing Army fatigue uniforms, leave the tavern, walk to the corner, and then break into a run to a car double-parked on a side street. They drove away before he could note the license number. Condre then entered the tavern, where he found no one except the bartender outstretched on the floor, moaning and in a semi-conscious state, with blood on the front of his shirt. Without regaining consciousness, Gaertner died early the next morning. His death resulted from the hemorrhage of both lungs and the heart in consequence of gunshot wounds.

The police arrived at the tavern within a few minutes after Condre. Upon making a search of the premises, the police found no gun but they did discover two bullets, one embedded in a post and the other lying on the seat of a booth, where it had apparently ricocheted. Some three months later a gun was found by some workmen in the course of doing some excavating work in DeFremery Park in Oakland. Both the gun and the two bullets were introduced in evidence at the trial; and a ballistics expert testified that these two bullets had been fired from that gun.

Miller was first apprehended and taken into custody on November 8, 1950, more

than a year after the commission of the crime. He was questioned by the Chief of Police of Emeryville, and he signed a written statement, made about 1 p. m., wherein he admitted that he had participated "about one year ago" in the "Bloomheart stickup." He stated that one evening when he, Dusseldorf, and another colored man met in San Francisco, Dusseldorf said that he knew "where to make some money, not stating where"; that the next day the three of them drove across the bridge to Bloomheart's Cafe on San Pablo Avenue; that upon entering the tavern, they found no one there except the bartender; that he, Miller, heard one of the two men with him say "This is a hold-up"; that Dusseldorf was carrying a revolver; that he, Miller, heard two shots fired, and that he and his two companions then fled from the tavern.

Later that same afternoon Miller made a similar, though more detailed statement to an assistant district attorney about the "robbery and shooting," saying that he was "willing to tell what happened" there. Again Miller recounted the preliminary meeting of himself and his two confederates to plan a "job" to make some money; their trip the next day from San Francisco across the bridge to Bloomheart's Tavern on San Pablo Avenue; their entry into the tavern, with Dusseldorf being the only one carrying a gun; the remark of one of the men, as they walked by the counter, that "This is a holdup," and immediately thereafter his hearing a shot; his running toward the door as he heard a second shot fired; and then the escape of all three in the car which had been left double-parked on the street. Miller stated that his part in the "job" was to act as a "look-out," stationed near the door. Both of these statements were admitted in evidence only as against Miller.

On the evening of November 8, 1950, and following Miller's account of Dusseldorf's involvement in the Bloomheart "job," Dusseldorf, who had also been taken into custody that day, gave his statement to the same assistant district attorney. While admitting his participation as one of the trio in the planned robbery of the

tavern, Dusseldorf transposed the roles that he and Miller played at the scene of the homicide, Dusseldorf maintaining that he did not enter the place but stood at the door and that it was Miller who fired the shots just after their companion had said "This is a holdup." Dusseldorf further stated that they had used his car, a grey Chrysler, to make the trip; that after the shooting, he drove all three to the home of a friend, where they changed their clothes, and that he, Dusseldorf, threw the ones which they had been wearing into a garbage can; that at that time he hid the gun in this friend's house but retrieved it some two weeks later, when he finally disposed of it by throwing it into a "bunch of cement blocks" near where a swimming pool was under construction in DeFremery Park in Oakland. This statement was admitted in evidence only against Dusseldorf.

Condre, the service station attendant who went to Bloomheart's Tavern immediately after the shooting, positively identified Miller and Dusseldorf both at the trial and on the occasion of the preliminary examination a month after their arrest. He also testified that they were wearing "Army fatigue clothes" as he saw them leave the tavern. There was testimony that on the afternoon in question "a colored fellow" was seen putting "a pair of coveralls in the garbage can" on the premises where, according to Dusseldorf's statement, he and his two companions had gone to change their clothes; and that later that day the coveralls were recovered from the garbage can and turned over to the police. These coveralls were introduced in evidence and identified by Condre as similar in appearance to those worn by the three men as they left the tavern. Condre also described the "getaway" car as blackish grey in color.

Neither Miller nor Dusseldorf testified at the trial. Their separate extra-judicial statements were introduced in evidence without objection, and neither was challenged. The statements, as above detailed, agree in the main pattern of events up to a certain point—the identity of the person who allegedly did the actual shoot-

ing—with Miller and Dusseldorf each claiming that the other was the one who fired the gun.

[1-5] In this state of the record, there is clearly no merit in Miller's attack upon the sufficiency of the evidence to sustain his conviction of murder of the first degree. The *corpus delicti* of the crime charged, murder, was established by the testimony of the witness Condre and others, without the aid of the extra-judicial statements of either Miller or Dusseldorf, and it is this testimony which constituted the basis for the admission in evidence of such extra-judicial statements. 8 Cal.Jur., Criminal Law, § 303, p. 234; *People v. McMonigle*, 29 Cal.2d 730, 738, 177 P.2d 745. Considering solely the statements made by Miller—and disregarding the statement made by Dusseldorf, which was admitted solely against the latter—it is clear that the deceased was killed by Dusseldorf while Miller, Dusseldorf and their confederate were perpetrating or attempting to perpetrate a robbery. Such a killing constitutes murder of the first degree, Pen.Code, § 189; *People v. Cook*, 15 Cal. 2d 507, 513, 102 P.2d 752; *People v. Phyle*, 28 Cal.2d 671, 674, 171 P.2d 428, and each of the confederates acting jointly in furtherance of the common purpose is as accountable to the law as though he fired the fatal shot. *People v. Martin*, 12 Cal. 2d 466, 472, 85 P.2d 880; *People v. Waller*, 14 Cal.2d 693, 703, 96 P.2d 344. In this connection, Miller apparently contends that the prosecution was bound to establish by independent evidence the *corpus delicti* of the crime of attempted robbery, as well as the *corpus delicti* of the crime of murder, before his extra-judicial statements concerning the planning and execution of the attempted robbery could be used to prove the degree of the murder which was admittedly committed. He cites no authority to sustain his contention, and it appears to be without merit. The *corpus delicti* of the crime of murder having been established by independent evidence, both reason and authority indicate that the circumstances surrounding the commission of the crime can be shown by the

extra-judicial statements of the accused, and that such evidence of the surrounding circumstances may be used to establish the degree of the crime committed. It follows that Miller's attack upon the sufficiency of the evidence to support the jury's finding of his guilt of murder of the first degree cannot be sustained. *People v. Cabalero*, 31 Cal.App.2d 52, 57, 87 P.2d 364.

Nor may Dusseldorf prevail in his appeal upon the claim that the trial court committed reversible error in refusing to grant his motion for a new trial on the ground of newly discovered evidence. It appears that in support of his motion he submitted five affidavits—three by himself, one by his wife, and one by a friend—all to the effect that he was not at the scene of the crime but, in fact, was then ill and had spent most of the day in bed in his own apartment in San Francisco. According to his affidavit, his failure to present this alibi evidence earlier was correlated with a combination of circumstances: his wife's absence from the state during all the proceedings herein; her illness and lack of finances as reasons for the delay in her return to San Francisco until a few days after the conclusion of the trial; and his dependence on her testimony and that of a friend, whose place of residence he did not know, to establish his whereabouts that day.

The record shows that at the beginning of the trial Dusseldorf, in chambers, asked for a continuance to allow time for his wife to return to the state, but he made no claim then that she was an essential witness to prove an alibi nor was his application made by motion with appropriate affidavits in support thereof. (8 Cal.Jur., Criminal Law, § 284, p. 212.) The court denied Dusseldorf's request on the ground that "there ha[d] been no showing [as] would warrant a continuance of the case," and Dusseldorf does not question the propriety of this ruling. As heretofore stated, Dusseldorf did not testify at the trial nor did he attempt to establish an alibi. He made no attack upon the validity of his statement admitting his participation in the

Bloomheart episode in question—either as to the truthfulness of its recitals or its free and voluntary character. However, now, Dusseldorf claims that the alibi evidence is "newly discovered" matter which he could not with reasonable diligence have produced at the trial. Pen.Code, § 1181, subd. 7. In denying Dusseldorf's motion for a new trial, the court said: "The matter of the defendant's whereabouts at that particular time is a matter peculiarly within the knowledge of the defendant himself. He must have known who he was with and where he was."

[6-9] A motion for a new trial on the ground of newly discovered evidence is looked upon with disfavor, and the trial court's ruling in that regard will not be disturbed except upon a clear showing of an abuse of discretion. *People v. Yeager*, 194 Cal. 452, 491, 229 P.2d 40; *People v. English*, 68 Cal.App.2d 670, 673, 157 P.2d 429. On the record here it plainly appears that Dusseldorf has shown no diligence in presenting evidence of his alibi. Facts that are within the knowledge of a defendant at the time of trial are not newly discovered. *People v. English*, supra. While the colloquy between the court, Dusseldorf and his counsel at the opening of the trial, shows that Dusseldorf regarded his wife as a material witness, no explanation was there made as to the particulars wherein her testimony would be material nor why she could not be present for the trial. With regard to his failure to attack the validity of his statement placing him at Bloomheart's at the time in question, Dusseldorf suggests that on retrial he might make such challenge on the ground that it was obtained through force and duress, since he now has alibi evidence in aid of his defense; that at the trial he failed to take the stand because his bad criminal record would then have come before the jury at a time when supporting alibi evidence was not available to him as an offsetting factor. Such an argument suggests no more than that Dusseldorf was willing to take a chance on an acquittal but following conviction, now seeks a new trial so as to present a defense which should properly

have been made in the first place. As the record here stands, the significant factor is Dusseldorf's presence in court throughout the trial and his failure to attack the incriminating evidence against him, including his own statement of his participation in the crimes in question. Under such circumstances, it cannot be said that the trial court abused its discretion in denying Dusseldorf's motion for a new trial. Cf. *People v. Shelest*, 62 Cal.App. 213, 218, 216 P. 389.

The judgments and the orders denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



106 Cal.App.2d 232

MADISON v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 14410.

Supreme Court of California,
Department 1.

Oct. 19, 1951.

Hearing denied.

CARTER, Justice.

I dissent.

While voting to grant a petition for hearing in the Supreme Court after decision by a District Court of Appeal is ordinarily sufficient to indicate my disapproval of the holding of the intermediate appellate court, in this case I deem it advisable briefly to state my reason for so voting.

There can be no doubt but that both the majority and concurring opinions of the District Court of Appeal, 234 P.2d 995, followed the rule which has been heretofore announced in cases of this character by the Supreme Court and District Courts of Appeal of this state. This rule is based upon the old outmoded and outgrown

maxim that "The King Can Do No Wrong," or the doctrine of sovereign immunity. This had its origin in medieval English theory and was introduced in this country without sufficient understanding. *Government Liability in Tort*, Borchard, 34 Y.L.R. 1. It has been pointed out that what the maxim really meant was that the King was privileged to do no wrong—that if his acts were against the law—they were wrongs—not that he should be immune from the consequences of his unlawful acts. However that may be, there was never any reason for its incorporation into the law of this country where democracy exists and where we are said to have a "*government of the people, by the people and for the people*." It requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the state's functions—an unjust burden—which is becoming graver and more frequent as the government's activities become more diversified and as we leave to administrative officers in even greater degree the determination of the legal relations of the individual citizen. The government obviously cannot insure the citizen against all defects and errors in administration, but there is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts of the officers, should be allowed to rest as they now generally do, in practice, if not in theory, at the door of the unfortunate citizen alone.

I can not follow the reasoning that a county or municipality in operating a hospital, where a charge is made to a patient for services rendered, is not engaged in a proprietary activity, and in my opinion the defendant in the case at bar was so engaged, and should be held liable for the negligence of its employees which directly caused injury to such a patient.

The reasoning which supports the doctrine of sovereign immunity in cases of this character is so fallacious and unsound that it should shock the intelligence, as well as the sense of justice, of those who believe in the American way of life. In

my opinion, decisions of this kind are not only productive of widespread disrespect for the law and courts but can be used as the basis for propaganda which affects the stability of our government.



37 Cal.2d 821

CROSS v. TUSTIN et al.

S. F. 18413.

Supreme Court of California, in Bank.

Oct. 19, 1951.

As Modified on Denial of Rehearing

Nov. 15, 1951.

Nancy Cross brought mandamus proceedings against John Tustin and others. The Superior Court of Santa Clara County, Byrl R. Salsman, J., entered orders denying motions to impeach and vacate and amend a settled statement of oral proceedings and entered orders dismissing motions of plaintiff for a new trial of her motions to impeach and vacate and amend settled statement, and the plaintiff appealed, and the defendants moved to dismiss the appeals on ground that the orders were non-appealable. The Supreme Court, Shenk, J., held that the orders were non-appealable.

Motion to dismiss appeals granted.

Prior opinion, 231 P.2d 59.

1. Judgment ⇨375

A court has inherent power to expunge a fraudulent record or set aside a decree procured by extrinsic fraud where an unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court or by false promise of compromise, or where defendant had no knowledge of suit by being kept in ignorance by acts of plaintiff, or where attorney fraudulently or without authority assumed to represent party and connived at his defeat, or where employed attorney corruptly sells out his client's interest to the opponent. Code Civ.Proc. §§ 473, 1916.

2. Judgment ⇨375

Impeachment of record must necessarily rest on ground that through fraud and

collusion, apparent record is not a record at all, but is a forged or fraudulent instrument which has no existence as a record, and that therefore court should expunge it. Code Civ.Proc. §§ 473, 1916.

3. Appeal and Error ⇨113(1)

Final judgments or orders in proceedings to impeach record on ground that through fraud or collusion, the apparent record is not a record at all, but is a forged or fraudulent instrument which has no existence as a record, are appealable. Code Civ.Proc. §§ 473, 1916.

4. Appeal and Error ⇨113(2)

Correction as on review of an order or judgment in proceedings to impeach records cannot be procured through device of impeachment pursuant to statutes relating to the correction or impeachment of a judicial record. Code Civ.Proc. §§ 473, 1916.

5. Appeal and Error ⇨113(2), 659(1)

Motion of plaintiff to impeach and vacate and amend statement of oral proceedings, was appropriate if purported settled statement was surreptitiously prepared and filed without any proceedings for settlement and without knowledge of plaintiff and court, but if plaintiff sought by the motion to correct order settling the statement after proceedings duly taken, in which she had been heard, attempt by indirect method would render order thereon non-appealable as an unauthorized method of obtaining a review of a non-appealable order. Code Civ.Proc. §§ 473, 1916.

6. Appeal and Error ⇨607(1)

Statutes dealing with motion to correct or impeach a judicial record, may not be invoked to settle a dispute between a trial judge and a litigant as to what constitutes a correct statement of oral proceedings at the trial. Code Civ.Proc. §§ 473, 1916.

7. Appeal and Error ⇨659(1)

Where litigant fails to convince trial judge that proposed statement accurately reflects the proceedings in question, action of the judge who heard and tried the case, must be regarded as final, since his familiarity with the trial and knowledge of what took place makes him specially qualified to

determine what the evidence and the proceedings were. Code Civ.Proc. §§ 473, 1916.

8. Appeal and Error ⇨113(2), 607(1)

Where plaintiff was accorded a hearing in settled statement proceeding settling statement of oral proceedings, and she did not allege that she was prevented from presenting fully her case, and undisputed facts disclosed by documentary record negated charges of untruth in settled statement, and there did not appear to be substantial difference in settled statement and plaintiff's proposed statement, and record failed to disclose any evidence whatsoever of fraud or collusion, motions to impeach and vacate and amend the settled statement were properly denied, and orders denying the motions were non-appealable. Code Civ.Proc. §§ 473, 1916.

Nancy Cross, in pro. per.

Howard W. Campen, County Counsel,
Harry C. Nail, Jr., Asst. County Counsel,
and Wade H. Hover, Deputy County Counsel, San Jose, for respondents.

SHENK, Justice.

The plaintiff appealed from orders denying motions to impeach and vacate and to amend a settled statement of the oral proceedings on the trial of her petition in mandamus, and from orders dismissing her motions for a new trial of her motions. The defendants have moved to dismiss the appeals on the ground that the orders are non-appealable.

On December 6, 1948, after passing a regular competitive examination, Nancy Cross was appointed Senior Personnel Technician of Santa Clara County. She thereupon entered upon a six-month probationary period of employment. On March 2, 1949, she was dismissed without the filing of charges. She requested a hearing before the Civil Service Commission which was denied.

On July 7, 1949, appearing for herself, Nancy Cross as plaintiff filed in the superior court in Santa Clara County an amended petition for the writ of mandate.

She alleged that her dismissal as a probationer was wrongful pursuant to county ordinance 154 and that said county ordinance was in contravention of the County Civil Service Enabling Law, Govt. Code Secs. 31100-31113. She sought to have the court set aside the dismissal, direct that she be reinstated in her former or a similar position, and that she received compensation from the time of her dismissal to the date of reinstatement. The defendants filed an answer. At the trial on September 13, 1949, neither side requested a reporter and there is no written record of the proceedings. On October 15th the court made its findings and determined that the provisions of ordinance 154 giving the appointing authority the power to dismiss a probationer without the filing of specific charges and without providing for a hearing were valid and not in contravention of the County Civil Service Enabling Law. The judgment, entered on November 10, 1949, was a denial of the writ. The plaintiff appealed, giving notice that she desired to prosecute the appeal on a settled statement of the oral proceedings.

The plaintiff submitted to the trial court for settlement a proposed narrative statement. The defendants proposed amendments thereto. After hearing on the proposed statements the court rejected both and directed that a statement be prepared by defendants' counsel as indicated by the court. That statement was settled on December 29, 1949. On the same day the plaintiff filed her petition in the District Court of Appeal, First Appellate District, for settlement of the narrative statement. On February 24, 1950, her petition was denied on the ground that that court could not substitute its judgment for that of the trial court as to what happened in the course of the unreported trial proceedings. A petition for rehearing and a petition for hearing in this court were denied. Cross v. Tustin, 96 Cal.App.2d 207, 214 P.2d 565.

On May 26, 1950, after notice, the plaintiff moved in the trial court to impeach and vacate the settled statement pursuant to sections 473 and 1916 of the Code of Civil Procedure. By consent the motion was

heard before another judge. Hearings were had on May 26th and May 29th. The motion to impeach and vacate was denied. Thereupon the plaintiff moved in open court to amend the settled statement. That motion was also denied. The plaintiff filed notice of intention to move for a new trial as to each motion. After a hearing the motions for new trial were dismissed. The plaintiff appealed from all of the orders.

Pursuant to notice and on April 9, 1951, the defendants moved to dismiss these appeals on the ground that since the order settling the statement of trial proceedings was non-appealable, an appeal would not lie from an order refusing to vacate the non-appealable order. The District Court of Appeal, First Appellate District, granted the motion and denied a petition for rehearing. *Cross v. Tustin*, 1951, Cal.App., 231 P.2d 59. On petition a hearing was granted in this court for the purpose of considering the question whether a motion based on fraud and collusion in the procurement of the settled statement was a special proceeding and an order therein appealable as an order in such special proceeding.

[1] Section 1916 of the Code of Civil Procedure provides that any judicial record may be impeached by evidence of want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record in respect to the proceedings. That section is in part a codification of the settled doctrine that a court has inherent power to expunge a fraudulent record or set aside a decree procured by extrinsic fraud. As stated in *United States v. Throckmorton*, 98 U.S. 61, 65-66, 25 L.Ed. 93, such action is justified in cases where an unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court or by a false promise of a compromise; or where the defendant had no knowledge of the suit by being kept in ignorance by acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the employed attorney corruptly sells out his

client's interest to the opponent. There are many instances in this state of the exercise of the power which is deemed not to derive from section 473 of the Code of Civil Procedure and is not limited by any time period. See e. g. *McGuinness v. Superior Court*, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110, and *Raps v. Raps*, 20 Cal.2d 382, 387, 125 P.2d 826, spouse surreptitiously obtained final decree of divorce after reconciliation of the parties and resumption of marital relations; *Britton v. Bryson*, 216 Cal. 362, 14 P.2d 502, divorce decree obtained by husband in county other than that in which the spouses resided, knowledge of which was kept from the wife by the husband; see also *Bennett v. Wilson*, 133 Cal. 379, 65 P. 880, recognizing other instances; and additional cases collected in *Dei Tos v. Dei Tos*, 105 Cal.App.2d 81, 232 P.2d 873.

[2-7] From the foregoing it is observed that impeachment of the record must necessarily rest on the ground that through fraud and collusion the apparent record is not a record at all, but is a forged or fraudulent instrument which has no existence as a record, therefore the court will expunge it. Final judgments or orders in actions or proceedings to that end are appealable. But correction as on review of an order or judgment cannot be procured through the device of impeachment pursuant to the invoked sections. The motion is appropriate here if a purported settled statement was surreptitiously prepared and filed without any proceedings for settlement and without the knowledge of the plaintiff and the court. But if the plaintiff seeks by the motion to correct the order settling the statement after proceedings duly taken in which she has been heard, the attempt by the indirect method would render the order thereon non-appealable as an unauthorized method of obtaining a review of a non-appealable order. *Litvinuk v. Litvinuk*, 27 Cal.2d 38, 43-44, 162 P.2d 8. As in *Burns v. Brown*, 27 Cal.2d 631, 166 P.2d 1, so here, these code sections may not be invoked to settle a dispute between a trial judge and a litigant as to what constitutes a correct statement of the oral proceedings at the trial. As said in that case, with citation of *Averill v. Lincoln*, 24 Cal.

2d 761, 151 P.2d 119, and other decisions, when the litigant fails to convince the trial judge that his proposed statement accurately reflects the proceedings in question, the action of the judge who heard and tried the case must be regarded as final since his familiarity with the trial and knowledge of what took place make him specially qualified to determine what the evidence and the proceedings were.

The plaintiff has neither alleged nor shown a cause for attack on the certified settled statement as one procured through fraud or collusion. Undeniably she was accorded a hearing in the settled statement proceeding and thereupon the statement was settled and certified by the trial judge. In no wise does she allege that she was prevented from presenting fully her case. In substance her claim is that the judge did not include all of her proposed statement but omitted one matter and misstated another which she considered pertinent to the issues on the appeal. Her statement is that although she has been diligent in the presentation to the trial judge of the claimed errors in the statement, he has refused and still refuses to correct them. It is admitted that she rejected an offer by counsel to include asserted omitted matter by stipulation. Thus the sole alleged objective of the motions was to obtain a corrected settled statement to accord with her version of the oral proceedings.

The lengthy record of the hearing on the motions has been examined. The undisputed facts disclosed by the documentary record negative the charges of untruth in the settled statement. Nor does there appear to be the substantial difference in the settled statement and the plaintiff's proposed statement which could be deemed to deprive her of a hearing on the issues presented by the appeal in the mandamus proceeding. The record also fails to disclose any evidence whatsoever of fraud or collusion, but is confirmation that the plaintiff's sole purpose on the motions was to obtain a corrected settled statement. As has been stated, the motions were not available to that end and the plaintiff has merely attempted to do indirectly what she could not do directly.

[8] It follows that the motions were for a purpose not available pursuant to either section 473 or section 1916 of the Code of Civil Procedure; that the motions and the appeals therefrom were an endeavor to obtain a review of the non-appealable order settling the statement of the oral proceedings; and that the orders on the motions are non-appealable for that reason. *Litvinuk v. Litvinuk*, supra, 27 Cal.2d 38, 162 P.2d 8.

The motion is granted and the appeals from the orders are dismissed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



37 Cal.2d 792

PEOPLE v. McKAY et al.
Cr. 5212.

Supreme Court of California, in Bank.
Oct. 15, 1951.

James McKay and Robert Sturm were convicted in the Superior Court, Shasta County, Benjamin C. Jones, J., of murder of the first degree and from the judgments of conviction and orders denying motions for new trial, they appealed. The Supreme Court, Traynor, J., held that the facts and circumstances established by the record showed that defendants could not have a fair and impartial trial in small county in which they allegedly murdered two well-known and popular officers and hence were entitled to a change of venue.

Judgments and orders reversed with directions to grant motions for change of venue.

1. Criminal Law Ⓒ=121

A motion for change of venue on ground that a fair and impartial trial cannot be had in the county is addressed to the sound discretion of trial court. Pen.Code, §§ 1033-1035.

2. Criminal Law Ⓒ=126(1)

Where the facts demonstrate that a fair and impartial trial cannot be had in

the county, an order must be made transferring the action to the proper court of some convenient county free from a like objection. Pen.Code, §§ 1033-1035.

3. Criminal Law ⇨126(2)

Where two strangers with bad reputations, eighteen and nineteen years of age, were charged with murder of two well-known and popular officers of a small county in which local feeling was so intense as to impede presentation of defendants' case, jurors were familiar with the facts in advance of trial and were aware of intense antagonism of community toward defendants and regular trial judge by published letter had forcefully presented his opinion as to merits of case and attacked the good faith of defense counsel, defendants were entitled to a change of venue on ground that a fair and impartial trial could not be had in county. Pen.Code, §§ 190, 1033-1035.

4. Criminal Law ⇨126(2)

The popularity of decedent, fact that inhabitants are well known to each other in a small county, and customary newspaper publicity, do not necessarily warrant the granting of a motion for change of venue in murder case. Pen.Code, §§ 1033-1035

5. Criminal Law ⇨126(1)

Where, though excitement has abated and there is no real intent to lynch defendant, but one opinion in regard to guilt of defendant exists throughout county, defendant cannot have a fair and impartial trial and is entitled to a change of venue. Pen.Code, §§ 1033-1035.

6. Criminal Law ⇨1166(4)

Defendants, regardless of guilt, were entitled to a fair and impartial trial on murder charges, and where such trial could not be had in county, refusal to grant change of venue resulted in a miscarriage of justice, regardless of abundant evidence of guilt. Pen.Code §§ 190, 1033-1035.

7. Criminal Law ⇨126(2)

Determination of the penalty to be imposed upon conviction of defendants over 18 years of age of first-degree murder rested solely in the discretion of jury, and

hence it was of vital importance that they should exercise such discretion free from bias, prejudice or pressure from the community. Pen.Code, § 190.

8. Criminal Law ⇨126(1)

The very enormity of the offense itself may arouse the honest indignation of the community to such a degree as to make it apparent that a dispassionate investigation of the case cannot be had, and under such circumstances the law requires that the place of trial be changed. Pen.Code, §§ 1033-1035.

Rupert Crittenden and Kennedy Jackson, Oakland, under appointment by the Supreme Court, for appellants.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Wallace B. Colthurst, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

Defendants James McKay and Robert Sturm, 18 and 19 years of age respectively, escaped from a Youth Authority camp at Whitmore in Shasta County. They went to Seattle, where they were arrested and detained. Earl Sholes, undersheriff, and Dan Heryford, a deputy sheriff of Shasta County, took custody of defendants in Seattle. On the return trip by automobile the two officers rode in front, the two defendants in back. Each defendant was handcuffed separately with his hands in front of him. While the automobile was traveling through a sparsely inhabited mountain area each defendant lunged forward on a prearranged signal and struck the officer directly in front on the head and shoulders. During the struggle the car skidded to a stop, and one of the defendants secured one of the officers' guns. The officers were shot and fatally wounded, and their bodies dragged down an embankment by the side of the highway. Defendants removed various articles from the officers' clothing and then fled in the car. They were apprehended the following day. There is a conflict in the evidence as to the way in which the shots were fired and by which defendant and as to whether the

homicides were a premeditated or spontaneous part of the escape plan. The jury found defendants guilty of two counts of murder of the first degree without recommendation.

[1-3] Defendants contend that the trial court committed prejudicial error in denying their motions for a change of venue. See Penal Code, §§ 1033-1035. A motion for a change of venue on the ground that a fair and impartial trial cannot be had in the county is addressed to the sound discretion of the trial court. *People v. Cullen*, 37 Cal.2d 614, 627, 234 P.2d 1, and cases cited. When the facts demonstrate that such a trial cannot be had "an order must be made transferring the action to the proper court of some convenient county free from a like objection." Penal Code, § 1035; *People v. Suesser*, 132 Cal. 631, 635, 64 P. 1095; *People v. Yoakum*, 53 Cal. 566, 571. We have concluded in the light of the circumstances established by the record that this is such a case.

The decedents were well known, popular officers of a small county. Defendants were strangers with bad reputations. The homicides were given extensive and continuing publicity in the local newspaper, which was widely circulated in the county. The accounts of the crime emphasized the fact that defendants had confessed. At the time of the crimes the community was thoroughly aroused, there was talk of lynching, and defendants were taken to the state prison for safe-keeping. Although affidavits filed in opposition to the motions for change of venue stated that by the time of trial the feeling of public indignation had considerably cooled, they did not deny the existence of widespread bias and prejudice against defendants. When defendants moved to disqualify Judge Ross of the Superior Court of Shasta County he stated that if he were conducting a trial without a jury "then perhaps the things stated by the defense would constitute a disqualification." He was prohibited from proceeding with the trial of the cause. *McKay v. Superior Court*, 98 Cal.App.2d 770, 220 P.2d 945. At the time the trial was originally commenced before Judge

Ross and at the time it was continued before Judge Jones, who was assigned to the case from Lake County, no available member of the Shasta County bar was sufficiently free from bias or prejudice to participate in the defense. At the time of trial one of the local attorneys, after stating reasons why he should not serve, said, "Despite that situation, feeling as I do the responsibility with which the attorneys here and myself are burdened in such an unhappy situation, I would be willing to do my best to act as attorney for these boys or either one of them, knowing that it is not a popular thing to do, knowing that maybe in the defense of these boys I might offend a friend whom I revere, but despite that I would accept it." One of the defense attorneys appointed from outside the county was unable to find any local citizen who would execute an affidavit in support of the motions for change of venue. All of the more than twenty persons he interviewed stated that the vast majority of persons in Shasta County believed defendants guilty and thought they should receive the extreme penalty. All of them, however, refused to execute affidavits to that effect because of the criticism it would engender.

Public indignation against defendants was further aroused by the publicity given to a letter written by Judge Ross to the board of supervisors. At the time Judge Ross appointed counsel for defendants, he suggested to them that some provision could probably be made to reimburse them for the expenses that would be incurred because they would have to come from a distance to undertake the defense. After these counsel were successful in having Judge Ross prohibited from proceeding with the case, some of them filed a claim with the board of supervisors for expenses. Judge Ross wrote the board of supervisors that the claim should not be paid. After giving the history of the case before the opening of the trial before him, Judge Ross wrote:

"On the morning of July 18, with 125 jurors waiting to be called and for the trial to commence, the attorneys asked to

confer with me in my office before going into court. They then said they were going to file affidavits of prejudice against me so that I would have to call in another judge to preside. They stated that they had nothing personal against me and considered that I would be fair and impartial, but that they owed this duty to their clients. I asked if that meant they were going to waive a jury trial when a new judge was brought in, and they said they would have to see about that later and that the first step was to get a new judge in for the case. I called their attention to the fact that 125 jurors were getting \$5 per day and mileage to be there, and they just shrugged their shoulders.

"We then went into court and they filed affidavits of prejudice against me. I asked in open court if they intended to waive a jury if a new judge came in and remade my offer to voluntarily step out without admitting disqualification in case of a waiver of jury or a plea of Guilty. They would not state what their plans were. (I had in mind that all four attorneys had stated in our conferences in my office many times that they had gone over the case with the defendants, and that there was no question of the guilt of both defendants of the crime of murder and that their only hope was to get them off with life imprisonment, although they might try to argue to a jury that it was only second degree murder.)

"Under the law all I could do was to have the Judicial Council in San Francisco get some other Superior Court Judge to come in and pass on my disqualifications. Therefore, on July 19th, Judge Warren Steel of Marysville came up and heard both sides of this matter and decided that there was nothing in the record to show that I was disqualified.

"We proceeded with the case on the 20th and 21st, and on the 25th and 26th of July, and had almost succeeded in selecting a jury for the trial when a writ of prohibition from the appellate court halted us. This was heard on August 2nd in Sacramento, and on the 3rd the appellate court held that I was disqualified.

"Although we must obey this decision, it was wrong and I was not actually disqualified, and all four attorneys for the defendants at one time or another admitted this to me. They therefore did what they did apparently for delay of the case and to make it as expensive on the county as they could. Nothing they did was directed towards having a trial on legal evidence to decide whether McKay and Sturm did or did not commit murder. I therefore feel that they are not entitled to be paid anything for what they have done in this case."

Judge Ross' letter was printed in the local paper in its entirety approximately two weeks before the trial commenced before Judge Jones, and the part referring to the unanimous opinion of defense counsel that defendants were guilty was reprinted at the time the jury was being selected.

A jury and two alternates were selected with difficulty after ten trial days and the examination of approximately 251 possible jurors. Although all peremptory challenges were exhausted, there remained on the jury persons familiar with the publicity given the case, including Judge Ross' letter.

[4] It has recently been held that "The popularity of the decedent, the fact that the inhabitants are well known to each other in a small county, and the customary newspaper publicity, do not necessarily warrant the granting of a motion for change of venue." *People v. Mendes*, 35 Cal.2d 537, 542, 219 P.2d 1, 4; see also, *People v. Brite*, 9 Cal.2d 666, 689-690, 72 P.2d 122. In the present case, however, a much more compelling showing has been made that defendants could not receive a fair and impartial trial in Shasta County. The record is replete with evidence, not only of general bias and prejudice against defendants, but of antagonism so intense that the local citizens hesitated or refused to take part in any effort directed toward securing to defendants their legal rights.

Although it may be true that the feeling of substantial citizens at the time of the crimes that "the courts should not waste time on persons such as [defendants], but that instead [they] should be lynched and

'strung up,'" had cooled by the time of the trial, the record demonstrates that it had been replaced by a cool, widely held conviction that defendants were guilty and should be tried and sentenced to death as expeditiously as possible. The community was determined that defendants be given no quarter. In no other way can be explained the antagonism toward defense counsel or the fact that "all of said persons with whom [defense counsel] talked refused to make an affidavit concerning said public feeling and requested that [defense counsel] not disclose their names, upon the ground that they believed they would be criticized by their friends, customers and other persons of Shasta County."

[5] The counter showing offered in affidavits presented by the prosecution created no real conflict with the evidence presented by the defense. In his affidavit in opposition to the motions for change of venue the sheriff stated, "That the feeling of public indignation and resentment that existed against James McKay and Robert Sturm up to the time when they were transported from Folsom State Penitentiary to the Shasta County Jail on June 3, 1950, has subsided and cooled considerably since that date and the only public feeling of indignation that exists now in Shasta County in connection with the killing of Earl Sholes and Dan Heryford is a cool, calm and wholesome feeling that justice be administered in the murder action now pending against James McKay and Robert Sturm." Other affidavits were of similar import. The counter showing was essentially similar to that made in *People v. Suesser*, 132 Cal. 631, 634, 64 P. 1095, 1097, where the court said, "This amounted to little more than a showing that after the lapse of a few days the excitement abated, and there was no real intent to lynch the defendant; also that there was not so much excitement in the remote parts of the county. That but one opinion in regard to the guilt of the defendant existed throughout the county is admitted. There was no pretense that such opinion had

changed, but only that the feeling against the defendant was less intense. * * *

"Where such a state of things exist, the defendant cannot have a fair and impartial trial. If the change of venue should not be granted in this case, I think the statute should be repealed. Why courts should hesitate to grant change of venue in a proper case I cannot understand. It seems that many, perhaps most, of the merchants and business men of Salinas, made affidavits of the nature I have stated above to prevent such a change. Why? Was it feared the defendant would escape if he were allowed a fair trial? It is suggested that there is undue delay in reaching final judgment. Those who complain of delay prejudged the case, but delays are too often caused by plain disregard of obvious rights of friendless and unpopular defendants."

In view of the prevailing atmosphere in the community, the fact that from 251 persons it was possible to select 14 who thought they could try the case fairly does not sustain the conclusion that a fair trial could be had. Because they had exhausted all of their peremptory challenges defendants were forced to go to trial before jurors who were familiar with the publicity that had been given to the case. One juror stated that she took it for granted that the officers were murdered by defendants. Another knew one of the decedents by sight, and a third knew all the members of a family that was related to one of the decedents. This juror's husband also worked part time as a deputy sheriff. Another juror testified that Mr. Heryford, one of the decedents, "belonged to an old Shasta County family as I do myself and I know of him * * *." Moreover, none of the jurors could have been unaware of the popular feeling. They knew, just as the local attorneys knew, that any verdict other than guilty without recommendation would be highly unpopular in the community. They, just as the citizens who refused to execute affidavits, had to continue living with their neighbors.

[6] Because of the abundant evidence of guilt, it is contended that defendants

could not have been prejudiced by the widespread antagonism against them. Regardless of their guilt, however, they were entitled to a fair and impartial trial. *Moore v. Dempsey*, 261 U.S. 86, 87-88, 92, 43 S.Ct. 265, 67 L.Ed. 543; see concurring opinion of Mr. Justice Jackson in *Shepherd v. Florida*, 341 U.S. 50, 71 S.Ct. 549. "Neither can a plea for the application of [Article VI, section 4½] of the constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the constitution." *People v. Mahoney*, 201 Cal. 618, 627, 258 P. 607.

[7] Moreover, the jury was presented with the problem of determining the penalty to be imposed. Had one of the defendants been one month younger and the other approximately one year younger the death penalty could not be imposed. Penal Code, § 190. The considerations that led the Legislature to provide that no murder committed by a person under 18 years of age should be punishable by death might lead a jury to recommend life imprisonment for defendants slightly over that age. By law the determination of the penalty is left solely to the discretion of the jury, Penal Code, § 190, and accordingly, it was of vital importance that they should exercise that discretion free from bias, prejudice, or pressure from the community.

Not only was such freedom of deliberation denied to the jury, but at least some of its members were aware of the statements made by Judge Ross in his letter to the board of supervisors. One juror testified as follows:

"Q. You say you did read the Judge's letter? A. Yes.

"Q. Was there anything in that letter that would cause you to form an opinion one way or the other concerning the guilt or innocence of the defendants? A. No. I figure—well, I don't know just how to answer that. As far as making up an opin-

ion. Judge Ross made quite a statement as far as that goes * * *.

"Q. * * * Would you say from the recollection of the letter Judge Ross wrote that the Judge expressed himself concerning the guilt or innocence of the defendants? A. Well, I would say he expressed himself, yes."

Judge Ross' letter not only stated that all defense counsel conceded defendants' guilt, but also bitterly attacked the methods of the defense. If his statements had been made by a judge presiding at the trial they would clearly have required a reversal. *People v. Mahoney*, 201 Cal. 618, 626-627, 258 P. 607. "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Sanguinetti v. Moore Dry Dock Co.*, 36 Cal.2d 812, 819, 228 P.2d 557, 561, quoting from *Starr v. United States*, 153 U.S. 614, 626, 14 S.Ct. 919, 38 L.Ed. 841. Judge Ross was well known in the county and had been the only regular superior court judge for approximately 17 years. In the latest election he had received the highest number of votes of any county officer. His opinions were known to members of the jury. Under such circumstances the prejudicial effect of his statements was not materially less because they were made outside rather than inside the courtroom.

It is unnecessary to determine which, if any, of the facts and circumstances of this case standing alone would require the granting of a motion for change of venue. When local feeling is so intense that the presentation of defendants' case is impeded, members of the jury are familiar with the facts in advance of the trial and are aware of the intense antagonism of the community toward defendants, and the regular trial judge has forcefully presented his opinions as to the merits of the case and attacked the good faith of defense counsel, a change of venue should be ordered. However conscientious the members of the jury may have been, it cannot reasonably be concluded that they could so divorce them-

selves from their past experiences and present surroundings that a fair and impartial trial could be had.

[8] "The prisoner, whether guilty or not, is unquestionably entitled by the law of the land to have a fair and impartial trial. Unless this result be attained, one of the most important purposes for which Government is organized and Courts of Justice established will have definitely failed. Cases sometimes occur, and this would appear to be one of them, in which the very enormity of the offense itself arouses the honest indignation of the community to such a degree as to make it apparent that a dispassionate investigation of the case cannot be had. Under such circumstances the law requires that the place of trial be changed." *People v. Yoakum*, 53 Cal. 566, 571.

The judgments and the orders denying the motions for a new trial are reversed and the trial court is directed to grant the motions for change of venue.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concur.

CARTER, J., did not participate.



37 Cal.2d 808

REACHI v. NATIONAL AUTO. & CAS. INS. CO. OF LOS ANGELES.

L. A. 21766.

Supreme Court of California, in Bank.

Oct. 19, 1951.

As Amended Nov. 1, 1951.

Rehearing Denied Nov. 15, 1951.

Action by Manuel Reachy against National Automobile and Casualty Insurance Company of Los Angeles for damages sustained by reason of wrongful attachment of plaintiff's property by present defendant in prior action. The Superior Court, Los Angeles County, William B. McKesson, J., sustained demurrer to plaintiff's complaint, and plaintiff appealed. The Supreme Court, Edmonds, J.,

Cal. Rep. 235-236 P.2d-27

held that when all the proceedings, pleadings and documents with respect to levy of attachment are valid and regular on their face so that defense on merits is necessary to procure discharge of attachment, expenses incurred in such defense may be allowed as damage caused by wrongful attachment.

Judgment reversed with directions.

Prior opinion, 232 P.2d 13.

1. Attachment ⇨376

Where defendant whose property has been wrongfully attached as incident to principal suit might rid himself of attachment on motion to vacate or dissolve it, but chooses to appear generally and defend action on merits, although appearance may be for dual purpose of getting rid of attachment and of disposing of issues, defendant is not entitled to legal expenses incurred in defense of principal suit as damage proximately caused by wrongful attachment, since such expenses were not primarily and necessarily incurred for purpose of obtaining order vacating wrongful levy. Code Civ.Proc. § 539.

2. Attachment ⇨ 376

Under statute providing that defendant whose property has been wrongfully attached may be awarded all damages sustained by reason of such attachment, recovery of expenses for defending the attachment or garnishment suit on its merits is proper when it is necessary to defeat main action in order to defeat the attachment. Code Civ.Proc. § 539.

3. Attachment ⇨373

Complaint, in action to recover damages to plaintiff caused by wrongful attachment of his property by defendant in prior suit, which alleged that the attachment therein was regular on its face and that wrongfulness of levy could only be shown upon trial upon merits and which prayed for expenses incurred on trial on merits as damages, stated cause of action. Code Civ.Proc. § 539.

4. Attachment ⇨376

Where all proceedings, pleadings and documents with respect to levy of attachment on defendant's property are valid and regular on their face so that motion to dis-

charge attachment would be futile act, and defendant is required to defend and win principal action before attachment, although wrongful, can be dissolved, defendant is entitled to expenses incurred in defense of principal action as damage proximately caused by wrongful attachment. Code Civ.Proc. § 539.

5. Attachment ⇨379

In action to recover damages caused by wrongful attachment, necessity and reasonableness of all expenses are fact issues to be determined upon trial.

6. Attachment ⇨376

Where defense of action on merits was necessary to procure release of wrongful attachment, expenses incurred for aid of experts in defense of main action, even though experts had not been appointed under direction of court, might be allowed as damages necessarily incurred in obtaining release of attachment if such expenses were reasonably necessary for preparation and conduct of defense.

7. Attachment ⇨376

Payment of attorney's fees incurred is not a condition precedent to their recovery as an item of damages for wrongful attachment.

Guy E. Ward and Kenneth D. Holland, Beverly Hills, for appellant.

Harry A. Franklin, Los Angeles, for respondent.

EDMONDS, Justice.

Manuel Reachi is claiming damages assertedly sustained by him in clearing title to real property from the lien of an attachment which was wrongfully obtained. His appeal is from a judgment which followed an order sustaining the surety's demurrer to the complaint without leave to amend.

At the time the attachment was issued, Reachi alleges, he was a resident of Mexico City and the owner of certain land in Los Angeles. Damages assertedly caused by the negligence of Reachi in making an excavation upon his land were claimed by the

adjoining owner who filed a bond executed by the respondent surety, and obtained a writ of attachment. The writ was levied on Reachi's property pursuant to section 537, subsection 3, of the Code of Civil Procedure.

Reachi did not move to set aside the levy or recall the writ but, following a trial of the action on the merits, judgment was rendered in his favor. That judgment is now final. As he states the situation in his complaint, "all of the proceedings, pleadings and documents with respect to the levy of said attachment were valid and regular on their face and for that reason * * * [he] * * * made no motion nor brought any proceeding to discharge or dissolve said attachment, as said motion or proceeding would have been unsuccessful and an idle and futile act, and the only manner by which said attachment could be dissolved or discharged was to defend and win the above mentioned action on its merits".

To defend the action, Reachi alleges, it was necessary for him to travel from Mexico City to Los Angeles to testify at the trial at an expense of \$1,500, and to incur liability for attorney's fees of \$2,500. According to the complaint, the issues to be tried required him to employ, at \$505, a licensed surveyor to make an examination of the excavation on his property and the alleged damage caused by it, prepare maps, exhibits, blue prints and other documents, and testify at the trial. Reachi alleges that, after demand, payment of these sums has been refused by both the plaintiff in the principal action and by the surety.

The demurrer of the surety was sustained without leave to amend and judgment entered accordingly. As grounds for reversal of the judgment, Reachi contends that because the gravamen of the present action is a wrongful attachment, he is entitled to the expenses necessarily incurred by him in clearing his title of the attachment. He admits that, ordinarily, attorney's fees incurred in defense of the principal suit, as distinguished from those paid for procuring a dissolution of an attachment, are not recoverable as an item of damages. However, he contends that where

the attachment is regular on its face and the wrongfulness of the levy can only be shown in a trial upon the merits, attorney's fees are allowable.

The surety contends that the decisions in this state limit the recovery of attorney's fees to those paid in proceedings to vacate the attachment, and do not permit the recovery of amounts paid for the defense of the principal suit. Furthermore, argues the surety, the complaint does not show that attorney's fees were paid. The traveling expenses are challenged as unnecessary. Reach's testimony, it is said, could have been taken by deposition; a party to a suit is not entitled to witness fees or mileage for attending a trial, and "his presence must be referred to his natural interest as a party to the litigation". The claim for expenses incurred in the employment of the surveyor is attacked upon the ground that fees paid to an expert witness may be taxed as costs only when he has been appointed by and under the direction of the court, and no such order is pleaded as having been made.

In accordance with the provisions of section 539 of the Code of Civil Procedure, the undertaking guarantees payment of " * * * all costs that may be awarded to the said defendants, or any of them, and all damages, which they, or any of them may sustain by reason of the said attachment. * * *" The parties agree that the measure of damages in an action on an attachment bond is the actual expense and loss necessarily and proximately caused by the levy. But the surety, in effect, argues that attorney's fees incurred in the defense of the principal suit can never be regarded as having been proximately caused by the attachment levy. There is no support for this position either in logic or legal principles.

Although there are several decisions by the courts of this state denying the recovery of counsel fees paid in defense of the principal suit, *Miramonte & Louedestel Co. v. National Surety Co.*, 91 Cal.App. 64, 266 P. 576; *Soule v. United States Fidelity & Guaranty Co.*, 82 Cal.App. 572, 255 P. 886, and see cases cited and discussed therein, material factual differences distinguish

them from the situation shown by *Reach's* complaint. In none of those cases did the plaintiff allege or prove that the writ of attachment was regular on its face and, for that reason, not subject to a motion to vacate or dissolve it.

[1] As stated in *Thropp v. Erb*, 255 N. Y. 75, 174 N.E. 67, 68, 71 A.L.R. 1455, "If a defendant, instead of making such a motion, chooses to appear generally in an action and to defend it on the merits, his appearance may be for the dual purpose of getting rid of the attachment and of disposing of the issues; but he can hardly assert that his defense on the merits was for the purpose of disposing of the attachment and that expenses incurred in such defense were 'damages sustained by reason of the attachment' where the defendant might have rid himself of the attachment without such defense and without incurring such expenses." Accordingly, legal expenses incurred in defense of the principal suit, under such circumstances, are not allowed. But this is not because there is any rule of law denying them; the ground for denying recovery is that they were not primarily and necessarily incurred for the purpose of obtaining an order vacating the wrongful levy.

[2-4] In the present case, however, it is alleged that "all of the proceedings, pleadings and documents with respect to the levy of said attachment were valid and regular on their face" and that a motion to discharge the attachment "would have been unsuccessful and an idle and futile act, and the only manner by which said attachment could be dissolved or discharged was to defend and win the * * * action on its merits." This was the factual situation in *Thropp v. Erb*, supra, and the following comments of the court are equally applicable here: "Without proof that a defendant has used every remedy open to him to dispose of an attachment without a trial on the merits, the chain of causation from the warrant of attachment to the expenses incurred in a trial on the merits may at times be incomplete. In the present case there would have been no 'reasonable chance of success' if a motion had been

made to vacate the warrant. No contention can be seriously raised that this plaintiff could have rid himself of the warrant of attachment except by a trial on the merits. No futile motion to vacate was necessary to complete the chain of causation between the warrant of attachment and the expenses incurred in the successful defense." Accordingly, it was concluded that: "In each case the question of whether the defense on the merits was the result of the warrant of attachment must depend upon the circumstances of that case. Where that is established the expenses of the defense on the merits may be recovered in an action upon the statutory undertaking as damages sustained by reason of the attachment." Similarly it was said in *Moesely v. Fidelity & D. Co.*, 33 Idaho 37, 189 P. 862, 865, 25 A.L.R. 564, that attorney's fees are a recoverable item of damages " * * * where a trial of the principal action was necessary to dispose of the attachment". And see the cases collected in 5 Am.Jur., 215, where it is stated: "The majority view is that recovery of expenses for defending the attachment or garnishment suit on its merits is proper where it is necessary to defeat the main action in order to defeat the attachment." Additional cases upon this point are cited in the annotations in 25 A.L.R. 579, 592, and 71 A.L.R. 1458, 1462.

[5] The foregoing principles are applicable to the other items of damages claimed by *Reachi*. *Moseley v. Fidelity & D. Co.*, supra, travel expenses allowed; *Olsen v. National Grocery Co.*, 15 Wash.2d 164, 130 P.2d 78, expenses incurred in employment of a marine architect allowed. Concerning the claim for traveling and hotel expenses incurred in attending and testifying at the trial, the surety argues that they were unnecessary because the testimony might have been taken by deposition. But the necessity and reasonableness of all expenses—attorney's fees, travel costs, and the charges made by the expert witness—can be determined only with the other issues of fact upon a trial.

The decision in *Beal v. Stevens*, 72 Cal. 451, 14 P. 186, cited by the surety, does not preclude the recovery of travel expenses as

an item of damages. The *Beal* case was one to foreclose a mortgage and the court properly held that a statute allowing witness fees and mileage did not apply to a party to the action. By way of contrast, the present action is upon an undertaking which guarantees the payment of all damages sustained by reason of the attachment, and the complaint alleges that *Reachi* was "obliged" to incur those expenses in order to vacate the attachment.

The final item of damages claimed is the expense incurred because "it was necessary * * * to employ a licensed surveyor to make an examination and investigation into the facts relating to said excavation and alleged damage and to prepare certain maps, exhibits, blue prints and other documents and to testify in the trial of said cause as an expert witness". The surety contends that this item is improper because "fees paid to an expert witness may be taxed as costs only where the expert has been appointed by and under the direction of the Court".

[6] However, this expense is not sought as an item of allowable costs, but as damages necessarily incurred in obtaining the release of the attachment by the successful defense of the action on the merits. As was stated in *Olsen v. National Grocery Co.*, supra [15 Wash.2d 164, 130 P.2d 84], where such expenses were allowed, "The basis of the rule appears to be whether the expenses incurred were reasonably necessary for the preparation and conduct of the trial." The reasonable necessity of this item is to be determined, with the other factual issues, on the trial.

[7] The surety's final contention is that the complaint is defective in that it does not show that the attorney's fees were paid. It is true that the complaint only alleges that such expenses were "incurred", and it has been held in this state that such an allegation is insufficient. There is no logical reason for such a rule and it is contrary to the conclusions reached in all other jurisdictions in this country. See cases collected in 25 A.L.R. 597-598; 71 A.L.R. 1463. Insofar as they hold that payment

of counsel fees is a condition precedent to their recovery as an item of damages for wrongful attachment, *Elder v. Kutner*, 97 Cal. 490, 32 P. 563; *Prader v. Grimm*, 28 Cal. 11, and *Willson v. McEvoy*, 25 Cal. 169, are overruled.

The judgment is reversed with directions to the trial court to overrule the demurrer and to allow the surety a reasonable time within which to answer.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



37 Cal.2d 815

CHAMPION v. BENNETTS et al.

L. A. 22036.

Supreme Court of California, in Bank.

Oct. 19, 1951.

Action by Harry E. Champion against Frederick A. Bennetts and others for damages for malpractice by defendant surgeon wherein it was charged that rubber tube had negligently been left in incision in scrotum with resultant injury requiring removal of left testicle. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment upon order granting judgment notwithstanding verdict of jury for plaintiff, and plaintiff appealed. The Supreme Court, Edmonds, J., held that evidence was sufficient to warrant finding by jury that removal of testicle of plaintiff had been necessitated by failure of defendant surgeon to provide for proper drainage after incision in scrotum.

Judgment reversed with directions.

Prior opinion, 231 P.2d 108.

1. Judgment ⇐199(3.10)

A defendant's motion for judgment notwithstanding verdict may properly be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, result is determination that there is no evidence sufficiently substantial to support verdict.

2. Hospitals ⇐8

Physicians and Surgeons ⇐18(8)

In malpractice action against hospital and surgeon wherein it was claimed that rubber tube had negligently been left in incision in scrotum of plaintiff with resultant injury which required removal of left testicle, evidence was sufficient to support finding by jury that rubber tube had either been negligently completely enclosed within scrotum or had been insecurely fastened so that rubber tube had withdrawn into scrotum.

3. Physicians and Surgeons ⇐18(8)

In malpractice action against hospital and surgeon wherein it was claimed that rubber tube had negligently been left in incision in scrotum of plaintiff with resultant injury which required removal of left testicle, evidence was sufficient to establish that negligent failure of surgeon to provide for proper drainage from incision had been proximate cause of subsequent condition necessitating removal of testicle.

4. Negligence ⇐56(1.2, 1.3)

It is not necessary that negligence of defendant be sole cause of injury complained of by plaintiff in order to entitle plaintiff to damages therefor, but it is sufficient if such negligence of defendant be proximate cause of injury.

Sheppard, Mullin, Richter & Balthis, Gordon F. Hampton and E. Talbot Callister all of Los Angeles, for appellant.

Charles E. Beardsley, Bodkin, Breslin & Luddy, Henry G. Bodkin, Richard L. Oliver, Fred Girard, Hirson & Horn, Theodore A. Horn, Edward Feldman, all of Los Angeles, Belli, Ashe & Pinney, Melvin M. Belli, Ryan & Ryan, Thomas C. Ryan, Mancuso, Herron & Winn, John W. Herron, J. F. Shirley, Vernon W. Humber all of San Francisco, and James F. Boccardo, San Jose, as amici curiae, for appellant.

Reed & Kirtland and Henry E. Kappler, all of Los Angeles, for respondents.

EDMONDS, Justice.

Dr. Frederick Bennetts, with Dr. Glen Gummess assisting him, performed a surgical operation upon Harry Champion at the California Luthern Hospital. Charging that a rubber tube negligently was left in the incision with resulting injury which required the removal of the left testicle, Champion sued the hospital and the surgeons, claiming damages for the asserted malpractice. The appeal of Champion is from a judgment entered against him notwithstanding the verdict of a jury in his favor against Dr. Bennetts.

Champion alleges that he consulted Dr. Bennetts concerning severe pain in the scrotum. Dr. Bennetts diagnosed the ailment as varicocele, and advised an operation. In the course of performing the operation, Dr. Bennetts "negligently and carelessly deposited and left a rubber tube within the scrotum of plaintiff, and negligently and carelessly closed said incision and sutured the same." Because of the tube, Champion suffered severe pain, hysteria, and a swelling and splitting of the scrotum both at the incision and otherwise. The complaint further states that the negligent enclosure of the tube caused an infection in the scrotum which required the removal of the left testicle, with consequent shortening of life expectancy and sterility. Damages are also sought for loss of earnings during Champion's incapacity.

By his answer, Dr. Bennetts admits that he operated upon Champion. He states that a rubber tube was placed in the scrotum, but he denies the other facts alleged in the complaint.

The record shows evidence tending to prove the following facts:

Dr. Bennetts diagnosed Champion's difficulty as varicose veins and he advised surgery for the removal of them. Dr. Bennetts said, "It is a simple operation, you will be confined from three to seven days, your total convalescence should not be over three weeks." Champion stated that he did not wish to lose his left testicle. Dr. Bennetts assured him that, "If the testicle is healthy there will be no occasion for

that; you will have to leave that up to me, however."

The operation was performed by Dr. Bennetts, assisted by Dr. Gummess. Dr. Bennetts made a four-inch incision in the left upper scrotum, dissected certain varicose veins and removed them. Following the operation, Dr. Bennetts told Champion's mother that the left testicle was "a little smaller than the other one but it appeared healthy and he did not take it out."

The notes of the nurse attending Champion show that on the following day he complained of considerable pain and the scrotum had begun to swell. It was necessary to sever the tape holding the operative dressings to relieve the pressure.

On the next day, the swelling had increased to such an extent that it was necessary for an interne to remove the operative dressings, replacing them with a small pad or cloth over the scrotum. Champion testified that he could then see the scrotum "very plainly." He described it as swollen and discolored, and in a position of elevation over the abdomen. The operative incision was sewed tightly, he said; there was no drainage from the scrotum, and nothing protruded from it.

Administration of penicillin was then begun and dosages were continued for two days. Two witnesses who observed Champion during this time testified that they saw no wound other than the main operative incision with nothing protruding from the scrotum.

Six days after the operation, Dr. Bennetts told Champion that he had decided to probe the wound for the purpose of establishing drainage. When asked what the trouble was, the doctor stated that "nothing was wrong"; "it could be a thrombosis". He probed the incision by inserting surgical forceps, and ordered Champion to take sitz baths.

A witness testified that he assisted Champion in taking the recommended sitz baths. He told the jury that he then observed the entire scrotum. The opening which had been established through probing was on the left side of it and gave off an

odor. As he described the operative area, there was only the one wound on the entire scrotum with nothing protruding from it.

After two weeks in the hospital Champion was taken to his home. He was instructed to continue taking sitz baths, use hot compresses, and to walk as much as possible. His mother helped him to take sitz baths and cleaned and dressed the operative incision. She saw no opening in the scrotum other than that established through probing, and did not observe anything protruding from it. Her description of the incision was substantiated by the testimony of a neighbor.

About a month after the operation, Champion was examined by Dr. Bennetts in the latter's office. When questioned about a red area at the top of the scrotum, the doctor stated that he thought an abscess was developing. He instructed Champion to apply hydrogen peroxide to the wound and to cleanse it with swab sticks. Two days later, while cleansing pus from the probe wound, Champion and his mother noticed, deep in the wound, the edge of a substance which resembled "a muscle". Upon touching this substance with the swab stick, about an inch of white rubber tube protruded.

On the following morning, the rubber tube stuck to a dressing and came out. Champion and his mother described it as being "very wet and full of pus". This was the first time either Champion or his mother knew that a rubber tube had been inserted in his scrotum. Champion immediately telephoned Dr. Bennetts who said: "That is fine. I left it for a drain. I am glad you found it."

On the following day, Dr. Bennetts examined Champion and stated, "That is the first time that ever happened to me." He then advised Champion that a further operation would be necessary; the left testicle would have to be removed. About a week later Dr. Bennetts again examined Champion and said, "This kind of thing hasn't happened to me before," and again urged an operation.

Dr. Bennetts, assisted by Dr. Gummess, performed the second operation. The left testicle was removed, a drainage tube was inserted, its presence being indicated on the operative report. Several days later, the drain was removed and Champion left the hospital.

Concerning the first operation, Dr. Bennetts testified that he had placed a rubber tube in Champion's scrotum for drainage purposes. He described it as being attached to the wall of the scrotum by sutures, part of the tube protruding from a "stab wound" made in the lowest part of the scrotum. He admitted, however, that he told no one except Dr. Gummess of the tube. He did not tell the internes or nurses of its presence, and "overlooked" mention of the tube or stab wound in making his operative report, although it called for pertinent information on drainage. When asked whether the tube might have slipped entirely inside the scrotum, Dr. Bennetts replied that such was "* * * within the realm of possibility * * *."

Dr. Gummess substantiated Dr. Bennetts' testimony as to the insertion of the tube but said that he did not see it at any time when he examined the patient following the operation. As a practicing specialist in urology, Dr. Gummess was asked whether "* * * in an operation for the removal of a varicocele, under proper medical and surgical practice here, would a physician and surgeon intentionally permit a wound to close, leaving a rubber tube within the scrotum, with no part of the rubber tube protruding?" He replied, "No, he would not."

It was further established, by expert testimony, that drainage of scrotal wounds is a mandatory rule because "proper drainage will prevent infection." Two experts identified the pain and other symptoms of disease in Champion's scrotum after the operation as "classical signs" and "indications" of infection, which indicates bacterial attack upon living tissue. Dr. Bennetts admitted that there was infection present in the incision which was draining; that the draining involved the testicle, the spermatic cord and scrotum. Such infec-

tion, he said, can make tissue become necrotic.

Upon this evidence the jury returned a verdict in favor of Champion against Dr. Bennetts, exonerating Dr. Gummess and the hospital. Subsequently, the motion of Dr. Bennetts for judgment notwithstanding the verdict as to him was granted. The appeal of Champion challenges only the ruling of the court as to Dr. Bennetts; no complaint is made in regard to the judgments in favor of the other parties to the action.

[1] A defendant's motion for judgment notwithstanding the verdict " * * * may properly be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is a determination that there is no evidence sufficiently substantial to support the verdict." *Devens v. Goldberg*, 33 Cal.2d 173, 177-178, 199 P.2d 943, 946. Relying upon this rule, Champion contends that the evidence, disregarding conflicts, and the legitimate inferences to be drawn from it furnishes sufficient support for the jury's implied finding that Dr. Bennetts was negligent in performing the varicocelectomy, which negligence proximately caused the subsequent removal of the testicle with resulting damages.

[2] The record fully supports Champion in this regard. From the evidence presented by the respective parties the jurors reasonably might have concluded that the rubber tube was completely enclosed within the scrotum at the time of the operation, and the incision tightly sutured. If, however, they chose to believe that Dr. Bennetts left the tube protruding, there is ample evidence tending to prove a failure to fasten it so as to prevent withdrawal into the scrotum, a possibility admitted by Dr. Bennetts.

Under either view of the evidence, it shows a surgical procedure which permitted the operative incision to become tightly closed, leaving the rubber tube completely within the scrotum. Dr. Rosen-

bloom testified that "It is a rule, it is a mandatory rule, that we always drain scrotal wounds * * *." The evidence would justify a conclusion that Dr. Bennetts violated this "mandatory rule" by failing to drain the scrotum during the period following the surgery, either because he made no provision for drainage or because he permitted the drainage tube to slip into the scrotum and the operative incision to close completely.

[3, 4] There is no merit to the contention that the evidence fails to establish a causal relation between the failure to properly provide for drainage and the subsequent necessity for removal of the testicle. "The law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor. All that is required * * * is that the negligence in question shall be a proximate cause of the injury * * *." *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 392, 212 P. 913, 914. It was shown that at the time of the first operation Champion's testicle was healthy and for that reason Dr. Bennetts did not take it out. Yet, forty-two days later, it was in such condition that removal was deemed necessary. Although Dr. Bennetts argues to the contrary, the jury's implied finding that a causal relationship existed was not purely speculative. According to the medical testimony, the reason for the "mandatory rule" of drainage is the danger of infection. That testimony also characterized Champion's symptoms following the operation as "classical signs" and "indications" of infection and unquestionably it was a necrotic condition which necessitated the second operation.

The judgment entered upon the order granting judgment notwithstanding the verdict of the jury is reversed with directions to the trial court to enter judgment upon the verdict in favor of Champion.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

37 Cal.2d 770

WEIL v. WEIL.

L. A. 21160.

Supreme Court of California, in Bank.

Oct. 11, 1951.

Felix J. Weil brought action against Helen K. Weil for divorce, on ground of cruelty, and the defendant filed a cross-complaint seeking separate maintenance, on ground of cruelty, and the cross-complaint was amended to ask for divorce. The Superior Court of Los Angeles County, LeRoy Dawson and William S. Baird, JJ., entered a judgment for divorce in favor of the defendant and entered orders denying defendant counsel fees and costs for new trial motion and for appeal, and defendant appealed. The Supreme Court, Traynor, J., held that Superior Court was not guilty of misconduct in requiring defendant to amend her cross-complaint to pray for a divorce and in granting her a judgment for divorce and temporary alimony, but that defendant was entitled to counsel fees and costs for new trial motion and for appeal.

Judgment affirmed, and orders reversed, and Superior Court directed to allow reasonable sums for counsel fees and costs for new trial motion and for appeal.

Schauer, J., dissented in part.

Prior opinion, 224 P.2d 460.

1. Divorce ⇨104, 154

Where husband brought suit for divorce, on ground of cruelty, and wife cross-complained for separate maintenance on ground of cruelty, and evidence justified the granting of divorce to either party, and there was no prospect of reconciliation, judge was not guilty of misconduct in requiring wife to amend her cross-complaint to pray for a divorce and in granting her a judgment for divorce and temporary alimony.

2. Divorce ⇨12

Public policy does not discourage divorce where relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.

3. Deeds ⇨211(3, 4)

In divorce suit, evidence sustained finding that deed by wife to husband of her

interest in realty which had been purchased with husband's money, was the voluntary and deliberate act of the wife, taken with full knowledge of legal results involved, and that deed was not obtained by undue influence or through constructive fraud. Civ.Code, §§ 158, 2235.

4. Deeds ⇨196(3)

When a husband secures a property advantage from his wife, burden is cast on him to show that there has been no undue influence. Civ.Code, §§ 158, 2235.

5. Appeal and error ⇨1010(1)

Whether or not spouse gaining a property advantage from the other spouse, has overcome the presumption of undue influence, is a question for the trier of fact, whose decision will not be reversed on appeal, if supported by substantial evidence.

6. Divorce ⇨182

The right to counsel fees on appeal in a divorce case is not dependent on proof that judgment is erroneous.

7. Divorce ⇨182

Fact that wife consented to judgment in divorce action did not bar her right to seek attorney fees, where the principal issue on appeal was whether or not the consent was coerced.

8. Divorce ⇨182, 222

In determining whether wife was entitled to counsel fees and costs for new trial motion and for appeal, essential question was whether wife prosecuted appeal in belief, held in good faith, that he had reasonable grounds for seeking a reversal.

9. Divorce ⇨223

Question of counsel fees in divorce action, was addressed to sound discretion of trial court.

10. Divorce ⇨286

In rare instances, an order denying counsel fees in divorce action will be reversed on appeal where it is shown that appeal presents debatable questions which were not without substantial merit or controversy.

11. Divorce ⇨286

Where attorneys for wife in divorce suit carefully examined record and per-

tinient legal authorities and believed and advised wife that appeal by her involved meritorious grounds of contest and offered substantial hope of success, Supreme Court on appeal would reverse orders denying counsel fees and costs for new trial motion and for appeal.

Norman Newmark and George I. Devor, all of Los Angeles, for appellant.

Francis C. Whelan, Los Angeles, in pro. per.

Pacht, Warne, Ross & Bernhard, Isaac Pacht, Clore Warne, Rudolph Pacht, Shirley Adelson Siegel and Maxwell E. Greenberg, all of Beverly Hills, for respondent.

TRAYNOR, Justice.

Plaintiff, Felix J. Weil, brought this action for divorce against defendant, Helen K. Weil, alleging extreme cruelty. Defendant answered, denying cruelty, and cross-complained for separate maintenance, alleging desertion and forty-three specific acts of cruelty. By stipulation the allegations of the cross-complaint were deemed denied. At the conclusion of the trial defendant amended her cross-complaint to pray for a divorce. It was agreed that all findings might be waived, except the finding that plaintiff was guilty of one of the specific charges of cruelty. A divorce was granted to defendant, she was awarded thirty months alimony at \$300 a month, certain contested furs and jewels were decreed to be her separate property, and plaintiff was ordered to pay specified sums to her attorneys. The family home was adjudged to be the separate property of plaintiff. Defendant and her then attorney consented to the judgment and agreed to accept it as "final."

Shortly after the decree was entered, defendant announced her refusal to comply with its provisions. She discharged her attorney, moved for a new trial, and then engaged her present counsel. The motion for new trial was denied. Requests for orders requiring plaintiff to pay fees for defendant's counsel and costs in connection with the new trial motion and for similar fees and costs on appeal were also denied. Defendant has appealed from the judgment

and from the orders denying fees and costs. Plaintiff has not appealed.

Defendant's principal contention is that the trial judge was guilty of misconduct in coercing her into amending her prayer and consenting to the judgment. In support of this contention she has filed an affidavit describing the circumstances under which the alleged coercion took place and has also presented an affidavit of her trial attorney, Francis C. Whelan. Counter-affidavits have been filed by plaintiff and by his attorneys, Isaac Pacht and Rudolph Pacht. Certain statements made by the trial judge on the last day of the trial and during the argument on defendant's request for counsel fees in connection with the motion for new trial are also pertinent.

The question presented is one of fact. In deciding this question, we have carefully examined not only the foregoing affidavits but also the entire trial transcript and the numerous exhibits. The judicial conduct claimed to be improper consisted of comments by the judge to counsel at the bench and in chambers; of necessity, therefore, we have relied principally upon the affidavits of the attorneys who were present on those occasions. We have given less weight to the self-serving statements of defendant's affidavit, not only because she proved at the trial to be an unreliable witness, but also because her version of the judge's remarks is hearsay and goes beyond that of her trial attorney, from whom she obtained her information.

The trial lasted fifteen days. The transcript discloses that on the twelfth day of testimony the trial judge interrupted cross-examination of defendant to call counsel to the bench. The affidavit of Francis C. Whelan, defendant's attorney, recites that the judge "stated in substance, among other things, that he felt it was needless to prolong the trial and that in the event defendant and cross-complainant amended her cross-complaint to ask for a divorce he, the said Judge, was disposed to grant her a divorce and alimony for a short period, but that he, the said trial Judge, didn't believe in separate maintenance for short marriages and that unless there was additional evidence that he hadn't heard he

didn't consider that separate maintenance should be granted in this case * * *." Plaintiff's attorney's version of this conference (the Isaac Pacht affidavit) is that the judge "stated that in view of the admissions and contradictions already elicited under cross-examination, he could see no useful purpose being served in my continuing the cross-examination with other material which might prove embarrassing to Helen K. Weil * * *. In the course of the discussion at the bench, which was of very short duration, the Judge stated that on the evidence which he had heard thus far, it did not appear to him that this was a case for separate maintenance, although his mind had not been made up and would be kept open until all the evidence had been introduced and the case submitted to him for decision * * *. Mr. Whelan and I suggested that a recess be taken until the following day to give counsel an opportunity to discuss a possible settlement of the case. Judge Baird agreed to this."

The statement in the Whelan affidavit that the judge remarked that it was "needless to prolong the trial" is not inconsistent with Pacht's statement that the judge said he could see "no useful purpose" in continuing the cross-examination "in view of the admissions and contradictions already elicited." Moreover, the record supports Pacht's more specific explanation of the judge's action. Defendant had been examined about a day and a half when counsel were called to the bench. In several material matters she had been forced to concede misstatements in her earlier testimony.¹ One of her charges of cruelty against plaintiff was that he had offended and shocked her by discussing indiscreet conduct of certain persons of his acquaintance, that he had persisted in associating with such persons in spite of her disapproval, and that he had accused her of

being "prudish." On cross-examination, therefore, defendant was called upon to explain her own relationship with plaintiff before their marriage and while plaintiff was still married to a former wife. The judge's interruption of the cross-examination immediately followed the introduction into evidence of a communication from a third party indicating that on a trip to Mexico before their marriage plaintiff and defendant had posed as man and wife. Defendant admitted intimate relations with plaintiff for over a year preceding plaintiff's divorce from his former wife, and certain letters written by defendant describing this relationship were introduced. The judge himself later stated that it was to avoid further embarrassment, particularly to defendant, that he urged a cessation of such evidence and a settlement of the case.

[1] The judge's statement that he did not believe in separate maintenance for short marriages does not, in our opinion, evidence an unwillingness to try defendant's case according to law. A judge is not required to approve every statute or precedent by which his decision is governed. Like other citizens he is bound, not to believe in a particular law, but to obey it. Thus, he may doubt the wisdom of particular economic legislation but it is nevertheless his duty to enforce it in a proper case. The judge who disagrees with the policy of a statute is not necessarily disqualified from hearing a case in which that statute must be applied. In the present case, there has been no showing that the judge's opposition to separate maintenance for short marriages was anything more than a personal opinion concerning the wisdom of the legislation involved. According to the Pacht affidavit, the judge stated that on this issue "his mind had not been made up and would be kept open." Whelan's affida-

1. For example, defendant testified that while the parties were living in New York, early in their marriage, she had been forced to protest against intrusions into their home by plaintiff's friends and relatives, and that on one such occasion, during a "typical week," she had complained to him that "Ursula [plaintiff's

stepdaughter] has used the house for her friends for jitterbug parties twice this week, and these are all little things but they are difficult for me * * *." On cross-examination defendant admitted that at all times covered by this testimony Ursula had been in Colorado and had held no dances in their New York home.

vit also shows that the judge's observation was qualified, for it quotes him as saying that he did not believe separate maintenance should be granted in this case "unless there was additional evidence that he hadn't heard." Had he regarded length of marriage as a controlling circumstance, "additional evidence" would have made no difference to him.

[2] The judge was guilty of no misconduct in thus expressing to the parties what he believed the law should be. The Legislature itself has not infrequently heeded judicial comment suggesting modification of statutes. A judge may properly indicate to litigants the hardship that may result from a rigid insistence upon technical rights. Such suggestions are peculiarly appropriate in a court of equity, and all the more so when the task before the court involves the difficult social and legal adjustments that attend the tragedy of an unsuccessful marriage. Defendant had divorced her first husband before she met plaintiff, and she knew that plaintiff also had been divorced. Even after this suit was begun, settlement negotiations were had between the parties predicated upon the assumption that a divorce would be granted. It is apparent, therefore, that defendant's prayer for separate maintenance was not based upon conscientious or religious objections to divorce. In view of this fact, and in view of the seriousness and finality of the marital rupture, as disclosed by the evidence, it was not error for the judge to urge divorce as the more appropriate solution to their problems. "[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed." *Hill v. Hill*, 23 Cal.2d 82, 93, 142 P.2d 417, 422.

It is clear from the record that the trial judge was anxious to spare the parties the spectacle of further embarrassing testimony; that he was tentatively persuaded that defendant's charges were exaggerated and her testimony unreliable and that plaintiff should be given a divorce; that, owing to defendant's possible need of an early operation, together with plaintiff's relative-

ly favorable financial position and the absence of community property, he felt the desirability of temporary payments by plaintiff to enable defendant to reestablish herself economically; that in view of the merits of the respective cases as thus far presented, and particularly since this marriage had lasted less than five years, he was unwilling to decree separate maintenance as a means of effecting defendant's economic adjustment, for that would have deprived plaintiff of a divorce; and that he was willing to grant a divorce nominally to defendant in order that temporary alimony might be provided. There is no indication in either affidavit that he had prejudged the facts of the case—these were tentative views and expressly subject to modification in the event that later evidence should require it.

At that time defendant declined to amend her prayer, and the trial proceeded. At the close of the fourteenth day, after all evidence had been presented, another conference was held. The Whelan affidavit states that the judge told counsel, in chambers, "that there was enough evidence to justify him in granting a divorce to either party to this action but that in the event defendant and cross-complainant amended her cross-complaint to pray for a divorce he would grant her a divorce and would make an order providing for payment of alimony to defendant and cross-complainant for a period of thirty months at the rate of \$300.00 per month, plus a maximum expense of \$1,000.00 for an operation if had by her, and that in the event defendant and cross-complainant did not so amend he would not grant her separate maintenance but would grant a divorce to plaintiff and cross-defendant, in which event defendant and cross-complainant could not be given any alimony whatsoever." The affidavit further states that on the following day Whelan and his client "had a conference outside of the court room at which time affiant told said Helen K. Weil that the trial Judge had stated that unless she amended her cross-complaint to pray for a divorce and consented to accept the judgment of the trial Judge as final he was going to grant a divorce to

plaintiff and cross-defendant upon the complaint of plaintiff and cross-defendant; that thereupon affiant advised the said Helen K. Weil that if she wished to get judgment for anything in addition to her furs and jewels she would have to amend her cross-complaint to pray for a divorce and state in open court that she accepted the judgment of the trial Judge as final; that thereupon the said Helen K. Weil stated that if there was no alternative and that if, in order to get judgment for anything in addition to her said furs and jewels, she would have to so amend and so consent, she would do so, and thereupon the said Helen K. Weil authorized affiant to amend her cross-complaint accordingly * * *."

The Pacht affidavit states that at this later conference "Judge Baird said that if we so desired he was now prepared to tell us what conclusions he had come to in the case. Mr. Whelan and I invited him to give us his views; thereupon the Judge stated that it was clear to him from the evidence that he had heard and the reaction which he had received from the testimony of all the witnesses and his observation of them, that Helen K. Weil, soon after the marriage of the parties, had embarked upon a campaign to obtain for herself an interest in the trust funds to which Felix J. Weil had invasion rights; that her continued pressure and intrigue upon Felix J. Weil to accomplish this purpose was the basic cause for the differences between them, and that the evidence introduced in behalf of Felix J. Weil was more than ample to justify a decree in his favor. However, the Judge said he hesitated to give a judgment of divorce to the husband because this would debar him from awarding Helen K. Weil any alimony and he wanted to provide some support money for her for a reasonable period of time. He, therefore, suggested that if the defendant and cross-complainant, Helen K. Weil, were so inclined she could amend her complaint to pray for a divorce, which he would grant her, together with alimony at the rate of \$300 per month, for a period of thirty (30) months. The Judge also said that in any event he was satisfied from the evidence that Helen K. Weil had

voluntarily and without duress or coercion or any false promises, deeded back her interest in the property at 533 Spoleto Drive to Felix J. Weil and, therefore, he would find that Felix J. Weil was the sole and exclusive owner of the whole interest in that property, free of any claims on the part of Helen K. Weil.

"As to the jewelry and furs, valued at some \$18,000.00, given to her by her husband and subsequently returned to him, he would find, regardless of whether Helen K. Weil amended her cross-complaint to ask for a divorce or not, that these were still Helen K. Weil's property and he would order them to be returned to her, and would also allow her a maximum sum of \$1000.00 for an operation if one is had by her; that he would award Mr. Whelan, attorney's fees in the sum of \$6000.00, and to Messrs. Jennings & Belcher and Sigurd E. Murphy, who had, during the course of the trial (at a hearing in Chambers in the presence of Mr. Whelan, Rudolph Pacht and myself), made application for an allowance for their services, the sum of \$1500.00.

"I protested to Judge Baird that on the evidence in the case, our client, Felix J. Weil, was entitled to a judgment of divorce. I further protested to Judge Baird that the allowance to Mr. Whelan was excessive for the services rendered to him, especially in view of the fact that we had already paid \$2500 attorney's fees to Mr. Sadicoff and a judgment was about to be given against Felix J. Weil for \$1500.00 for services rendered by Messrs. Jennings & Belcher and Sigurd E. Murphy, and that our client was in effect being penalized for Mrs. Weil's arbitrary and unjustified discharge of her former lawyers. Judge Baird then replied that it was clear to him from all the evidence that he had heard and read in the case, that the legitimate objects of matrimony had been destroyed and that while he recognized the validity of my argument that we had proven a case entitling Felix J. Weil to a divorce, he still felt that he wanted to do something for Helen K. Weil in the way of support money until she could reconstitute her life; as to the attorney's fees of Mr. Whelan, he

felt that this was a reasonable amount, to which I then replied that I would defer to the court's conclusion. I argued, however, that even if the Judge insisted upon granting the divorce to Helen K. Weil, that he base the decree solely upon the allegations set forth in subdivision 2 of Paragraph II of the Second Cause of Action in the amended cross-complaint and that the court find all the other specifications of cruel conduct set forth in the said amended cross-complaint to be untrue. The Judge said he would so find, and Mr. Whelan agreed to have such findings made and to waive all other findings of fact and conclusions of law in the case.

Once again it is to be observed that the Whelan and Pacht affidavits are not materially inconsistent. The Whelan affidavit makes no mention of the judge's conclusions on the merits of the case—nowhere is there any contradiction of the categorical averment by Pacht that the judge stated "it was clear to him from the evidence" that defendant's "continued pressure and intrigue" in her "campaign to obtain for herself an interest in the trust funds" of plaintiff was the "basic cause" of their marital differences, nor is there any contradiction of the further averment that the judge "recognized the validity of my argument that we had proven a case entitling Felix J. Weil to a divorce."

These statements are not only uncontradicted; they find strong support in the record. Following the judge's unsuccessful effort to bring an end to the trial on the twelfth day, the cross-examination of defendant was continued and additional misstatements and inconsistencies on her part were established. Notable among these were misstatements relating to the charge in her verified complaint that plaintiff had appropriated approximately \$4,000 of her

earnings as a school teacher in New York. Undisputed records of the New York Board of Education showed that she had earned only \$704.50 in the period in question. Nor was even this amount appropriated. Following her endorsement of the salary checks they were deposited in the parties' joint account, on which defendant had the right to draw, and did draw, for whatever she needed.² Defendant's theory of "appropriation" was that plaintiff insisted that her checks be deposited in their joint account in spite of her desire to give the money to her mother. It was established, however, that defendant had drawn checks to her mother's order during the period in question—a fact which defendant did not recall until the checks were exhibited to her. Moreover, her mother lived with the parties during most of their married life before their separation; at such times her expenses were paid by plaintiff, including medical expenses, and she was given in addition a monthly allowance of \$100 by plaintiff, from which she saved approximately \$900. It is not disputed that there was an affectionate relationship between plaintiff and defendant's mother.

Defendant also charged that plaintiff had forced her to decline a permanent appointment as a teacher in New York in order that she might devote herself entirely to his interests. A letter written by defendant at a later date showed, however, that this decision was reached jointly by the parties, that the appointment was declined so that defendant might devote herself not only to her home but also to her art studies, financed by plaintiff, and that at that later date defendant had "no regrets" about the action that had been taken—"I still think this decision was good."

Defendant also claimed that plaintiff would not permit her to have children. A

2. "Q. You could draw whatever checks you wanted to on this joint bank account, couldn't you? A. Yes.

"Q. And you did? A. Yes."

In a deposition, defendant had earlier testified as follows:

"Q. And you drew on the joint account? A. For household and—

"Q. How much did it cost you to live during that period a month or per year?

A. I don't know, but we certainly had ample.

"Q. How much? A. I don't know.

"Q. Out of that account you paid your household bills, your clothes? A. We traveled, yes. We lived well.

"Q. Everything for your joint benefit? A. Yes.

"Q. And in that account he put his money, too, his income? A. Yes."

gynecologist testified, however, that the parties had consulted him to determine why defendant had not become pregnant and that they had stated they had been trying to have children for a year. Office records substantiated his testimony.

Defendant's principal corroborating witness was her sister, Mrs. Mildred Green. In her testimony Mrs. Green unequivocally denied that she had advised defendant concerning evidence that should be produced or allegations that should be made or that she had written any letters to defendant in which she told her how to conduct the case. Such a letter was introduced, however; it was written to defendant shortly after plaintiff's complaint was filed and contained detailed instructions concerning evidence and allegations. Mrs. Green admitted that the letter was hers.

This letter is also noteworthy for its emphasis upon the trusts in which plaintiff's assets were held and upon defendant's activities concerning them. Plaintiff and defendant had first met through Mrs. Green, who was employed by the Institute that held plaintiff's money, and who was therefore familiar with the persons and circumstances connected with the trusts. In her letter she states that defendant should contest the divorce action and should show: "Husband alienated for very obvious reasons, as soon as you prevailed upon Lix [plaintiff] to retain control of his money—this provoked H [one of the Institute officials and a life-long friend of plaintiff]. * * * Your attorney should threaten to expose H. * * * Your attorney must also prove that you are not a gold-digger, you showed this by signing the deed to the house, etc. * * * Lix signed control of money to Institute—but Lix is still trustee and it still legally belongs to Lix. H. will try to bribe you. * * * State motives—why your marriage was interfered with from outside—intentional outside interference for very obvious reasons—at the very moment you tried to make Lix see the light. H & P [another Institute official and close friend of plaintiff's] are living on Lix' money * * *. It will be a hard fight but I think it is worth it. You

may even win Lix back—for he is bound to sit up and take notice when people he has known for years testify in your behalf. It would be wonderful if you would crush these fiends. I hope this will prove helpful to you. I intend to see more people within the next few days and will keep you posted." The observations in this letter are in marked contrast to defendant's testimony that she did not urge plaintiff to withdraw his money and give up his friends. Significantly, the witnesses referred to in the letter were not called to testify in defendant's behalf.

In thus reviewing the record, we are not to be understood as having substituted our decision on the evidence for that of the trier of fact. The matters we have discussed, however, are relevant to the question of fact that is presented to this court by defendant's appeal, namely, whether or not the trial court improperly coerced her. Defendant has submitted her affidavit to aid us in deciding that question, and we have therefore examined the record for indications of her credibility. We have also sought to evaluate, on the basis of the record, the uncontradicted claim of the Pacht affidavit that the judge had decided that defendant's financial intrigue was the cause of the marital rupture and that plaintiff was entitled to a divorce.

There can be no doubt that the judge's suggestion that defendant amend her cross-complaint induced her to do so, but there must be more to a claim of coercion than mere causation. If the judge believed from the evidence that plaintiff was entitled to a divorce, and if he so stated to counsel, then his suggestion was not, *as to defendant*, improper. The judge's remarks would constitute prejudicial misconduct only if his announced intention to grant plaintiff a divorce were contrary to the facts of the case as he had decided them. Defendant has failed before this court to prove that fact. We have concluded, therefore, that defendant's amendment of her prayer and consent to the judgment were made to obtain alimony to which she would not otherwise have been entitled, and that she was persuaded to make that decision,

not because of any prejudice or misconduct of the court, but because she had failed to establish her case.

Defendant relies upon the rule that an appellate court will not go behind the findings of fact in an effort to determine the trial court's true views on the evidence. Manifestly that rule can have no application to a situation where it is clear that the findings were entered solely to support what was in effect a consent judgment.

Defendant also points to the statement in the Whelan affidavit that the judge remarked that there was "enough evidence to justify him in granting a divorce to either party." This is a fair comment on the evidence from the standpoint of an attack by appeal, for the conflicting testimony of plaintiff and defendant made the decision on the facts depend largely upon the credibility of the witnesses. The judge's purpose in making this observation appears to have been to point out to counsel that if his suggestion were not followed and plaintiff were granted a divorce, defendant would probably be unsuccessful on appeal, but that if, by agreement, the divorce were given to defendant, it would have every appearance of evidentiary support. In our opinion this was an accurate description of the legal situation and was rendered with a view to assisting defendant in making her decision.

It is apparent from the proposal made by the trial judge, and from his other comments, that he believed a divorce was the only satisfactory solution to the problems presented in the marital tragedy that confronted him. His statement that "it was clear to him from all the evidence that he had heard and read in the case, that the legitimate objects of matrimony had been destroyed" is conclusively supported by the record. The evidence shows that the marriage of the parties began with mutual affection and happiness, but that arguments and misunderstandings, largely over financial matters, became increasingly frequent and acrimonious. The physical health of both parties has become seriously impaired. Family, social, and even business relationships have been disrupted. No prospects of reconciliation remain—the final separa-

tion followed earnest efforts to overcome differences and live peacefully together. Since the filing of the complaint the activities of the parties have degenerated into a legal battle, characterized by extravagant and embittering charges, and in which the only remaining consideration of importance is money. We cannot ignore the important "social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down." *Blunt v. Blunt*, [1943] A.C. 517, 525 (H.L.), 169 L.T.R. 33, 34; *Hill v. Hill*, 23 Cal.2d 82, 93, 142 P.2d 417.

The authorities cited by defendant are not inconsistent with the result here reached. In *Webber v. Webber*, 33 Cal.2d 153, 199 P.2d 934, where the wife sought and was granted a divorce, part of her case was unquestionably prejudged. The trial court announced, before any of the wife's evidence was presented, that "anybody can get a job now * * * men or women" and that he would not consider an award of alimony. Her attorney introduced evidence of her physical condition and living expenses, but the judge several times declared it was "a waste of time." Early in the trial, when the husband offered to withdraw his cross-complaint if the wife would waive alimony, the judge stated that her waiver would be unnecessary because "the Court will waive it himself." The husband rested without presenting evidence. This court reviewed the wife's case, including the fact that the parties had been married many years and that the wife was beyond middle age and without experience other than as housewife and mother, and it was concluded that the evidence would have supported an award of alimony and that the wife was therefore prejudiced by the court's refusal to consider her claim.

In *Del Ruth v. Del Ruth*, 75 Cal.App.2d 638, 171 P.2d 34, the trial court refused to consider many of the material allegations made by each party and at the outset limited the proof of cruelty to the two or three years immediately preceding separation, although the parties had been married over twenty years. Also, at one point in the trial, the judge called the wife to his chambers and expressed reluctance to grant sep-

arate maintenance; no attorneys were present at this conference and the affidavits regarding the details of what took place do not appear in the opinion. The trial court ultimately gave a divorce to the husband on the basis of the wife's cruelty but nevertheless awarded her three-fourths of the community property. In reversing the judgment, the appellate court expressly refused to speculate whether or not the judge might have allowed his opposition to separate maintenance to color his judgment; his remarks regarding separate maintenance were referred to solely in connection with the question whether or not the wholesale exclusion of issues had been prejudicial error. As in the Webber case, there was no suggestion of consent to the judgment.

In *Wuest v. Wuest*, 53 Cal.App.2d 339, 127 P.2d 934, the wife brought an action in equity to modify a property stipulation that had been made a part of an earlier divorce decree. She alleged that she had agreed to the stipulation but that in other respects her attorney had exceeded his authority in waiving her rights and that she was not advised of the legal effect of her consent. She also alleged that she had proved a cause of action for divorce on the ground of her husband's physical cruelty and that when she agreed to the stipulation, she was sick in mind and body as a result of his beatings and the court's enforced psychiatric examinations. She further alleged that the trial court had threatened to deny the divorce, so that she would have been forced to return to her husband, unless she consented to the stipulation. For purposes of demurrer these allegations were assumed to be true, and the appellate court held a cause of action in equity had been stated.³ The facts alleged in the *Wuest* case are markedly different from those now before us. Here, defendant's attorney did not exceed his authority, nor had defendant established a cause of action entitling her to a divorce. It is true that defendant's affidavit alleges

that she was "harassed, nervous, upset and distraught," but she has pointed to no persuasive evidence that she was not mentally qualified to make her decision. In the *Wuest* case the wife's mental condition was recognized as doubtful even during the trial; here there appears at most to have been only the nervousness that many litigants feel while in court. Moreover, both the trial judge and defendant's counsel advised her concerning the legal effect of her consent.

In *Rosenfield v. Vosper*, 45 Cal.App.2d 365, 114 P.2d 29, it was held that the trial judge acted improperly in stating during settlement discussions that a particular amount appeared reasonable and in urging the defendant to settle at that figure. The defendant refused, and the judge later decided the case on the basis of a much higher amount. The appellate court was impressed by the fact that after the judge's comments the plaintiff amended his prayer; the amount ultimately allowed by the judge exceeded what was originally asked by the plaintiff. The opinion of the dissenting judge shows, furthermore, that even under those circumstances the court had difficulty in deciding whether or not the judge had acted improperly.

Each of the cited cases in which trial judges have been found guilty of misconduct, see also *Pratt v. Pratt*, 141 Cal. 247, 74 P. 742; *Bell v. U. S.*, 9 Cir., 9 F.2d 820 has differed substantially from the others; none of them can be a controlling precedent in a new situation in which new fact questions are presented. Differences in the nature of the litigation, the particular comments or conduct of the trial judge, the scope and reliability of affidavits by parties and attorneys, and the state of the evidence at the trial make it essential that each case turn upon its own facts.

Defendant's second major contention relates to an independent claim that a deed executed by her granting to plaintiff her interest in the family home in Santa Monica

3. After a trial, in which it was found that all the wife's allegations were true, a judgment modifying the property agreement was affirmed on a second appeal. 72 Cal. App.2d 101, 164 P.2d 32. The appellate

court observed that it could not "enthusiastically agree" that the evidence of fraud preponderated in the wife's favor, but that there was "substantial" evidence to support the findings.

was obtained through undue influence. She contends that under no theory of the evidence could the trial court decree the deed to be valid; if this contention is sound, it was error for the judge to advise her, at the time he suggested that she amend her prayer, that he had decided to award the house to plaintiff. Defendant concedes that if there were conflicting evidence on this issue, the court might properly have ruled in plaintiff's favor, and she also states that "it may be" that on the issue of actual fraud the evidence was in conflict. She argues, however, that even the testimony of plaintiff himself raises a presumption that the deed was obtained by undue influence, see Civil Code, §§ 158, 2235, and was therefore a constructive fraud.

The house in question was purchased with plaintiff's separate funds, but title was taken in the names of plaintiff and defendant as joint tenants. According to plaintiff's testimony, defendant complained insistently about plaintiff's financial affairs and urged him to exercise invasion rights in certain trusts into which he and his father had deposited funds. Plaintiff was satisfied with these trusts, however, and with the research work of the institute for whose benefit they had been established. He therefore refused defendant's demands that he transfer several hundred thousand dollars to the joint bank account of the parties. From time to time quarrels occurred regarding these financial matters. There were other quarrels over furs and jewelry, and on several occasions he acceded to her wishes and purchased them for her.

Plaintiff further testified that defendant eventually sought to dispel the impression that she was a "gold-digger." On one occasion she proposed to leave him, and on her own initiative she wrote and signed a paper giving back to him the house and the furs and jewelry, and waiving any right to support; this document was introduced at the trial. Plaintiff refused this offer and regarded it as but an incident of a quarrel. Later, however, after further arguments on the same subject, defendant again offered to deed him the home and on this occasion he accepted; but defendant then refused to sign the deed. By this time plaintiff was

genuinely apprehensive concerning defendant's interest in his finances.

At this juncture, the parties had their first separation, and shortly thereafter plaintiff went to New York to attend a meeting of the American Economic Association. Defendant followed, and they met at the home of her sister, Mrs. Green. A discussion of their future ensued, and, as evidence of her good faith in financial matters, defendant again proposed to deed her interest in the home to plaintiff. Plaintiff mailed the deed to her the next day, and she executed it without again consulting with him; it was acknowledged before a notary and in the presence of Mrs. Green. At the next meeting of the parties, defendant delivered it to plaintiff. Plaintiff then returned to California, and it was agreed that he would send for her if he should decide that another attempt to live together might be successful. According to plaintiff, defendant stated that she too desired at least a temporary separation, and she admitted that she had been at fault and that plaintiff had grounds for divorce. A few weeks later defendant suddenly returned to California, declaring that she had cancer. Although plaintiff had not yet come to a conclusion regarding a reconciliation and was in doubt concerning the genuineness of her claim that she had cancer, he admitted her to the house and they lived together several additional months before their final separation.

[3-5] The evidence supports the trial court's conclusion that the deed was the voluntary and deliberate act of defendant, taken with full knowledge of the legal results involved, and that plaintiff did not use his position as her husband to obtain the conveyance. It is true, as defendant contends, that when a husband secures a property advantage from his wife, the burden is cast upon him to show that there has been no undue influence. Civil Code, §§ 158, 2235; *Bryson v. Byrer*, 87 Cal.App. 320, 323, 262 P. 461; *Combs v. Combs*, 75 Cal.App.2d 903, 904, 171 P.2d 949; *Jorgenson v. Pardee*, Cal.App., 224 P.2d 884; see *Estate of Cover*, 188 Cal. 133, 143-144, 204 P. 583. It is also true, however, that whether or not the spouse gaining such an

advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence. *Brown v. Canadian Industrial Alcohol Co.*, 209 Cal. 596, 599, 289 P. 613; *Taylor v. Taylor*, 66 Cal.App.2d 390, 396-397, 152 P.2d 480; *Combs v. Combs*, supra, 75 Cal.App.2d 903, 904-905, 171 P.2d 949.

In only one of the many cases cited by defendant was the trial court's finding that there was no undue influence reversed. *Gaines v. California Trust Co.*, 48 Cal.App.2d 709, 121 P.2d 28. There it was proved that the wife had lived harmoniously with her husband for many years, had complete trust and confidence in him, and was accustomed to signing whatever legal papers he submitted to her without questioning or even reading them. One day he showed her his will and told her to sign it; when she asked why her signature was necessary, he said, "Edith, I am in a hurry. Sign this will." She immediately signed the document without examining it or having it read or explained to her and in ignorance of the fact that it contained a waiver of her community property rights and an election to take under the will a much smaller estate. There was no consideration for this act for her husband had no separate property to which she thereby obtained any rights. She was not informed of the effect of her signature until after his death, and at all times she was unfamiliar with legal and business matters and did not even know that her husband would leave a substantial estate. All of these facts were affirmatively established at the trial, and most of them were incorporated in the trial court's findings. It was held that under such circumstances the presumption of undue influence had not been overcome.

The facts in the present case are materially different. Defendant was not accustomed to relying on plaintiff's judgment in business affairs but was continually seeking to interfere in decisions concerning even his separate property. The deed was signed and delivered at a time when the parties were discussing their separation and a possible divorce, so that defendant was aware

that her interests and those of her husband were in conflict. She had ample opportunity to obtain independent advice, and the evidence shows that her sister, who admittedly had advised her about her relations with plaintiff and who has since advised her in this lawsuit, was with her when the deed was acknowledged, see *Brown v. Canadian Industrial Alcohol Co.*, 209 Cal. 596, 599, 289 P. 613; the deed was executed during a three-day period in which plaintiff did not see defendant. Defendant fully understood the nature and legal effect of the step she was taking, and in fact it was she who proposed it.

Defendant contends that the evidence conclusively shows that her deed was improperly exacted by plaintiff as a condition to reconciliation. There is evidence which, if believed by the trial court, would support such a conclusion, for during the period when defendant executed the deed, the parties extensively discussed their separation and plaintiff agreed to reconsider his decision to seek a divorce. That evidence does not compel the conclusion that plaintiff improperly refused a reconciliation, however, in view of the fact that there was other evidence that defendant had been to blame for the marital discord, see *Taylor v. Taylor*, 66 Cal.App.2d 390, 395, 398, 152 P.2d 480; *Young v. Cockman*, 182 Md. 246, 253, 34 A.2d 428, 432, 149 A. L.R. 1006, that she admitted her fault, that she herself desired at least a temporary separation, cf. Civil Code, § 159, that she offered on her own initiative to execute the deed, that plaintiff had paid for the house, and that the parties had always regarded it as his. Although defendant's apparent contrition and promises of reform, together with her renunciation of any technical claim to property thought of as plaintiff's, may well have led to his belief that a divorce might be unnecessary, nevertheless he made it clear that his consent to reconciliation would depend solely upon whether or not he should ultimately feel, after a period of rest and meditation, that a harmonious life with defendant was possible. There was ample evidence to justify the conclusion that any pressure on defendant to execute the deed was the result of

her past conduct and not undue influence by plaintiff. Plaintiff did not demand the deed as a condition of his reconsideration; rather defendant voluntarily offered it as evidence of the sincerity of her promises to reform.

Finally, it is urged that the trial court's award of the house to plaintiff is inconsistent with the award of the furs and jewelry to defendant. Defendant testified that she executed and delivered the deed to the house but did not deliver or agree to deliver the furs and jewels. Moreover, plaintiff's statement that defendant made a "gift" of the furs and jewels was largely a legal conclusion based upon evidentiary details relating to donative intent, delivery, and acceptance; on the extensive evidence that was introduced on this issue, the trial court may well have reached a contrary conclusion. The differing circumstances under which plaintiff had originally made these gifts to defendant were also relevant to the claim that plaintiff's later conduct was unconscientious; there was evidence that although the house was in joint tenancy it was regarded as plaintiff's property, whereas the furs and jewels were given to defendant for her use and usually on special occasions such as wedding anniversaries.

In addition to her appeal from the judgment, defendant has appealed from orders denying counsel fees and costs for the new trial motion and for appeal.

It is not disputed that plaintiff is able to pay for the reasonable value of the services rendered by defendant's present attorneys, nor is it denied that defendant is without funds. Plaintiff claims, however, that defendant's attack upon the judgment has not been made in good faith.

[6-11] It is elementary that the right to counsel fees on appeal is not dependent on proof that the judgment is erroneous. *Gay v. Gay*, 146 Cal. 237, 240, 79 P. 885. Our affirmance of the judgment, therefore, does not necessarily require an affirmance of the orders denying such fees. For the same reason, defendant's consent to the judgment does not bar her right to seek attorney fees, for the principal issue on appeal is whether or not that consent was

coerced. The essential question is whether or not defendant prosecuted the appeal in the belief, held in good faith, that she had reasonable grounds for seeking a reversal. Affidavits of her attorneys were submitted stating that they had carefully examined the record and the pertinent legal authorities and that they believed, and therefore had advised defendant, that the appeal involved meritorious grounds of contest and offered substantial hope of success. At the hearing on the motion, the sincerity of these affidavits was expressly conceded. The question of counsel fees is addressed to the sound discretion of the trial court. *Kellett v. Kellett*, 2 Cal.2d 45, 48-50, 39 P.2d 203. In rare instances, however, an order denying fees will be reversed where it is shown that the appeal presents "debatable questions which were not without substantial merit or controversy." *Norris v. Norris*, 50 Cal.App.2d 726, 735, 123 P.2d 847, 852. We believe this to be such a case.

Plaintiff contends that the allowance of \$6,000 to defendant's trial attorney included compensation for a motion for new trial. The trial court believed, however, that a final agreement in the case had been reached and therefore did not contemplate that such a motion would be made. In determining the amounts that should be awarded for services of counsel, the trial court will take into consideration the fact that the preparation for appeal necessarily duplicated much of the preparation for the new trial motion and was performed by the same attorneys.

The judgment is affirmed. The stay of execution is discharged and the petition for supersedeas is dismissed. The orders denying counsel fees and costs for the new trial motion and for appeal are reversed, and the trial court is directed to allow reasonable sums therefor.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the affirmance of the judgment but on the entire record would also affirm all orders from which appeal is taken.

106 Cal.App.2d 720

TRINGALI v. VEST.

Civ. 14735.

District Court of Appeal, First District,
Division 1, California.

Oct. 11, 1951.

S. Tringali, doing business as Monterey Fish Company, sued Gerald Vest, doing business as Jerry's Bass Bait & Tackle Shop, for the balances due on a mutual, open and current account and on an account stated for fish sold and delivered by plaintiff to defendant. From an order of the Superior Court of Monterey County, H. G. Jorgensen, J., denying defendant's motion for a change of venue to the county of his residence, he appealed. The District Court of Appeal, Peters, P. J., held that the motion should have been granted, where the count of the complaint on the account stated failed to allege where the account was stated, though the count on the open account alleged sufficient facts to warrant bringing the action in Monterey County.

Order reversed.

1. Venue ⇐16½

Where second count of complaint, stating cause of action for balance due on account stated, failed to allege where account was stated, defendant's motion for change of venue to county of his residence should have been granted, though first count, stating cause of action for balance due on mutual, open and current account, alleged sufficient facts to warrant bringing action in county wherein complaint was filed. Code Civ.Proc. § 395.

2. Venue ⇐16½

A change of venue, to which defendant is entitled on one of two or more causes of action alleged in complaint, must be granted, regardless of how many other causes of action, in which defendant is not entitled to change of venue, are set forth.

3. Pleading ⇐45

Allegations of one paragraph in count of complaint for balance due on account stated that items of such account represented sales of fish, contracted for by defendant and sold and delivered to and agreed to be paid for by him at plaintiff's

place of business in county wherein action was brought, were insufficient to supply deficiency in failure of preceding paragraph to allege where account was stated, as required to defeat defendant's right to change of venue to county of his residence. Code Civ.Proc. § 395.

4. Account Stated ⇐5

To constitute "account stated", there must be not only a showing that a statement of account was sent to debtor, but admission of correctness thereof by debtor, either directly or by acquiescence.

See publication Words and Phrases, for other judicial constructions and definitions of "Account Stated".

5. Account Stated ⇐7

An account stated alters nature of original indebtedness and is itself in nature of new promise or undertaking.

6. Account Stated ⇐14

Venue ⇐7

An action on account stated is not founded on original items of account, but on balance ascertained by parties' mutual consent, so that, as complaint pleads new contract, court may not look to old contract for venue purposes. Code Civ.Proc. § 395.

7. Account Stated ⇐7

While there must be pre-existing indebtedness to constitute account stated, since such indebtedness constitutes consideration on which new contract is based, account stated is new contract which supercedes original contract.

8. Account Stated ⇐7

An account stated cannot create a liability where none existed before.

9. Venue ⇐66

In action for balance due on account stated for fish sold and delivered by plaintiff to defendant, defendant's affidavit that no fish were sold or delivered to him at plaintiff's offices in county of venue, but that all sales and deliveries were made at defendant's place of business in county of his residence, that he never agreed to pay plaintiff any sums or contracted with plaintiff in county of venue, and that obligation, if any, to pay for fish, arose in county

of defendant's residence, was sufficient to support defendant's motion for change of venue to such county as alleging ultimate facts, not conclusions. Code Civ.Proc. § 395.

Ralph Leon Isaacs and Ivores R. Dains, San Francisco, for appellant.

Hudson, Martin, Ferrante & Street and Charles R. Barrett, all of Monterey, for respondent.

PETERS, Presiding Justice.

Plaintiff filed a complaint against defendant in Monterey County. The complaint alleges that plaintiff has its offices in Monterey County, and that defendant is engaged in business in San Francisco, and sets forth two causes of action, one for a balance due upon a mutual, open and current account, the other for a balance due upon an account stated. Defendant moved for a change of venue to San Francisco, the county of his residence. The motion was denied, and defendant appeals.

[1,2] The motion for a change of venue should have been granted. The first cause of action properly alleges a cause of action arising in Monterey County for the balance due upon a mutual, open and current account. The second count for the balance due upon an account stated fails to allege that the account was stated in Monterey County. In fact, this count fails to allege where the claimed account was stated.

We are concerned only with this second cause of action. The fact that the first cause alleges sufficient facts to warrant bringing the action in Monterey County is immaterial. If on one of the causes of action alleged the defendant is entitled to a change of venue, such change must be granted regardless of how many other causes of action are set forth in which defendant is not entitled to a change. *Goossen v. Clifton*, 75 Cal.App.2d 44, 170 P.2d 104; *Crofts & Anderson v. Johnson*, 101 Cal.App.2d 418, 225 P.2d 594. This principle of law is not challenged by the parties.

[3,4] The second count alleges in Paragraph II: "That within the four (4) years

last past, and prior to the commencement of this action, defendant became indebted to the plaintiff on a balance of account for fish before that time sold and delivered in the sum of \$2,529.37; and that defendant being so indebted as aforesaid, there was an account stated between plaintiff and defendant on or about February 17, 1950, upon which statement a balance was found to be due plaintiff from defendant in the sum of \$2,529.37."

This is the key allegation. It will be noted that it fails to allege where the account was stated. It was apparently the thought of the trial judge and the pleader that this deficiency was cured by the allegations of Paragraph III of the second count. It is there alleged "That the items of the account referred to in Paragraph II above represent sales of fish and fish products by plaintiff to defendant; that said sales [were] contracted for orally and expressly and also impliedly by defendant at the offices of the Monterey Fish Company in Monterey County, California; that said fish were sold and delivered and payment therefor was to be made at the offices and place of business of the said Monterey Fish Company located in Monterey County. * * *

Attached to the complaint, as Exhibit A, is a statement setting out in detail the charges and credits between the parties showing the balance prayed for in the complaint, but this exhibit is not made a part of the second cause of action.

The applicable venue section is section 395 of the Code of Civil Procedure. So far as pertinent here, it provides: "(1) In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commence-

ment of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *

As already pointed out, in the second count of the complaint the plaintiff has failed to allege where the account was stated. It is true that in Paragraph III of that count he refers to the contract underlying the account stated, but those allegations are not sufficient to supply the deficiency. This was the precise holding in *Crofts & Anderson v. Johnson*, 101 Cal.App.2d 418, 225 P.2d 594. In that case the court stated 101 Cal.App.2d at page 421, 225 P.2d at page 596:

"Moreover, to constitute an account stated there must be something more than a showing that a statement setting forth the account is sent the debtor. There must be an admission of the correctness of that account by the debtor either directly or by acquiescence. So far as the evidence to date is concerned, there is no showing that defendant admitted the account in either way. So, there is no evidence before the court as to where, if at all, the account actually was stated. Therefore, the court could not determine that as to the account stated Alameda County was the county in which the contract was made or was to be performed. Code Civ.Proc § 395. * * *

[5,6] "Plaintiff contends that the contract to be considered here is the original one, that is, the order for goods, wares and merchandise, given the salesman to be accepted and actually accepted at Hayward. Defendant has not denied these facts. This contention, however, overlooks the fact that "An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking. * * * An action on an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties." *Hallford v. Baird*, 27 Cal.App.2d 384, 389, 80 P.2d 1040, 1042.

"Thus, as there is a new contract pleaded in the complaint, the court may not, for venue purposes, look to the old contract.

[7,8] "While it is true that to constitute an account stated there must have been a preexisting indebtedness " * * * since such indebtedness constitutes the consideration upon which the new contract is based", *Block v. D. W. Nicholson Corp.*, 77 Cal.App.2d 739, 746, 176 P.2d 739, 744, the account stated is a *new* contract. 'An account stated constitutes a new contract which supersedes the original contract.' *Jones v. Wilton*, 10 Cal.2d 493, 498, 75 P.2d 593, 595. In *Swim v. Juhl*, 72 Cal. App. 363, 237 P. 552, cited by plaintiff it was held that an account stated could not be based upon a prior indebtedness which was void because of the statute of frauds. This was merely applying the well settled rule that an account stated cannot create a liability where none existed before. *Slaughter v. Meroff*, 93 Cal.App.2d 146, 208 P.2d 712, cited by plaintiff, is so fragmentary as to facts as to be of no value here. The question we are considering was not discussed, nor can it be determined whether or not the account was stated in the county of the defendant's residence. The fact that the court must, in an action on an account stated, inquire into the antecedent facts to determine whether there was a pre-existing liability in no way changes the fact that, if an account is stated on that pre-existing liability, the stating of such account is not the old contract but a new one."

This holding is decisive here, and compels a reversal. It should be mentioned that the order denying the motion for the change of venue was made in August, 1950, and the *Crofts & Anderson* case was not decided until December of 1950, so that the pleader and the trial court did not have the benefit of that decision at the time the pleading was drafted or the motion passed upon.

[9] Respondent attacks as being fatally defective the affidavit filed by Vest in support of his motion for change of venue on

the ground that it contains nothing more than opinions and conclusions of law. This attack is not justified. The affidavit avers that defendant is a resident of San Francisco; that "if any cause of action exists in this cause against defendant, the same arose in the City and County of San Francisco, State of California; * * * that no part of any of the fish or fish products alleged to have been sold and delivered by plaintiff to defendant were ever sold and delivered or sold or delivered to defendant at the offices of the Monterey Fish Company, * * * but in this regard affiant further states that all sales and all deliveries of fish and fish products, if any, were made by plaintiff to defendant at defendant's place of business * * * San Francisco"; that affiant "never at any time agreed to pay to plaintiff at their offices or place of business in Monterey County, California, the sum of \$2,529.37 or any sum or sums whatsoever" that affiant "never entered into any contract with plaintiff in the County of Monterey, State of California, for the sale, purchase or delivery of fish or fish products * * * alleged in" the complaint; that affiant "never agreed to perform the obligations sued upon" in Monterey County; that if any obligation to pay was incurred, such obligation arose in San Francisco, where the delivery and sale of the products were made; and that affiant has never made a special contract in writing with plaintiff to perform or pay the obligation sued upon. No counter-affidavit was filed by plaintiff.

This affidavit is sufficient. The basic allegations are of ultimate facts and not of conclusions. This is all that is required. *Hagan v. Gilbert*, 83 Cal.App.2d 570, 189 P.2d 548. The affidavit here is substantially similar to that filed in the *Goossen* case, and that affidavit was held to be sufficient. *Goossen v. Clifton*, 75 Cal.App.2d at page 46, 170 P.2d 104.

The order denying the motion for change of venue to the City and County of San Francisco is reversed.

BRAY and FRED B. WOOD, JJ., concur.

ACE REALTY CO. v. FRIEDMAN et al.
Civ. 18471.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Action by the Ace Realty Co., a California corporation, against Harry H. Friedman, and others to recover rent and recover for damages to leased equipment. The defendants filed a counterclaim to recover a sum paid as deposit for security. The Superior Court of Los Angeles County, Raymond McIntosh, J., rendered judgment for the defendants on their cross-complaint and the plaintiff appealed. The District Court of Appeal, Drapau, J., held that where the defendants made a deposit as security for the performance of the lease, upon the breach by the tenants, the tenants were entitled to recover the balance of the deposit after deduction of the rental found to be due the landlord.

Judgment affirmed as modified.

1. Evidence ⇨588

Testimony which is inherently improbable may be disregarded, but to warrant such action there must exist either a physical impossibility of evidence being true or its falsity must be apparent without any resort to inferences or deductions.

2. Landlord and Tenant ⇨184(1)

In action to recover rent and damage to leased equipment wherein the defendants filed a cross-complaint for recovery of sum paid as security of lease, the evidence presented a question for jury whether the defendants had made a substantial payment to the landlord, even though this payment was not mentioned in lease.

3. Evidence ⇨417(7)

Landlord and Tenant ⇨184(1)

In action to recover rent, wherein tenants filed a cross-complaint to recover a sum paid to landlord to secure landlord against damage for failure to abide by terms of lease, where such prepayment was not included as part of terms of lease, but lease did contain fact that a certain sum was paid for the consideration of signing the lease, evidence of oral payment was admissible, since it was not at variance with

terms of lease but was consistent with allegations of cross-complaint and was a matter directly related to express subject matter of written instrument and not embodied therein.

4. Evidence ⇨443(1)

One of the exceptions to the general rule excluding extrinsic evidence as varying or adding to terms of a written instrument permits proof of execution and existence of an oral agreement collateral to and executed contemporaneously with written instrument, covering and controlling a material matter agreed to by the parties, distinct from but closely related to express subject matter of written instrument and not embodied therein.

5. Evidence ⇨442(1)

Evidence of a contemporaneous oral agreement as to any matter upon which the instrument is silent and which is not inconsistent with its terms, cannot be said to contradict or vary terms of written instrument.

6. Frauds, Statute of ⇨144

Where at time of negotiation of lease the landlord's agent refused to permit that any mention be made in the lease of a down payment made by the tenant, landlord could not assert statute of frauds in order to prohibit proof that down payment was made.

7. Landlord and Tenant ⇨184(2)

An agreement which contemplates deposit of a fund as security for performance of a lease is valid and enforceable.

8. Landlord and Tenant ⇨184(2), 214

Where there is an absolute payment of rent in advance for some portion of term, or where there is a payment of a certain sum as a bonus or consideration for execution of lease, lessor may retain it upon termination, but if it is a deposit as security for performance of terms of lease it is treated as a provision for penalty and lessor cannot keep sum upon lessee's breach.

9. Landlord and Tenant ⇨184(2)

Where a deposit was given as security for performance of lease, upon breach of lease the lessees were entitled to recover balance of deposit after deductions of rentals found to be due landlord.

10. Landlord and Tenant ⇨184(2)

Where tenants gave a certain sum to landlord as consideration for lease, upon tenants' default landlord was entitled to retain amount and amount could not be used to be applied on rent due.

11. Landlord and Tenant ⇨231(8)

In action to recover rent, evidence sustained findings of trial court that premises were surrendered to landlord, that landlord relet the premises on its own account and not for benefit of tenants, and that landlord never notified tenants that such reletting was on their account or that they should be held responsible for any losses sustained by landlord as result of such reletting.

12. Bailment ⇨31(3)

In action to recover rent and for damages to leased equipment, the evidence sustained finding of trial court that no damage was done to leased property.

Allen J. Greenberg, A. E. Coppleman, Los Angeles (Sam Bubrick, Los Angeles, of counsel), for appellant.

J. George Bragin, Hollywood, for respondents.

DRAPEAU, Justice.

On October 2, 1946, the plaintiff by instrument in writing leased certain premises to defendants for use as a meat market. This lease ran for two years and provided for a monthly rental of \$260; receipt of the first month's rent being duly acknowledged therein. Defendants failed to pay the installments of rent due on November 3, 1946, to and including April 3, 1947, amounting to the sum of \$1,560; and on April 26, 1947, they surrendered the premises. Plaintiff rerented the store to third parties from May 1, 1947 to May 1, 1948. On the last named date the premises were taken over by the State of California under condemnation proceedings.

The new lessees paid \$200 per month instead of \$260 or \$720 less than the lease with defendants called for.

By this action, plaintiff seeks to recover such \$720; the \$1,560 on account of unpaid

rentals; and \$1,000 for alleged damages to a meat cooler; a total of \$3,280, together with attorney's fees for \$250 and costs.

Defendants by their answer and cross-complaint alleged that simultaneously with the execution of the lease they paid plaintiff the sum of \$6,000 in cash as security "against any possible damages which it might sustain by reason of the cross-complainant's failing to abide by the terms of the aforesaid lease." It was further alleged that defendants also turned over to the plaintiff \$520 "as and for consideration of the signing of the aforementioned lease."

Defendants admitted that the \$1,560 for rental of the property had not been paid, but that plaintiff had reimbursed itself therefor out of the said \$6,520 which it had received from them, leaving a balance of \$4,960 for which sum defendants prayed a judgment against the plaintiff.

The trial court found in favor of defendants on their cross-complaint, to-wit: that the premises were rented by plaintiff on its own account and not for defendants' account; that no loss was sustained by reason of any damage to the meat cooler; that defendants gave to plaintiff the sum of \$6,000 in cash to secure plaintiff against any possible damage it might sustain by reason of defendants' failure to abide by the terms of the lease; that in addition thereto, defendants paid plaintiff \$520 as and for consideration of the signing of the lease, which \$520 was to apply to the last two months rent of said premises. Further that defendants failed to pay \$1,560 in rentals, but that after plaintiff had reimbursed itself therefor out of the \$6,520, there remained a balance due and owing to defendants of \$4,960.

From the judgment which followed, plaintiff appeals.

It is here contended as follows:

(1) The evidence was insufficient to support the findings or the judgment on respondents' cross-complaint;

(2) It was error for the court to admit oral evidence of the alleged payment by respondents;

(3) The dismissal of appellant's first cause of action was predicated on errors

of law and was not supported by the evidence;

(4) The evidence is insufficient to sustain the court's finding that no damage had been done to appellant's property.

In negotiating the lease of the premises at 821 North Figueroa Street, Mr. Felix Napolitano represented appellant corporation as its president. He had known Mr. Eddie Berger for a long time and through him had met his cousin, Mr. Harry Berger. The Bergers ran the Olympic Meat Market. Sometime in September of 1946, Mr. Napolitano, the Bergers and the respondents Mintzer, Friedman and Feldman met at the Figueroa Street store. The respondents had recently arrived in Los Angeles from Washington, D. C., and were eager to get established and to bring their families to their new home. Respondents and Mr. Harry Berger were all brothers-in-law. Both Harry and Eddie Berger offered "to show us the ropes" and help them to get started in the meat business. When the six men met on October 2, 1946, the terms of the lease were discussed and a rental of \$260 per month was agreed upon. At the same meeting, Mr. Napolitano stated: "Fellows, I want \$8,000 as security for the lease and fixtures, and I don't want anything in writing, and it has to be all cash." After some discussion, respondents offered him \$5,000 which he refused, saying it was not enough because they were inexperienced in the business and he had a lot of equipment in the store. Respondents then agreed to give him \$6,000, and Mr. Napolitano repeated that it was to be in cash; nothing in writing. Respondents did not have cash and Mr. Napolitano refused to take their checks. So Mr. Eddie Berger said, "If you want the cash, I'll cash the checks for them and give you the cash." The group then drove over to the Olympic Meat Market where checks aggregating \$6,000 were drawn on Washington banks to the order of "cash" and given to Mr. Eddie Berger.

Two of these checks were introduced in evidence at the trial. With respect to the third, Mr. Friedman testified that he gave Mr. Berger a check for \$2,000 drawn to the order of cash on the City Bank of

Washington, D. C., at the time in question; that he had attempted to locate the cancelled check, but apparently his wife had mislaid it at the time they moved from Washington to Los Angeles.

It was also testified that when the checks were given, Mr. Napolitano assured respondents that the \$6,000 would be returned to them at the end of the term, or before that if the building was condemned at an earlier date.

On the next morning, October 3, 1946, respondents and Mr. Napolitano executed the lease. At that time, in answer to respondent Mintzer's question: "Felix, did you get that money from Eddie Berger?" Mr. Napolitano said: "Yes, that's been taken care of."

While on the stand, Mr. Napolitano admitted that he received from respondents a check for \$780: \$260 for the first month's rent, and \$520 for the last two months' rent. He denied that he either asked for or ever received the \$6,000.

No mention of the \$6,000 is made in the lease. However, Mr. Feldman testified that respondents requested a clause be put in the lease showing payment of the \$6,000, but Mr. Napolitano told them that for reasons of his own he did not want it mentioned in the lease.

There is evidence in the record that during November, 1946, and also in the month of January, 1947, because business was very bad and they were losing money, respondents asked Mr. Napolitano to make an adjustment by taking out of the \$6,000 "whatever damages he considered fit, and return the money to us, the balance."

In connection with its first point, appellant urges that the testimony of respondents was inherently improbable and difficult to believe; and that they failed to prove payment by a preponderance of the evidence.

[1] As stated in *Hughes v. Quackenbush*, 1 Cal.App.2d 349, 354, 37 P.2d 99, 102: "Of course, testimony which is inherently improbable may be disregarded. *Nielson v. Houle*, 200 Cal. 726, 254 P. 891. But to warrant such action there must exist either a physical impossibility of the evidence being true or its falsity must be apparent,

without any resort to inferences or deductions. *Powell v. Powell*, 40 Cal.App. 155, 180 P. 346, 348; *Stahmer v. Stahmer*, 125 Cal.App. 132, 13 P.2d 833. As said in *Powell v. Powell*, supra:

"The appellate court will not indulge in lengthy and dubious computations, nor seek far for a reason, no matter how ingenious may be the argument by which it is urged, to determine that witnesses have committed perjury. It is its duty, if possible to harmonize apparent inconsistency in their statements, and to do this it will indulge in every reasonable presumption of fact."

Although the facts disclosed by the record are unusual, to say the least, they are not so improbable as to be unworthy of belief.

[2] On the question of payment, the testimony was in direct conflict. The trial court resolved this issue in favor of the respondents and it is not within the province of this court to interfere.

[3] Appellant's second point is an assertion of the general rule that the terms of a written contract may not be varied by parol. Specifically, it is argued, that since respondents' answer makes reference to the \$520 fund as "further security" and at one place in the findings the trial court refers to the sum of \$6,520 as security for the payment of rent under the lease, therefore the character of the \$520 fund was established as security, and evidence of the oral payment of \$6,000 was inadmissible as a variance of the terms of the lease.

However, the judgment herein is based on the cross-complaint, in which it is alleged that appellant (cross-defendant) received the \$6,000 "to secure itself against any possible damages which it might sustain by reason of the cross-complainants' failing to abide by the terms of the aforesaid lease; * * *

"That in addition to the aforementioned \$6,000.00 in cash * * * cross-complainants gave to the cross-defendant \$520.00 as and for consideration of the signing of the aforementioned lease."

The trial court found in accordance with such allegations, to-wit: that the \$6,000 was given and received as security for per-

formance of the terms of the lease, and that the \$520 was given "as and for consideration of the signing of the aforementioned lease, which \$520.00 was to apply to the last two months rent on the said premises."

Moreover, the lease itself provides: "12. In consideration of the signing of this lease, the lessees hereby pay to the lessor the sum of Five Hundred and twenty dollars (\$520.-00), and in the event that there is no breach of the terms and conditions of this lease by the said lessees during the term hereof, the lessees will pay to the lessor the sum of One Dollar (\$1.00) a month for the last two months of the term of the lease * *."

Since the trial court's specific findings with respect to the two sums of \$6,000 and \$520, are entirely in accord with the allegations of the cross-complaint, with the evidence produced at the trial, and with the terms of the lease, the inconsistent finding pointed out and relied upon by appellant becomes immaterial.

[4,5] The following excerpt from 10 Cal.Jur. 927, sec. 195, Evidence, appears applicable to the instant situation: "One of the exceptions to the general rule excluding extrinsic evidence as varying or adding to the terms of a written instrument permits proof of the execution and existence of an oral agreement collateral to and executed contemporaneously with the written instrument, covering and controlling a material matter agreed to by the parties, distinct from but closely related to the express subject matter of the written instrument and not embodied therein. Of course this exception applies to a written instrument which prima facie purports to embody the complete obligations of the parties, only where the circumstances attending its execution warrant the inference that the parties did not intend that it should be a complete and final statement of the whole transaction. The reason for the exception is said to be found in the fact that the exclusion of such evidence when relevant to the issues joined would operate to permit one party to take an unjust advantage of the other by receiving the benefits accruing to him under the contract without assuming the burdens imposed. Evidence of a contemporaneous

oral agreement as to any matter upon which the instrument is silent, and which is not inconsistent with its terms, cannot be said to contradict or vary the terms of the written instrument." See, *Dobbins v. Horsfall*, 58 Cal.App.2d 23, 29, 136 P.2d 35, and authorities there cited.

As heretofore pointed out, no place in the lease is the subject of security mentioned.

[6] Appellant also requests a consideration of the applicability of the statute of frauds to the oral agreement here in question. Suffice to say that it ill becomes appellant to suggest this point, in view of the testimony that Mr. Napolitano refused to permit that any mention of the \$6,000 payment be made in the lease. See *Kaye v. Melzer*, 87 Cal.App.2d 299, 306, 197 P.2d 50.

[7] An agreement which contemplates the deposit of a fund as security for performance of a lease is valid and enforceable. *Giddens v. Krogh*, 116 Cal.App. 416, 2 P.2d 821; *Walter H. Sullivan, Inc. v. Johnson*, 116 Cal.App. 591, 3 P.2d 72; *Depner v. Joseph Zukin Blouces*, 13 Cal.App.2d 124, 56 P.2d 574.

"The lessor is entitled to retain the deposited fund until complete discharge by the lessee of the obligations the performance of which the deposit is shown to have been intended to secure. The lessee having defaulted, the lessor becomes entitled to resort to the deposited money. He has a right to retain the sum, applying it as payment of the amounts due as rental, until the money has been exhausted. * * * The lessee, equally, has a right to have the fund applied to the payment of rental.

"The lease contract being terminated, the lessee has a right to the fund, less any amount that may be due and unpaid on account of rental. A right to have the deposited sum returned to him, accrues in the event of a surrender of the premises and acceptance by the lessor." 7 Cal.Jur.Supp., 1945 Rev., 529, sec. 141, and authorities there cited.

[8] "It is settled in California that where there is an absolute payment of rent in advance for some portion of the term, or where there is a payment of a certain sum as a 'bonus' or 'consideration' for the

execution of the lease, the lessor may retain it upon termination. See *A-1 Garage v. Lange Inv. Co.*, 6 Cal.App.2d 593, 44 P.2d 681. But if it is a deposit as security for the performance of the terms of the lease, it is treated as a provision for a penalty, and the lessor cannot keep the sum upon the lessee's breach. *Redmon v. Graham*, 211 Cal. 491, 295 P. 1031; [*Walter H.*] *Sullivan, Inc. v. Johnson*, 116 Cal.App. 591, 3 P.2d 72. These rules are established, and the only problem is one of application." *Bacciocco v. Curtis*, 12 Cal.2d 109, 114, 82 P.2d 385, 387.

[9] Accordingly, respondent lessees were entitled to recover the balance of the \$6,000 deposit given as security for the performance of the lease after deduction of the rentals found to be due to appellant lessor.

[10] As to the sum of \$520 which was given as consideration for the lease, and which the trial court applied to the last two months' rent on the premises, appellant lessor is entitled to retain this amount because of respondent lessees' default. *A-1 Garage v. Lange Inv. Co.*, supra, 6 Cal.App.2d 593, 596, 44 P.2d 681. This amount should not have been included in the security deposit.

It is next contended that the court erred in its dismissal of that portion of appellant's first cause of action seeking recovery of the difference between the rental provided under the lease and that received under the reletting.

[11] The court found that the premises were surrendered by respondents to appellant on or about April 26, 1947. Also, that appellant relet the store on or about May 1, 1947 on its own account and not for the benefit of respondents; further that ap-

pellant never notified respondents that such reletting was on their account or that they should be held responsible for any losses sustained by appellant as a result of said reletting. The evidence produced supports such findings.

In *Rehkopf v. Wirz*, 31 Cal.App. 695, 696, 161 P. 285, 286, cited in the later case of *De Hart v. Allen*, 49 Cal.App.2d 639, 645, 122 P.2d 273, it is stated: "Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. * * *

"But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant."

[12] It is finally urged that the evidence is insufficient to sustain the court's finding that no damage was done to the leased property, to-wit: the small meat cooler.

The testimony upon this issue was highly conflicting, therefore the trial court's finding is conclusive on appeal.

For the reasons stated, the judgment is modified by reducing it from \$4,960 to \$4,440, and as so modified, the judgment is affirmed. Respondents to recover their costs on appeal.

WHITE, P. J., and DORAN, J., concur.

106 Cal.App.2d 796

HERRIN et al. v. WHITE.

Civ. 18285.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Action by Mae Herrin and husband against Frank White for injuries sustained by wife when she fell in defendant's garage. The Superior Court, Los Angeles County, Walter S. Gates, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that it was the province of trial judge to draw the inference that defendant was or was not negligent, and that there was or was not contributory negligence on part of plaintiff and that facts of case did not bring it within any exception to substantial-evidence rule.

Affirmed.

1. Negligence ☞ 136(22, 27)

In action by automobile owner against garage owner for injuries sustained by former when, after driving her automobile into garage for repairs, she fell at a doorway, where there was a seven and one half inch step down which had board at top of step slightly above level of room she was leaving and which had two and one half inch iron pipe extending about three inches out of center of step, garage was well lighted and floors and step were clean, whether garage owner was negligent, and whether automobile owner was guilty of contributory negligence were questions for trier of facts.

2. Appeal and Error ☞ 1010(1)

Where automobile owner sustained injuries when, after driving her automobile into garage as she had done at various other times, she fell at a doorway where there was a seven and one half inch step down which had board at top of step slightly above level of room she was leaving and which had a two and one half inch iron pipe extending about three inches out of center of step, garage was well lighted and floors and step were clean, such facts did not bring case within any exception to substantial-evidence rule and judg-

ment for garage owner was required to be affirmed.

McNamee & Moran; and John Moran, all of Pomona, for appellants.

Crider, Runkle & Tilson, and Donald E. Ruppe, all of Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff, Mae Herrin, drove her automobile into a garage to have the windshield wipers fixed. At the direction of an employee, she put her car into a stall in the garage. She then proceeded on foot through a doorway to another part of the garage. She was on her way, first, to the office of the garage, and, secondly, to a nearby grocery store.

The doorway was in a partition which divided the garage into two parts. One part was seven and one half inches lower than the other. The step down was at the doorway, in the direction plaintiff was going. A board was placed at the top of the step, slightly above the level of the room from which plaintiff was walking. And a two and one half inch iron pipe extended approximately three inches out of and approximately in the center of the step. This pipe is shown on a photograph, plaintiff's exhibit 3. The garage was well lighted. The floors and the step were clean.

As plaintiff went through the doorway she fell and was seriously injured. At the time she had on bifocal glasses, and was wearing galoshes over her shoes. And she had been several times before in that part of the garage into which she fell. She didn't know what caused her to fall; she just fell.

Plaintiff sued for her injuries, and alleged negligence in the maintenance of the step, and particularly in the maintenance of the pipe there.

After hearing the evidence and viewing the premises, the trial judge found against plaintiff. The judge said, "I am satisfied that if we did find this defendant was negligent we would have to guess or speculate

as to the negligence, and I am satisfied that if the plaintiff had looked as she should have looked this would never have happened. There is no evidence here to show that this pipe caused the accident."

From the judgment which followed for defendant owner of the garage, plaintiff appeals.

[1] It was the province of the trial judge to draw the inference that the garage owner was or was not negligent, and that there was or was not contributory negligence on the part of the plaintiff. *McWane v. Hetherton*, 51 Cal.App.2d 508, 125 P.2d 85.

[2] The facts in this case do not bring it within any exception to the substantial-evidence rule. Under that rule the judgment must be, and is affirmed.

WHITE, P. J., and DORAN, J., concur.



106 Cal.App.2d 760

HANNA v. O'CONNOR et al.

Civ. 4262.

District Court of Appeal, Fourth District,
California.

Oct. 11, 1951.

Jack Hanna sued Robert Francis O'Connor and Ruth A. Shannon, also known as Ruth A. Nace, and others, to recover for injuries sustained when motorcycle on which plaintiff was riding ran into rear of automobile owned by Ruth A. Shannon and in possession of Robert Francis O'Connor. The husband of Ruth A. Shannon had given the keys to the automobile to one who had expressed interest in buying the automobile and that person had given the keys to Robert Francis O'Connor. The Superior Court, San Diego County, Joe L. Shell, J., sitting without jury, gave judgment to plaintiff, and Ruth A. Shannon appealed. The District Court of Appeal, Griffin, J., held, *inter alia*, that evidence supported findings that defendant O'Connor had been negligent and that he had been in pos-

session of the automobile with the consent of Ruth A. Shannon and was making such use of it as Ruth A. Shannon could have reasonably anticipated.

Affirmed.

1. Automobiles ⇨244(13, 56)

In action by passenger on motorcycle against owner of automobile to recover for injuries sustained when motorcycle ran into rear of automobile, evidence was sufficient to sustain findings that person in possession of automobile was guilty of negligence, and that passenger was not guilty of contributory negligence. Vehicle Code, §§ 514, 582.

2. Appeal and Error ⇨994(1), 995

It is not the function of District Court of Appeal to weigh evidence nor to determine credibility of witnesses. Code Civ. Proc. § 1847.

3. Appeal and Error ⇨930(1), 931(1)

The District Court of Appeal must accept as true all evidence tending to establish correctness of finding or verdict, and must consider evidence in the most favorable aspect toward the prevailing party and give that party the benefit of every inference that can reasonably be drawn in support of his claim.

4. Evidence ⇨594

Provided the trier of facts does not act arbitrarily he is authorized to reject the testimony of a witness in its entirety when convinced it is unworthy of belief, even though testimony of witness is uncontradicted.

5. Automobiles ⇨244(22)

In action by passenger on motorcycle against owner of automobile for injuries sustained when motorcycle ran into rear of automobile, evidence was sufficient to support findings that owner had given consent to person in possession of automobile to drive automobile on day and on occasion of accident and that such person was making such use of the automobile at time of accident as could have been reasonably contemplated by owner.

6. Appeal and Error ⇨1048(5)

In action, triable to court, by passenger on motorcycle against owner of auto-

mobile, which, at time of accident, was in possession of another who had obtained automobile from one who had expressed interest in buying the automobile and who had been given the key by husband of owner, where husband of owner denied statement by officer that husband had said that he had cancelled the insurance on the automobile, questions on cross-examination of owner as to whether or not she carried insurance, which were answered in the negative, related to questions of whether husband and owner had joint interest in automobile and its operation, and its maintenance and sale, and whether or not officer had testified truthfully, and overruling of objections to such questions was not prejudicial error.

Desser, Rau, Christensen & Hoffman, Los Angeles, by Wm. Christensen, Los Angeles, for appellant.

Nottbusch & Nottbusch, San Diego, by Frank H. Nottbusch, Jr., San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Jack Hanna obtained a non-jury judgment for \$5,000 against defendant and appellant Ruth A. Shannon, as a result of an accident arising out of a collision of a motorcycle (on which respondent was riding as a passenger) with the rear end of a car owned by appellant and which was being driven by defendant Robert Francis O'Connor. Appellant Ruth A. Shannon, prior to her marriage to Mr. Nace, owned an old Auburn automobile which remained registered in her maiden name. After her marriage she used it for her own purposes until about July 9, 1949, when she left it parked in front of her house where she resided with her husband. He had been in the business of constructing swimming pools. One of the defendants, Arthur Kalmus, according to his testimony, had been working on a swimming-pool paint. While in a paint store he met defendant O'Connor, whom he had known for several weeks. O'Connor was interested in becoming associated with Kalmus in the business of

painting swimming pools. Kalmus told O'Connor he was going over to see Nace about getting some work painting swimming pools. O'Connor asked to go along and they left in a Ford coupe to see about getting a lead on some of the people for whom Mr. Nace had built pools. After some discussion with Mr. Nace, Kalmus asked if the Auburn car was for sale. Mr. Nace informed him it belonged to his wife, who was ill in the house; that she had discussed its possible sale and that his wife wanted \$250 for it. Kalmus said if he could drive it home and have it inspected by his mechanic he might buy it to use in his business. Mr. Nace consented and stated he did not believe his wife would object. Kalmus stated he would call Mr. Nace the first thing Monday morning and let him know or he would return the car. Kalmus asked for the key. Nace produced his key-ring and, according to his story, Kalmus noticed a car key which appeared as though it would fit the specific car lock described by Kalmus. The gas tank was locked and no key was given to it. The car battery was low. It was necessary to start the car by shoving it. O'Connor drove the Ford and Kalmus drove the Auburn to his home. The mechanic came Sunday and examined the car. O'Connor was there talking with Kalmus about the paint. Kalmus informed him the mechanic recommended against its purchase. O'Connor suggested to Kalmus that he might purchase it and would take the car back to the Nace home and try to make financial arrangements with them for its purchase. Kalmus delivered the key to O'Connor with that understanding. This testimony is corroborated by the testimony of Mr. Nace.

O'Connor did not return the car as indicated. On the following Wednesday Nace, according to his story, tried to phone Kalmus as to why the car was not returned but was unsuccessful in reaching him. On the following Friday he did reach him and asked him about the car and its whereabouts. Kalmus told him O'Connor was supposed to have brought it back on Monday, and registered surprise that he had not returned it. Kalmus obtained the license number of the car and agreed

to call the police and report it stolen. Kalmus testified he called the police but found such a report could not be made over the phone. Apparently no written report was made. On Sunday, July 17, O'Connor phoned Mr. Nace from Oceanside stating that he was in jail because of lack of proper registration of the car and asked Nace to send him \$15 to cover "impounding charges". This request was refused. O'Connor was incoherent in his conversation. Nace called the Oceanside police and told them not to turn the car over to O'Connor. He and his wife drove to Oceanside, found the battered car, and discovered the gas tank lock had been broken so additional gas could be supplied to the car. They heard the story about the accident from the police. O'Connor had been charged with being drunk but was subsequently released and has never been heard from since. One of the highway patrol officers told the Naces that O'Connor tried to sell the car to him and his brother but could produce no papers showing legal possession.

Opposed to this evidence is the testimony of the highway patrol officer at Oceanside which was given from notes he claimed to have made at the time. He testified quite positively that when Mr. and Mrs. Nace came to Oceanside he asked Mrs. Nace to tell him "what the circumstances were on the automobile, how it happened to be in the possession of Mr. O'Connor. She stated that Mr. O'Connor and a partner of his (the name was not mentioned) were interested in purchasing the vehicle for some business venture and that Mr. O'Connor had the vehicle on a trial basis, and that he had had the car for quite some time and that they were wondering where he was and then this thing had come up. They had gotten the word of the accident and come down and Mr. Nace stated that feeling the automobile was sold, or was being sold, he had called his insurance agent, the name not given, but the agent being the Automobile Club of Southern California, asking that the insurance be canceled on the car." The Naces denied this conversation, admitted they did not tell him the car had been stolen but stated that they told

him that it was taken by O'Connor without their permission. Mr. Nace testified that he did tell the officer that he had called the Auto Club, where he carried insurance on his own car, and asked them if he would be covered if he drove his wife's car back to Los Angeles.

In appellant's deposition, taken before the trial, she testified that the car was owned by her; that after her marriage she used it on occasions to go to the store and for her general transportation; that her husband paid for the state license; that it disappeared from in front of her home on the afternoon of July 9th; that she thought it had been stolen; that she did not report it as stolen; that she was the only one who had a key to it; that she was quite unhappy when she found that the car was gone; that when Mr. Nace explained what happened she did not like the idea very well but that she did not want to go to Mr. Kalmus and tell him to bring the car back; that she did have his address and that she was willing to have him look at it; that after the accident she did not ask Mr. Nace how O'Connor got the key to the car.

It is appellant's first contention that the evidence is insufficient to show negligence on the part of O'Connor in the operation of the car. The highway patrol officers, who were proceeding southerly on highway 101 just south of Los Flores that afternoon, noticed the Auburn car parked off of the highway with the hood up and headed in a northerly direction. O'Connor was standing by it. That evening, about 10 p. m., plaintiff Hanna and his wife were driving south on highway 101 just north of that vicinity and their car ran out of gas. They pulled off of the highway. A gentleman on a motorcycle stopped and offered to take Hanna back to a service station. Hanna rode on the extra seat of the motorcycle. The lights were on. It started north in the east lane of the four-lane highway. It overtook and passed one car and swung back into the east lane, and all of a sudden the motorcycle ran into the rear of the Auburn car which was in that lane. Plaintiff and the motorcycle driver were thrown off and severely injured.

They remembered nothing further about the accident.

[1] The point of the accident was about one mile north of the place where the officers first saw the Auburn car 2½ hours before. Hanna testified that as he was proceeding south in his car he noticed no lights on any car if one was parked in the east lane of the north-bound traffic. The two traffic officers were proceeding southerly on the highway that evening and just as a bus started to pull by them they heard a crash and observed a cloud of dust which reflected in the headlights of an oncoming car. They turned around and found the Auburn car standing in the east north-bound lane, headed north, without lights upon it. O'Connor was standing near its left rear wheel. The point of impact was about 48 feet south of the Auburn car and was about 4½ feet west of the east edge of the paved portion of the highway and in the main traveled portion. The officers testified that they checked the dash, headlight and ignition switch, and they were in an "on" position but no lights were burning. The car was out of gear, the emergency brake was off, and the motor was not running. The motorcycle was found near the center of the easterly north-bound lane and apparently struck the Auburn car to the left of its rear center line. No doors were open. The car was hauled to the garage in Oceanside. A test was made of the filament in the taillight by attaching it to a battery. It operated. It is reasonable to infer from the facts in this case that the Auburn automobile was stopped on the main traveled portion of the highway without lights. The position of the point of impact shows clearly that the Auburn was on the main traveled portion of the highway. The photographs in evidence show considerable damage to the Auburn car and indicate that a great force from the rear caused it. The fact that the lights would not burn when the ignition was turned on and the fact that O'Connor was uninjured might well indicate he was not seated in and driving the car at the time of the impact. There was sufficient evidence to support the court's finding that

the actions of O'Connor constituted negligence. Sec. 582 Vehicle Code; Sec. 514 Vehicle Code; Jackson v. Butler, 83 Cal. App.2d 608, 610, 199 P.2d 63; Thomson v. Bayless, 24 Cal.2d 543, 546, 150 P.2d 413. The evidence further justifies the finding that plaintiff was not guilty of contributory negligence. Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 34 P. 84.

The difficult question is whether the evidence is sufficient to support the finding that O'Connor was using and operating the vehicle at the time of the accident with the express or implied permission of appellant owner. The testimony is that neither Kalmus nor O'Connor ever saw or conversed with appellant at the time they took or drove the car away. Accordingly, no *express* consent was given by her. She claimed that she was not aware that Mr. Nace had turned the car over to Kalmus until several days later. There is evidence that Mr. and Mrs. Nace, prior to the time the car was turned over to Kalmus, did discuss between them the advisability of selling the car, and apparently Mrs. Nace had fixed a price. Although Mr. Nace claimed he did not drive the car except on one or two occasions, the possession of a key to it might indicate some implied authority from appellant for Mr. Nace to drive it or to turn it over to a prospective buyer for demonstration purposes. As between appellant and Kalmus, therefore, it might be reasonable to hold that there was an implied authority for him to drive the car home for the purpose of having his mechanic examine it, and to have Kalmus return it to appellant on the following Monday, if he failed to consummate the sale. But does this apply to O'Connor during the period he had it and under the circumstances here related?

It is respondent's argument that the evidence on this subject is conflicting; that there is testimony by an officer, in the form of a declaration by the appellant, showing that the registered owner impliedly gave possession of the car to "O'Connor and a partner of his" without restriction as to the time when or the place where the car was to be used.

There was some evidence that these parties discussed a contemplated future business arrangement between them. Mr. Kalmus testified, however, that this car was not to be used in any contemplated partnership deal. The trial court absolved defendant Kalmus from any liability and specifically found that it was "not true" that O'Connor was an agent or servant of appellant Ruth A. Shannon.

The question of implied consent under sec. 402 of the Vehicle Code was thoroughly discussed in the main opinion, in the concurring opinion, and in the dissenting opinion in *Souza v. Corti*, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861. The several opinions cite the rule laid down in *Henrietta v. Evans*, 10 Cal.2d 526, 75 P.2d 1051; and *Engstrom v. Auburn Auto Sales Corp.*, 11 Cal.2d 64, 77 P.2d 1059. In distinguishing the Engstrom and Henrietta cases the court said that in the Souza case there was no question concerning the use of the car *for the period for which it was borrowed*, and the use which was being made of the borrowed car at the time of the accident *was the use which was contemplated by the owner*. See, also, *Howland v. Doyle*, 6 Cal.App.2d 311, 315, 44 P.2d 453.

In the absence of the testimony of the highway patrol officer concerning the claimed admissions of appellant, it might be difficult to sustain the finding, under the rules laid down in the cited cases. From his testimony it might appear that "O'Connor and a partner of his" were interested in purchasing the vehicle for some business venture and that O'Connor "had the vehicle on a trial basis" and had had it "for quite some time" and that the Naces were wondering where he was.

[2-4] Apparently the trial court believed the testimony of the officer as opposed to the testimony of the appellant and the remaining witnesses. It is not the function of this court to weigh the evidence nor to determine the credibility of the witnesses. (Sec. 1847 Code Civ.Proc.) This court, on appeal, must accept as true all evidence tending to establish the correctness of the finding or verdict, and must consider the evidence in the most favorable

aspect toward the prevailing party and give that party the benefit of every inference that can reasonably be drawn in support of his claim. *Cope v. Goble*, 39 Cal.App.2d 448, 103 P.2d 598. Provided the trier of facts does not act arbitrarily, he is authorized to reject the testimony of a witness in its entirety when convinced it is unworthy of belief, even though the testimony of the witness is uncontradicted. *Blank v. Coffin*, 20 Cal.2d 457, 126 P.2d 868; and *Hicks v. Reis*, 21 Cal.2d 654, 659, 134 P.2d 788, and cases cited.

[5] We conclude that although the evidence is highly conflicting and might well have been decided otherwise, it cannot be said, as a matter of law, that the evidence, aided by inference and presumption that arise under the holding in *Prickett v. Whapples*, 10 Cal.App.2d 701, 52 P.2d 972; and *Lanfried v. Bosworth*, 45 Cal.App.2d 408, 114 P.2d 406, is insufficient to support the finding that the owner, Mrs. Nace, gave her consent, either express or implied, to O'Connor, to drive the car on the day and on the occasion of the accident, or insufficient to hold that the use O'Connor was making of the car at the time was not one that could be, under the circumstances, reasonably contemplated by the owner.

[6] Finally, it is claimed the court erred in denying a motion for mistrial, and in overruling an objection to a question propounded to appellant on cross-examination as to whether, from 1947 to 1949, she carried any insurance, such as collision insurance, on her automobile. She answered in the negative. Apparently the trial court justified its ruling on the ground that it was admissible as bearing on the question whether she or her husband had some joint or community interest in the car *and its operation* and as bearing on the question whether either had called the insurance company and told them the car had been sold. As commented by the court, this was not a jury case. It stated it was not interested in the question of insurance but was interested in knowing whether the parties acted jointly in regard to the maintenance and sale of the car and for the purpose of determining the truth of the state-

ment of the officer that the insurance company was called and told to cancel the policy because the car had been sold. When considered for this sole purpose, as indicated, the ruling of the court cannot be said to be prejudicially erroneous or that an order granting a mistrial must follow.

Judgment affirmed.

BARNARD, P. J., concurs.



**SUTTER HOSPITAL OF SACRAMENTO v.
CITY OF SACRAMENTO.**

Civ. 7847.

Sac. 6110.

District Court of Appeal, Third District,
California.

Oct. 11, 1951.

Hearing Granted Dec. 6, 1951.*

The Sutter Hospital of Sacramento brought action against the City of Sacramento to recover real property taxes paid by the plaintiff under protest. The Superior Court of Sacramento County, Lowell L. Sparks, J., entered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Peek, J., held that surplus earnings of plaintiff were "profit" and that therefore realty was not exempt from taxation.

Judgment affirmed.

1. Taxation ⇨204(2)

Constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed.

2. Taxation ⇨241(1), 244

The manifest purpose of statutory provisions that property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for re-

ligious, hospital, scientific or charitable purposes is exempt from taxation if no part of net earnings of owner inures to the benefit of any private shareholder or individual, is to establish as a requirement that owner of property claimed to be exempt must occupy a non-profit status. Revenue and Taxation Code, § 214(2).

3. Taxation ⇨241(1), 244

Before statutory provisions that property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if the property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted, come into play, it must first be established that the property for which exemption is claimed is used exclusively for one of the enumerated exempt purposes, and then that net earnings of owner do not inure to benefit of any individual. Revenue and Taxation Code, § 214(3).

4. Taxation ⇨241(2)

Where operation of hospital resulted in substantial surplus earnings which, though not inuring to the benefit of any individual, were devoted to expansion and improvement of a substantial character, surplus earnings were "profit" within meaning of statutory provisions that property used exclusively for hospital purposes is exempt from taxation if property is not used or operated by owner or by any other person for "profit" regardless of the purposes to which the "profit" is devoted, and therefore hospital's realty was not exempt from taxation. Revenue and Taxation Code, § 214.

See publication Words and Phrases, for other judicial constructions and definitions of "Profit".

Butler & Reckers, Sacramento, for appellant.

E. M. Glenn, City Atty., Ralph H. Lewis, Sacramento, for respondent.

* Subsequent opinion 244 P.2d 390.

PEEK, Justice.

This is an appeal by the Sutter Hospital from a judgment in favor of the City of Sacramento in an action brought by the hospital to recover real property taxes paid under protest for the fiscal year 1946-1947. Appellant here, as in the trial court, claims exemption under the provisions of Section 214 of the Revenue and Taxation Code.¹

In general, the findings of the trial court were favorable to the city. Among other things the court specifically found that the hospital was operated for profit within the meaning of subdivision (3) of Section 214. From an examination of said subdivision it is readily apparent that if such finding was proper under the record before us, and we conclude it was, such determination is decisive of the present appeal and hence it becomes unnecessary to discuss the remaining questions raised by the parties, or the facts relative thereto.

The record shows that in the year 1935 appellant was organized as a non-profit corporation, acquiring the assets of a predecessor profit corporation by the exchange

of its bonds equivalent in amount to the outstanding stock of the predecessor corporation. In the year 1945 the value of the corporation's land, buildings, machinery and equipment was for accounting purposes estimated at \$764,895.39, and its then bonded indebtedness was approximately \$292,000. The surplus of income over current expenses for that year, which expenses included interest payments and depreciation on the buildings, machinery and equipment, was \$86,609.24. For the year 1946 the surplus was \$106,603.12. Reduced to percentages the surplus for each year was slightly in excess of eight per cent of its gross income. No part of these surpluses was paid to any individual. Apparently these earnings were mingled with other cash on hand and the only uses to which they were put were debt retirement, maintenance and replacement of equipment, and expansion. Subsequently in 1947 a part thereof was used to build and equip an X-Ray room costing approximately \$60,000.

Appellant contends that it does not fail to qualify for the welfare exemption merely because it realizes net earnings; that

1. Sec. 214: "Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly

incidental to a primary religious, hospital, scientific, or charitable purpose;

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes;

"(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to comply with the foregoing requirements for the exemption of charitable organizations in general, has been chartered by the Congress of the United States, and whose objects are the encouragement or conduct of scientific investigation, research and discovery for the benefit of the community at large.

"The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade."

the requirements of said Section 214 are satisfied so long as its earnings do not inure to the benefit of any individual or shareholder. Appellant further contends that subdivision (3) of Section 214 is limited in its application to property claimed to be exempt but which is, in fact, used or operated for purposes other than the exempt purposes provided in the section; that any other construction of subdivision (3) would be in conflict with subdivision (2), which by its use of the term "net earnings" clearly implies that there may be a surplus of income over cost of operation of the property claimed to be exempt, so long as that surplus does not inure to the benefit of any private shareholder or individual. The question thus squarely presented is whether or not the hospital can qualify for the welfare exemption when its operation has resulted in substantial earnings, which, though not inuring to the benefit of any individual, admittedly have been and will be devoted to expansion and improvement of a substantial character, which question, in turn, depends, first, on whether or not subdivision (3) refers to profits from the operation of property used for one of the exempt purposes, and, second, on whether or not the earnings here involved properly may be termed profit within the meaning of said subdivision (3).

[1-3] As stated in *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal. 2d 729, 734, 221 P.2d 31, 34, 15 A.L.R.2d 1045, "Constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed." The plain meaning of the language employed in the first paragraph of said section is to enumerate the purposes to which the property must be devoted in order to qualify for the exemption. Subdivisions (1) and (2) clearly deal with the status of the owner of the property while the remaining subdivisions clearly deal with the status of the property itself and the uses to which it is put. The manifest purpose of subdivision (2) is to establish as a requirement that the owner of the property claimed to be exempt must

occupy a non-profit status. This appears obvious since by the use therein of the phrase "net earnings of the owner" (emphasis added) it necessarily is *not* limited to net earnings resulting from the operation of the property claimed to be exempt. Subdivision (3), on the other hand, deals with the operation of the property itself, and provides expressly and unequivocally that the property may not be "used or operated * * * for profit *regardless of the purposes to which the profit is devoted*". (Emphasis added.) However, before the provisions of subdivision (3) come into play, it must first be established that the property for which exemption is claimed is used exclusively for one of the enumerated exempt purposes, and then that the net earnings of the owner do not inure to the benefit of any individual.

In the present case it is not disputed that the two parcels of realty for which exemption is claimed are operated exclusively for hospital purposes. Likewise, it is clear that the net earnings of appellant have not inured to the benefit of any private shareholder or individual.

All but two of the cases relied upon by appellant were decided prior to the effective date of the welfare exemption and are obviously not controlling on the question of the interpretation of that statute. Nor do either of the two cases decided subsequent to the effective date of the act, *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal.2d 729, 221 P.2d 31, 15 A.L.R.2d 1045, and *Y. M. C. A. v. County of Los Angeles*, 35 Cal.2d 760, 221 P.2d 47, involve the precise question here presented. In the *Cedars of Lebanon* case, the property which was operated for a profit was not used for one of the exempt purposes, and the court predicated its denial of exemption on the "determinative prerequisite"—"the use of the property itself". 35 Cal.2d at page 746, 221 P.2d at page 41. In the *Y. M. C. A.* case the court found that the property in question, which was used for dormitory purposes, was not operated for a profit, but rather its operation resulted in a net loss, and on that ground the court refused to deny exemption under the provisions of subdivision (3) of Sec-

tion 214. Lastly, neither case holds, as contended by the petitioner, that subdivision (3) is limited in its application to property used for non-exempt purposes.

[4] In determining whether or not appellant is eligible for the welfare exemption under the provisions of subdivision (3) thereof, it is first necessary to ascertain whether these surplus earnings labelled in appellant's 1945 financial statement as "margin for expansion and debt retirement" may be classed as profit. Profit is ordinarily understood to refer to "acquisition beyond expenditure" or "excess of value received over cost." *Prince v. Lamb*, 128 Cal. 120, 126, 60 P. 689, 691. While appellant might properly have deducted the necessary sums for maintenance and debt retirement—uses to which the surplus here in question has apparently in part been put—from gross receipts, in order to determine net earnings, no such computation appears in the record before this court. However, from the testimony of appellant's superintendent it does appear beyond any question that a large portion of this surplus has been and will be devoted to expansion. In so far as the surplus earnings of appellant are accumulated and used for that purpose, those earnings are profit within the meaning of subdivision (3), and they are no less so because used to further the exempt purpose for which appellant is organized, since subdivision (3) refers to any profit, "regardless of the purposes to which the profit is devoted."

Although it is apparent that at least for the years here involved a profit was realized from the operations of appellant's property for which exemption is claimed, there remains the question of whether or not appellant's property was in fact *operated* for a profit, that is, was there a substantial surplus of earnings in excess of operating costs by design, or by mere chance. The evidence received at the trial indicated beyond any doubt that appellant's properties are operated on a sound financial basis in a manner befitting any modern commercial institution. While there was no testimony to reveal the method of computation by which appellant's directors fixed charges

for hospital services, suffice it to say that the "margin for expansion and debt retirement," which for two successive years exceeded eight per cent of appellant's gross receipts, was not attained by accident. We conclude that the properties for which exemption is here claimed were operated for a profit within the meaning of Section 214 of the Revenue and Taxation Code, and therefore the exemption must be denied.

Judgment affirmed.

ADAMS, P. J., and DEIRUP, J., pro tem., concur.



106 Cal.App.2d 768

PARSONS v. COLLINS.

Civ. 18409.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1951.

Rosa Parsons brought an action against William E. Collins for injuries resulting when automobile in which plaintiff was riding traveled into intersection and collided with defendant's automobile which had been traveling in opposite direction and which had turned to its left through intersection after defendant had given signal for left turn and had waited for two automobiles to pass through intersection in direction in which plaintiff was traveling. The Superior Court of Los Angeles County, J. T. B. Warne, J., rendered a judgment for defendant and plaintiff appealed. The District Court of Appeal, McComb, J., held that evidence justified implied finding that defendant was not negligent.

Affirmed.

Automobiles ⚡244(11)

In action for injuries resulting when automobile in which plaintiff was riding traveled into intersection and collided with defendant's automobile which had been traveling in opposite direction and which

had turned to its left through intersection after defendant had given signal for left turn and had waited for two automobiles to pass through intersection in direction in which plaintiff was traveling, evidence sustained implied finding that defendant was not negligent in operation of defendant's automobile.

Dulaney W. Palmer, Hollywood, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for personal injuries resulting from an automobile accident, plaintiff appeals.

The evidence being viewed in the light most favorable to defendant (respondent) discloses that at about 11:00 a. m. on November 21, 1948, plaintiff was riding with her husband in an automobile, in an easterly direction on Ventura Boulevard about 200 feet west of its intersection with Beverly Glen, at a speed of approximately 30 miles per hour.

At the same time defendant was driving in a westerly direction on Ventura Boulevard east of the intersection at a speed of about 15 miles per hour. Defendant gave a signal for a left turn and after two cars had passed through the intersection in an easterly direction he proceeded to turn left through the intersection.

The car in which plaintiff was riding, without reduction of speed, proceeded into the intersection swerving a bit to the right. When defendant realized that this car was not going to stop he applied his brakes, striking the left rear fender of the automobile containing plaintiff, causing her serious personal injury.

Plaintiff's sole contention is that the evidence is insufficient to support a judgment for defendant.

This contention is devoid of merit. It is obvious from the facts related above

which were sustained by the evidence that the jury's implied finding that defendant was not negligent in the operation of his car finds ample support.

Affirmed.

MOORE, P. J., concurs.



106 Cal.App.2d 815

PEOPLE v. JOHNSON et al.

Cr. 4675.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Proceeding by the State against Edward Johnson and others. Defendant William Comer pleaded guilty to robbery. The Superior Court, Los Angeles County, Charles W. Fricke, J., denied the defendant's application for probation and he appealed. The District Court of Appeal, Drapeau, J., held that the trial court in determining the degree of crime and in denying probation did not abuse its discretion.

Affirmed.

1. Robbery ☞11

Where party pleaded guilty to crime of robbery and was armed with gun at time of offense, but it was uncertain whether gun was loaded, and court found that defendant was in possession of a dangerous rather than a deadly weapon, determination that crime was first degree robbery was not abuse of discretion. Pen.Code, § 211a.

2. Criminal Law ☞982

Report of probation officer is not binding upon court in granting or denying application for probation. Pen.Code, § 1203.

3. Criminal Law ☞982

Where party pleaded guilty to crime of robbery and was armed with gun at time of offense, but it was uncertain whether gun was loaded, and court found crime was rob-

bery in first degree and that defendant was in possession of a dangerous rather than a deadly weapon, court's denial of probation was not abuse of discretion. Pen.Code, §§ 211a, 1203.

4. Criminal Law §982

Probation is not a matter of right.

5. Criminal Law §1186(1)

Mere fact that application for probation is denied is not a ground for reversal of conviction.

William Comer, in pro. per.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant pleaded guilty to robbery. The Superior Court found the crime to be of the first degree. Defendant's application for probation was denied, and he was sentenced to the state prison.

Defendant appeals, in pro. per., and urges two grounds for reversal of the judgment: First, that the degree of the crime was determined before the court reviewed the report of the probation officer; and, secondly, that it was error to deny his application for probation, contrary to the recommendation of the probation officer that probation be granted.

[1] After defendant's plea was entered, his counsel stipulated that he was armed with a gun at the time of the commission of the offense, but that it was uncertain whether the gun was loaded or unloaded. Thereupon, the court found defendant's crime was robbery of the first degree, and

that he was in possession of a dangerous, rather than a deadly weapon. Penal Code, Section 211a. Presumably this finding was made to enable the court, if it should desire to do so, to grant probation. Penal Code Section 1203 forbids probation when a *deadly* weapon was used in the commission of the crime. No abuse of discretion in fixing the degree of the crime appears in these circumstances. *People v. Gilbert*, 22 Cal.2d 522, 140 P.2d 9.

[2, 3] Referring to the denial of defendant's application for probation: Penal Code Section 1203 provides that the court must hear an application for probation, and consider the report of the probation officer; and that the court shall have power "in its discretion" to grant or to deny probation. The report of the probation officer is not, however, binding upon the court. *People v. Wahrmond*, 91 Cal.App.2d 258, 206 P.2d 56. Nothing in the record indicates any abuse of discretion in denying defendant's application for probation.

Apparently defendant's theory is that when it was found that he was armed with a dangerous, not a deadly, weapon, the trial court was required to grant him probation. This is not the law. Granting or denying probation in such circumstances is within the court's discretion. *People v. Raner*, 86 Cal.App.2d 107, 194 P.2d 37; *People v. Wiley*, 33 Cal.App.2d 424, 91 P.2d 907.

[4, 5] Probation is not a matter of right. *People v. Roach*, 139 Cal.App. 384, 33 P.2d 895. The mere fact that an application for probation is denied is not a ground for reversal of the judgment. *People v. Wahrmond*, *supra*.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

106 Cal.App.2d 729

REID et al. v. KOESLAG et al.

Civ. 18480.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1951.

Cluese Reid and another sued John A. Koeslag and Marie McWilliams for declaratory relief, quiet title and ejectment. The Superior Court, Los Angeles County, William B. McKesson, J., entered judgment upon stipulation for judgment which quieted title and awarded possession to plaintiffs. Defendants then filed motion for an order setting aside judgment on ground of mistake, surprise and excusable neglect, and plaintiffs appealed from order which granted said motion. The District Court of Appeal, Moore, P. J., held, *inter alia*, that where affidavit and proposed answer averred that defendants, who had been owners of the property, had accepted a loan from plaintiff Cluese Reid, who was a real estate broker and whom defendants considered a friend, and, in reliance upon named plaintiff's misrepresentations, had signed deed and conditional sale contract unknowingly, a meritorious defense to the suit was stated, and judgment was properly set aside.

Affirmed.

1. Judgment ☞68(3)

Where it was alleged that former owners of property had accepted loan from a friend, who was a real estate broker, and, in reliance upon friend's representations, had signed papers without knowledge that they were a deed and conditional sale contract, judgment, which had been entered on stipulation for judgment, and which quieted title in friend, was properly set aside on ground of mistake, surprise, and excusable neglect.

2. Appeal and Error ☞957(1)

Judgment ☞344

The granting of relief from a judgment or order is vested in the sound discretion of the court, and it is only when such discretion has been abused that the appellate court will disturb the judgment or order.

3. Appeal and Error ☞957(1)

On motion to set aside judgment on ground of mistake, surprise and excusable neglect, credence to be accorded conflicting affidavits was a matter entirely within discretion of trial court.

4. Appeal and Error ☞935(2)

On appeal from order which grants relief from default, it will be assumed that lower court believed statement of facts as made by prevailing party.

5. Judgment ☞68(1)

Where averments of affidavit, filed in support of motion to set aside quiet title judgment, which had been entered upon stipulation for judgment, were to effect that movants had accepted a loan from their friend, who was a real estate broker, and had signed papers without knowing that they were a deed and conditional sale, in reliance upon friend's false representations, a meritorious defense to quiet title action was stated.

6. Appeal and Error ☞1129

Judgment ☞135

The law favors trial of an action on its merits and appellate courts will affirm an order which requires a trial upon merits when it appears that a substantial defense can be made.

7. Appeal and Error ☞957(1)

Where the action of the trial court will result in a trial upon the merits, the appellate court will interfere with such action only when it clearly appears that there has been a plain abuse of discretion.

8. Judgment ☞390

On motion to set aside quiet title judgment on ground of mistake, surprise, and excusable neglect, where answer of both movants was verified and presented grounds for relief, court did not err in setting aside judgment as to both movants, though only one movant had filed an affidavit.

9. Judgment ☞396

Where affidavit averred that movants had borrowed money from real estate broker and had signed deed and conditional sale, in reliance upon false statements of

broker, without knowing the true character of the instruments, it was not inequitable to set aside judgment quieting title in broker without requiring payment of penalty, in view of facts that broker was in possession and was receiving rentals, and that movants had paid about \$300 to broker, and that broker had profited in sum exceeding \$600 by the transaction.

Leo Branton, Jr., Los Angeles, for plaintiffs.

Gilman, Gilman & Shearer, Los Angeles, Don L. Gilman, Los Angeles, for respondents.

MOORE, Presiding Justice.

The motion of defendants to set aside a judgment quieting title in plaintiffs to a parcel of real property in the city of Los Angeles having been granted plaintiffs have appealed from the order. They demand a reversal on the ground that the trial court abused its discretion and that the affidavit of merits and the answer do not show a meritorious defense to the action.

The complaint sued in three counts, to wit, declaratory relief, quiet title and ejectment. No appearance was made by defendants except through a "stipulation for judgment." Pursuant to that stipulation, judgment was granted quieting title and awarding possession. The decree was entered December 6, 1950. On December 15 defendants served and filed their motion for an order setting aside the judgment on the ground of mistake, surprise and excusable neglect. In support thereof they filed the affidavit of Marie McWilliams and their proposed answer. The motion was granted December 21, 1950.

From the affidavit of Marie and the answer of both defendants it appears that in January, 1950, Mrs. McWilliams and her brother, John A. Koeslag, owned a home at 4182 Ascot street in the city of Los Angeles reasonably worth \$6,000. They were in need of money. That fact was evidently known to plaintiff Cluese Reid who called upon them. Mrs. McWilliams told him of their need for \$2,300 in order to pay an ex-

isting mortgage, delinquent taxes and cost of repairs. Thereupon, Cluese proposed that he would lend defendants the sum demanded and would arrange for monthly payments thereon to be made in the sum of \$34.50. Pursuant to Cluese's request on the 15th day of January, 1950, defendants presented to such plaintiff their title papers and the latter reiterated his former proposal and agreed that he would secure for them additional money with which to make such repairs and additions to their property as would increase their rental income. He thereupon requested defendants to sign documents and papers which he presented. Defendants being ignorant, uneducated and without knowledge concerning real estate transactions did not understand the contents of the papers presented, but acting upon false representations, signed them.

After the entry of the judgment, the defendants discovered on December 10, 1950, that the documents signed by them on January 15, 1950, were (1) a grant deed bearing date of January 30, 1950, whereby defendants conveyed to plaintiffs their home property and (2) a conditional sales agreement of the same date whereby they became the purchasers of the Ascot lot. The sales agreement obligated them to pay plaintiffs the sum of \$2,588.50 with interest of 8 per cent in monthly installments of \$34.50.

Defendants learned also that after procuring the grant deed from them, plaintiffs obtained a loan in the sum of \$2,500 from the Liberty Savings and Loan Association of Los Angeles by representing themselves to be the owners. They received the amount of the loan from the lender.

Defendants alleged further in their proposed answer that at no time during their negotiations with Cluese Reid did he inform them that he was taking title to the property and reselling it to them or that he would mortgage their home. At all times they believed the statements of Cluese Reid to the effect that it was necessary for them to sign the documents presented to them in order to consummate the proposed transaction and while believing and trusting Mr. Reid defendants signed the grant deed and the conditional sales agreement. After the

entry of judgment, defendants discovered also that the amount of indebtedness owed by them upon the property on January 15, 1950, including interest and delinquent taxes was \$1,738.25 and that the amount required to be paid by them under the conditional sales contract was \$2,588.50.

It is alleged that the statements and representations of Cluese Reid in obtaining the execution of the grant deed and the conditional sales contract were false and fraudulent and were made for the purpose of securing title to defendant's property by fraud and deceit and that such statements and representation were known by Cluese Reid to be false at the time, but that defendants believed him and trusted him as their broker and while acting upon his representations signed both instruments; that at the time of his transaction with defendants Cluese Reid was a licensed real estate broker; was employed by defendants to procure a loan for them and by reason of such relationship they trusted and relied upon him.

In her separate affidavit, Marie McWilliams avers that the purpose of herself and her brother in transferring title of their home to plaintiffs was to obtain a loan and not of selling the same to plaintiffs; that she did not know the contents of the agreement; that no copy thereof was given to her; that after defendants had been sued in this action they called upon Mr. Reid who in turn referred them to attorney Branton; that the attorney did prepare an agreement whereby defendants would make certain payments upon the conditional sales contract and upon the payments in arrears; that he asked Marie to sign the writing and stated to her that no action would be taken against her because of the signing of such agreement; that it is true that she signed the stipulation for a judgment to be entered and paid \$15 court costs; that thereafter the decree was entered and a writ of possession was issued and defendants were removed from the property by the sheriff. Marie states also that at the time of signing the several documents presented to her by plaintiffs and their counsel that she did not know, nor did her brother

know the effect of any such documents; that she signed what she supposed to be an agreement to make the payments regularly and to pay up all sums in arrears.

Plaintiffs filed certain affidavits for the purpose of showing that the meaning of the stipulation and the other writing prepared in October, 1950, were understood by defendants. Inasmuch as the court below adopted the evidence offered by defendants as against that of Messrs Branton and Thomas, an extended discussion of the latter would be of no avail. The affidavit of Cluese Reid, in addition to the allegations that he told Marie to get an attorney to answer his complaint and that he would be agreeable to anything that she and Mr. Branton worked out, avers that he had expended \$240 as sheriff's cost in ousting defendants and \$500 in improving the property and that he will be irreparably harmed if the judgment should be set aside, and that security should have been furnished appellants against loss.

[1] There was no error in the court's order setting aside the judgment. The allegations of the answers and the averments of Mrs. McWilliams are such as to require the court to grant the relief demanded in view of the showing made by defendants. Mr. Reid was a broker; he solicited the business of procuring a loan for defendants and was employed. Defendants were the owners of the Ascot property; Mr. Reid acting on behalf of his wife and himself accepted the deed from Mrs. McWilliams and borrowed money from a public institution; paid off the existing mortgage and retained the balance of the borrowed money. Plaintiffs paid no consideration for the property but on the contrary collected in excess of \$600 as a profit upon the fraudulent deal.

When Mrs. McWilliams at the suggestion of Mr. Reid called upon attorney Branton, the latter might with propriety have referred her to the public defender or to some legal clinic for advice with reference to the suit which Reid had filed against defendants. Such treatment of Mrs. McWilliams by Cluese Reid and his conduct hereinabove detailed were properly considered by the trial court as addi-

tional circumstances showing that defendants had made such a mistake or series of mistakes as to invoke the aid of the chancellor.

[2] The granting of relief from a judgment or order is vested in the sound discretion of the court and it is only when such discretion has been abused that the appellate court will disturb the order made. *Jones v. Title Guaranty and Trust Company*, 178 Cal. 375, 376, 173 P. 586; *Keller v. Keller*, 91 Cal.App.2d 39, 41, 204 P.2d 361; *Raines v. Damon*, 89 Cal.App.2d 812, 816, 201 P.2d 886. See *Judgments*, section 115, Cal.Jur., Vol. 7, Ten Year Supplement, 1950.

[3,4] Credence to be accorded affidavits if in conflict on a motion to set aside an order on the ground of mistake is a matter entirely within the discretion of the trial court. *De Mattie v. Henry*, 84 Cal. App.2d 15, 17, 189 P.2d 774. On appeal from an order granting relief from a default it will be assumed that the lower court believed the statement of facts as made by the prevailing party. *Ackerman v. Beach*, 104 Cal.App. 299, 285 P. 895.

[5] The answer of defendants as well as the affidavit of Mrs. McWilliams show that they have a meritorious defense. If the averments of such pleading and affidavit can be substantiated at a trial, the court will be obliged to find that the plaintiffs acting through Mr. Reid defrauded defendants and thereby gained title to the property without their knowledge. After he had called upon them and solicited their patronage and been employed it was incumbent upon him as their confidential agent not to seek to make a profit in addition to his brokerage without fully explaining his purpose. He placed them in a position whereby their default in complying with their agreement gave him the whip hand.

[6,7] It is the policy of the law to favor wherever possible trial of an action on its merits and appellate courts will affirm

an order requiring a trial upon the merits when it appears that a substantial defense can be made. *Waybright v. Anderson*, 200 Cal. 374, 377, 253 P. 148; *Downing v. Klondike Mining & Mill. Company*, 165 Cal. 786, 788, 134 P. 970. The policy of the law looks with disfavor upon a party who without regard to the merits of his case attempts to take advantage of a mistake, inadvertence or neglect of another in a transaction "and where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will do so only where it clearly appears that there has been a plain abuse of discretion." *Berri v. Rogero*, 168 Cal. 736, 741, 145 P. 95, 97. Discretion has no office to perform in cases where it is definitely clear that a party is entitled to relief, but even in doubtful cases where an impartial mind would hesitate whether the excuse offered for the mistake or excusable neglect is with or without merit the judgment of the court below will not be disturbed.

[8] Appellants insist that in the absence of a personal showing by defendant Koeslag the court erred in vacating the judgment as to him. The answer of both defendants is verified and since it presents grounds for relief from the judgment Mr. Koeslag's own separate affidavit was not necessary.

[9] Plaintiffs argue that the order was inequitable in that it required payment of no penalty as a condition to vacating the judgment. It has already been shown that by the transaction plaintiffs profited in a sum exceeding \$600. In addition thereto they have the sum of about \$300 paid by defendants in discharge of the contract of purchase. Moreover, plaintiffs are now in possession and have rented the property from which they receive \$95 per month. In this situation there is an abundance of protection for plaintiffs against loss.

Order affirmed.

McCOMB, J., concurs.

106 Cal.App.2d 791

HAMLET v. HOOK.

Civ. 18236.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Action by Robert L. Hamlet against Arthur W. Hook for damages arising out of a collision between the parties' automobiles. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered an adverse judgment and the plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem., held that an improperly given "formula" instruction on negligence had not prejudiced the plaintiff.

Judgment affirmed.

1. Automobiles ⇨246(20)

In action between motorists for damages arising out of automobile collision at intersection, instruction embodying Kansas statute regulating speed limits, violation of which was prima facie evidence of negligence, and stating that violation of applicable speed limit was negligence as matter of law, was properly refused for failing to correctly state the law. G.S.1949, 8-532.

2. Automobiles ⇨245(40)

Kansas statute regulating speed limits of motor vehicles, which made violation prima facie evidence of negligence, created statutory rule of evidence on issue of negligence with respect to sufficiency of evidence to carry case to jury. G.S.1949, 8-532.

3. Automobiles ⇨229½

Kansas statute regulating speed limits of motor vehicles, which made violation prima facie evidence of negligence, was part of adjective law of Kansas, enforceable as such in courts of Kansas, but not required, under conflict of laws rule, to be recognized or enforced by courts of any other state in which substantive right created under laws of Kansas were sought to be enforced. G.S.1949, 8-532.

4. Action ⇨66

Law of the forum governs presumptions and inferences to be drawn from evidence.

5. Automobiles ⇨227(3)

Where record was entirely devoid of any evidence that defendant actually saw automobile of plaintiff in time to avoid colliding with it, doctrine of last clear chance was not applicable to facts of case.

6. Trial ⇨244(4)

In action between motorists for damages arising out of automobile collision at intersection, "formula" instruction that certain items of fact under Kansas law amounted to negligence should not have been given, since it unduly emphasized certain testimonial facts which might or might not be found true by jury.

7. Trial ⇨194(15)

Since it is exclusive province of jury to appraise and find facts, it is improper, even though it may not be reversible error, for court to say that fact or combination of facts in law amounts to negligence.

8. Trial ⇨263

Just because a requested instruction may correctly state the law it need not for that reason be given.

9. Appeal and Error ⇨1064(1)

Where testimony showed that plaintiff was guilty of contributory negligence and jury would have reached that conclusion even though improper formula instruction on negligence had not been given, jury was not misled and plaintiff was not prejudiced.

Gray, Binkley & Pfaelzer, Los Angeles, by John T. Binkley and William G. Robertson, Los Angeles, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

HANSON, Justice pro tem.

The only question we are called upon to determine in this case is whether the court erred in giving to the jury an instruction which was requested by the defendant and in refusing to give two instructions requested by the plaintiff, who is the appellant here. The jury returned a verdict for the defendant below, respondent here.

The record discloses that in broad daylight the automobiles driven by plaintiff and defendant collided at a street intersection in a residential district in Pittsburg, Kansas. At the time the plaintiff was proceeding northerly and the defendant westerly on streets which intersected. The intersection was 30 feet in width from west to east and south to north.

The evidence is that the plaintiff observed the defendant's automobile approaching the intersection from his right when his own automobile was 25 feet distant from the intersection, but that the defendant did not observe the car of the plaintiff until he was 10 feet from the intersection at which time he applied his brakes and thereupon skidded a distance of 14 feet to the point of impact. The plaintiff initially testified that he looked to his right a second time as he entered the intersection, but later stated he was not sure whether he had looked or not. The details of the collision are not of any importance to a consideration of the question before us.

The statutory law of Kansas provides that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." G.S.1949, 8-532. The statute then goes on to provide that in a residential district a speed of 30 miles per hour is lawful, unless some special hazard exists, but that any speed in excess of that limit shall be *prima facie* evidence that the speed is not reasonable and prudent and that it is unlawful.

[1-4] It is at once apparent from a reading of the statute that driving a car in excess of thirty miles per hour in a residential district is not negligence *per se*, but merely *prima facie evidence* of negligence. Nevertheless, the plaintiff requested an instruction which not only embodied the provision we have quoted above from the law of Kansas, which the court gave, but in addition the instruction recited the speed limits as set forth in the statute and, moreover, it advised the jury that a violation of the applicable speed limit was "negligence as a matter of law." The court declined to

give this part of the instruction. In so ruling the court was correct for at least two reasons. First, because the requested instruction did not correctly state the law, in that, a violation of the speed limit is not "negligence as a matter of law" under the Kansas statute, but only *prima facie* evidence of negligence. Second, because the statute merely creates an evidential presumption sufficient to make a *prima facie* case on the issue of negligence, without the necessity of supplying additional evidence. In short, by reason of the statute the court could not grant a non-suit solely on ground that there was no evidence of negligence where the evidence disclosed the defendant had exceeded the speed limit pertinent to the case. In other words, on an issue of negligence, the statute creates a statutory rule of evidence with respect to the sufficiency of evidence to carry the case to the jury. If the presumption is not rebutted the issue of negligence is proved, but if the presumption is rebutted it is for the jury to say whether there was or was not negligence in fact. The substantive common law of Kansas gives to one injured by the negligence of another a right of action against him which is not expanded or cut down by the provision of the statute which makes a violation of the statute *prima facie* evidence of negligence. Accordingly, the provision being no part of the substantive law it lies in the domain of the adjective law of Kansas, enforceable as such in the courts of Kansas, but not recognized or enforced by the courts of any other state in which the substantive right created under the laws of Kansas is sought to be enforced. As is said in Rest., Conflict of Laws, sec. 595(2): "The law of the forum governs presumptions and inferences to be drawn from evidence."

[5] The next contention is that the court erred because it did not give an instruction on the last clear chance doctrine as requested by the plaintiff. The short answer to the contention is that inasmuch as the record is entirely devoid of any evidence that the defendant actually saw the car of the plaintiff in time to avoid colliding with it, the doctrine of the last clear

chance is not applicable to the facts of the case. *Starck v. Pacific Electric Ry. Co.*, 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58.

There remains for consideration the contention that not only was an instruction requested by the defendant, and given by the court, a "formula" instruction, but additionally it was highly prejudicial to the plaintiff. The instruction, aside from some immaterial introductory language, reads as follows:

"You are further instructed that under the law of the State of Kansas that even though you find a party entered the intersection in question before the other party, if you further find that when he was within a short distance of the intersection he looked and observed the other party's car approaching at a high or dangerous rate of speed and then proceeded without again looking in the direction from which the other party's car approached and without increasing or decreasing the speed of his vehicle and continued oblivious to what might happen, then under the Kansas law his conduct was less careful than was required of him under the laws of said state."

[6-8] The instruction is a so-called "formula" instruction and should not have been given. In a simple case of negligence, such as is the case here, the basic question is whether or not the parties used due care; that is to say the ordinary care which would have been used by the average man under the same or similar circumstances. When the jury is instructed that that is the law it becomes its province to determine whether the various items of evidence, which it accepts as true, do or do not add up to negligence as to either or both parties to the cause. If there is testimony, as there was in the case at bar, (1) that the plaintiff saw the defendant's car before either car reached the intersection; (2) that he estimated its speed at 40 to 45 miles an hour; (3) that he did not again pay any attention to defendant's oncoming car until he had entered the intersection, then it is clear on those facts, if they were believed by the jury that it should and presumably would have found that the plaintiff was not exercising the ordinary care which the av-

erage man would have exercised and, as a consequence the plaintiff was guilty of negligence. The jury did not need to be told that these items of fact under the law spelled negligence. The vice in any such instruction is that it unduly emphasizes certain testimonial facts—which may or may not be accepted by the jury as being true—and misleads the jury into thinking that because the court has specifically mentioned them they are of undue importance or that the court believes them to be true. As it is the exclusive province of the jury to appraise and find the facts, it is improper even though it may not be reversible error for the court to say that a fact or a combination of facts in law amounts to negligence. Where this is done not only is the province of the jury invaded, but instructions are quite too often unduly expanded in numbers and content and as a consequence the jury quite too often is confused and misled. Just because a requested instruction may correctly state the law it need not for that reason be given. Until and unless trial courts take it upon themselves to reduce the huge bulk of instructions generally given to juries today down to the minimum of necessary and essential instructions we cannot expect juries to understand, carry in their minds and correctly apply the law that is applicable to the facts as juries find the facts to be.

[9] In the instant case it seems very clear to us from a reading of the testimony that the plaintiff below was guilty of contributory negligence that proximately contributed to his injury. Likewise it seems to us that the jury would have arrived at that conclusion even though the requested instruction which was given to them had not been given. That being true the jury was not misled by the instruction and the plaintiff has not been prejudiced. The instruction was but one out of some fifty instructions given which taken as a whole more than adequately presented the rights of the plaintiff under the law.

The judgment is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

106 Cal.App.2d 787

AIRWAYS WATER CO., Inc. v. LOS ANGELES COUNTY.

Civ. 18189.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Hearing Denied Dec. 13, 1951.

Action by Airways Water Company, Inc., against County of Los Angeles, a body corporate and politic, to recover cost of relocating water mains occasioned by county's widening of highway. From a judgment of Superior Court of Los Angeles, Roger A. Pfaff, J., defendant appealed. District Court of Appeal, Drapeau, J., held that plaintiff having signed the dedication certificate without reservation its easement became subordinate to that of defendant.

Reversed.

Doran, J., dissented.

1. Dedication ⇨26

Upon recordation of map and certificate dedicating property to county for highway purposes, title for such purposes vested in county and rights of contiguous property owners and owners of prior easements were measured by terms of their conveyances to county. Business and Professions Code, § 11615.

2. Dedication ⇨57

Though a county's right of way in land dedicated as highway is in nature of an easement, an owner of a prior easement who signs dedication certificate without reservation or exception may not use highway for any purpose inconsistent with right of public to its full and free enjoyment as such, including use of all territory platted and dedicated, and any rights which owner of easement has must yield to such use.

3. Highways ⇨88

A county has right to adapt and appropriate its highways from time to time to such uses as will in its judgment be most conducive to public good.

4. Dedication ⇨62

Where owner of easement to run water mains under street signs, without reservation or exception, certificate dedicating street to county for highway purposes, such

owner must pay cost of relocating such mains in case of conflict with reasonable use of street as highway.

5. Estoppel ⇨62(3)

Where, prior to dedication, county road department proposed that street be improved with parkway on either side and water company which had easement and knowledge of proposed plan, placed mains underneath the parkway, right of county to change highway to meet changed conditions was apparent to water company when it subsequently signed certificate dedicating street to county without reservation and there was no estoppel against county.

Harold W. Kennedy, County Counsel,
Lloyd S. Davis, Deputy County Counsel,
Los Angeles, for appellant.

Samuel M. Garroway and Frederick L. Botsford, Los Angeles, C. W. Cornell, and O. O. Collins, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

The facts in this case have been stipulated by the parties.

Plaintiff is a public utility water company, supplying water near the City of Inglewood, in the county of Los Angeles. Easements for plaintiff's water mains were granted by owners of the real property, and the mains were placed underground along Anza Avenue prior to its dedication as a public highway. All of the places mentioned are in unincorporated territory in the county.

Dedication of the highway was by filing subdivision maps, in accordance with Section 11590, Business and Professions Code. On these maps appeared a certificate executed by plaintiff and the title owners of the property as follows: "We hereby certify that we are the owners of an interest in the land included within the subdivision shown on the annexed map and that we are the only persons whose consent is necessary to pass a clear title to said land, and we consent to the making and recordation of said map and subdivision as shown within the colored border line, and we hereby dedi-

cate to public use all the streets, places and avenues shown on said map within said subdivision."

There were no reservations or exceptions in the certificates of dedication and the subdivision maps indicate an eighty-foot right of way designated as Anza Avenue, with no portion of it set apart for a parkway. Section 11590 Business and Professions Code requires reservations, if any, to be set forth in the offer.

Prior to the dedication, the County Road Department proposed and recommended that Anza Avenue be improved as a secondary highway, with a parkway twelve feet wide on either side of the paved portion thereof. Plaintiff, knowing the proposed plan, placed its water mains underneath the parkway, where they would not be disturbed by such improvement. Had Anza Avenue been maintained under the original plan, plaintiff's mains would not have been affected.

But the plan was changed, and the county contracted with contiguous property owners to make Anza Avenue, a primary highway of such width as to require paving and curbing over most of the twelve-foot parkway. It thus became necessary to relocate certain of plaintiff's water mains. Upon request of the county, plaintiff did so, at a cost of \$5,598.34. Claim for reimbursement was duly presented to the county, which claim was rejected.

The Superior Court made its findings upon the agreed facts, concluded that judgment should be for plaintiff, and judgment passed accordingly. Defendant appeals from the judgment.

Defendant county states that the only question here is one of law as to the rights of the owner of a private easement after he has joined with owners of contiguous property in dedicating a highway to public use. In other words, it is defendant's position that by joining in the execution of an unequivocal dedication of the eighty-foot right of way the water company subordinated its private easement to the right of the public to use any portion of Anza Avenue for highway purposes, when required by public convenience and necessity; and that,

therefore, the water company must bear the cost of relocating its water mains.

It is plaintiff water company's position that its easement was not conveyed by, or included in the dedication; that it was not a part of the dedication; that it has at all times remained in plaintiff; that plaintiff's right to maintain and use its water mains as located prior to the dedication is superior to whatever rights the county acquired by the dedication; and that the trial court correctly determined that the county should reimburse the water company. It is also plaintiff's position that in any event the county is estopped, in the circumstances of this case, from requiring plaintiff to pay this cost.

Plaintiff argues that all equities are in its favor; that it was requested to join in the dedication in order to clear up the title of the county to its easement; and that the county at all times recognized plaintiff's use of a portion of the highway.

Defendant argues to the contrary; that the water company was influenced by its expectation of increased population and new customers.

Wherever the equities may be, the primary question for this Court to determine is the scope and extent of the title which vests in the state, or any of its agencies, upon dedication of property for highway purposes. To do otherwise would be to exemplify the hoary legal adage that hard cases make bad laws.

[1-3] Plaintiff's rights and the rights of contiguous land owners are to be measured by the terms of their conveyance to the county. The maps and acceptance thereof dedicated Anza Avenue as delineated thereon to county road purposes. *Watson v. Greely*, 69 Cal.App. 643, 232 P. 475. Upon recordation of the maps title to the property for highway purposes vested in the county. Section 11615, Business and Professions Code. While the county's right of way is an easement, neither the owners of adjoining land nor plaintiff may use the highway for any purpose inconsistent with the right of the public to its full and free enjoyment as such. Such rights as plaintiff and adjoining land owners may have are

subordinate to, and must yield to the public use. *Pasadena v. California-Michigan, etc., Co.*, 17 Cal.2d 576, 110 P.2d 983, 133 A.L.R. 1186; *Hayes v. Handley*, 182 Cal. 273, 187 P. 952; *Colegrove Water Co. v. City of Hollywood*, 151 Cal. 425, 90 P. 1053, 13 L.R.A.,N.S., 904; *People v. Henderson*, 85 Cal.App.2d 653, 194 P.2d 91. The public is entitled to the use of all the territory platted and dedicated as a public street. *Merritt v. McFarland*, 4 Cal.App. 390, 88 P. 369. With changing conditions of travel, a city has the right to adapt and appropriate its highways from time to time to such uses as in its judgment will be most conducive to the public good. *Wattson v. Eldridge*, 207 Cal. 314, 278 P. 236.

No case has been cited to, or found by this Court precisely on the question as to who has the burden and must pay the cost of relocating pipe lines in place before dedication of highways.

When such structures have been placed in state highways under franchise, Section 680 of our Streets and Highways Code makes it the obligation of the franchise holder upon demand of the state to move the pipe lines at the cost and expense of the franchise holder. In this case plaintiff's rights were not acquired by franchise, and the code does not give county boards of supervisors the rights set forth in Section 680, Streets and Highways Code.

But the county holds the property for highway purposes. The effect of the dedication was to make these purposes superior and paramount to the prior rights of plaintiff and the other land owners. *Pasadena v. California-Michigan, etc., Co.*, supra; *Fallon v. City and County of San Francisco*, 44 Cal.App.2d 404, 112 P.2d 718.

[4] Therefore it is the conclusion of this Court that plaintiff has an easement to maintain its water mains underneath Anza Avenue so long as such maintenance is not in unreconcilable conflict with its use for highway purposes, *Pasadena v. California-Michigan, etc., Co.*, supra; and that inasmuch as such easement must give way to reasonable use of Anza Avenue for highway purposes plaintiff must pay the cost of relocating its mains.

[5] Nothing in the agreed statement of facts supports plaintiff's suggestion of estoppel of defendant. When the dedication was made, the right of the county to change and improve the highway with changing conditions, *Hayes v. Handley*, supra, was as apparent to the water company as it was to the county.

The judgment is reversed.

WHITE, P. J., concurs.

DORAN, J., dissents.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



106 Cal.App.2d 770

MARSHALL v. PACKARD-BELL CO. et al.
Civ. 18411.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1951.

Rehearing Denied Nov. 1, 1951.

Hearing Denied Dec. 13, 1951.

Cloyd Marshall sued the Packard-Bell Company, a corporation, and another for damages on the theory of illegal business compulsion and accounting on the theory that plaintiff entrusted money to defendants because of duress. From a judgment of the Superior Court of Los Angeles County, William B. McKesson, J., on an order sustaining defendants' demurrer to plaintiff's amended complaint, plaintiff appealed. The District Court of Appeal, McComb, J., held that plaintiff's causes of action for damages were barred by the two year statute of limitations and that the count of the complaint for accounting stated no cause of action.

Judgment affirmed.

1. Limitation of Actions §28(1)

Where action to recover damages for alleged illegal business compulsion to contribute to defendants' advertising fund in order to retain distributorship of one defendant's products was not filed until over two years after plaintiff's last payment of money to defendants, causes of action predicated on theory that plaintiff was entitled to recover money from defendants on quasi

contractual obligation arising from defendants' receipt of money from plaintiff because of such compulsion were barred by two-year statute of limitations. Code Civ.Proc. § 339, subd. 1.

2. Limitation of Actions ☞97

The two-year statute of limitations governing causes of action predicated on theory that plaintiff was entitled to recover money from defendants on quasi contractual obligation arising from defendants' receipt of money from plaintiff because of alleged illegal business compulsion was not tolled during period in which plaintiff was acting under alleged duress. Code Civ.Proc. §§ 312, 339, subd. 1.

3. Limitation of Actions ☞104½

Statutes of limitation must be strictly construed, and if statute providing for tolling of time for filing of action contains no express exception, court cannot create one. Code Civ.Proc. § 312.

4. Courts ☞95(1)

Decisions of courts of foreign states are not controlling on questions decided by California appellate courts.

5. Pleading ☞8(16)

General allegations of duress, coercion, threats, compulsion, etc., are merely pleader's conclusions and insufficient, without further statement of particular facts, to raise issue of duress or coercion.

6. Contracts ☞95(3)

A threat to do what party making threat has legal right to do does not constitute duress or coercion.

7. Account ☞7

A count of amended complaint for accounting on theory that plaintiff paid money to defendants under duress of corporate defendant's threat to deprive plaintiff of his distributorship of corporation's products, unless he made contributions to corporation's advertising fund, stated no cause of action, where corporation had right to terminate distributorship at any time.

8. Release ☞12(2)

Where written releases of corporation and its advertising agent from responsibility and accountability for moneys paid them

by distributor of corporation's products as contributions to corporation's advertising fund were not executed under duress, they were binding, though there was no consideration for them. Civ.Code, § 1541.

Elmer H. V. Hoffman and Charles H. Carr, Los Angeles, for appellant.

Todd W. Johnson, Donald C. McGovern, Edward D. Robertson, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment predicated upon the sustaining of defendants' demurrer to plaintiff's complaint as amended in an action to recover damages and for an accounting, plaintiff appeals.

Facts

Plaintiff's complaint as amended was in three counts, the first two based upon the theory of "illegal business compulsion," and seeking damages therefor, while the third count sought an accounting and was predicated upon the theory that plaintiff had entrusted money to defendants by duress.

The substance of the complaint as amended was: that during the month of November, 1945, plaintiff and defendant Packard-Bell Company agreed that plaintiff should have an exclusive distributorship (within a specified area of the city of Los Angeles) of the products to be manufactured by the corporation; that during the month of November, 1945, defendant represented to plaintiff and other distributors of Packard-Bell products that defendant intended to carry on and did carry on an extensive campaign of advertising Packard-Bell products; that all distributors would be required to contribute a fixed percentage of their monthly billings to an advertising fund to be administered by the defendant David Fenwick, and in order for plaintiff and such other distributors to act as such they would have to contribute to such fund and make payment to defendant David Fenwick out of each of their monthly billings, percentages thereof to be determined by defendant Packard-Bell; that coerced by the threat of defend-

ants to deprive him of his distributorship plaintiff did accede to defendants' requirement that he agree to contribute a percentage of his billings to defendants, and as a result of such continued economic and business compulsion and duress of defendant, plaintiff contributed to the fund out of his billings from January, 1946, to and including the billing of April 5, 1947, the sum of \$25,521.24; that plaintiff continued to be subject to such business and economic compulsion until the termination of his distributorship by defendant company in May, 1948.

It was alleged that plaintiff executed and delivered to defendants a letter reading in part as follows:

"November 19, 1945.

"Mr. Dave Fenwick—Advertising

* * * * *

"Dear Mr. Fenwick:

* * * * *

"It is understood the payment to you monthly of the specified percentage of Packard-Bell Company billing to me shall represent payment in full for my share of all advertising of Packard-Bell products and policies, dealer display boards and other sales promotion material supplied by you, and such other expenses as are incident to this advertising and sales promotion program.

"Very truly yours,

"/s/ Cloyd Marshall

"Distributor."

It was further alleged that plaintiff thereafter on February 10, 1947, executed a release to defendants the material portion of which read as follows:

"* * * I hereby release you and the Packard-Bell Company, individually and jointly, for any responsibility for the monies paid by me to you and expended by you, including monies already paid by you

to the Packard-Bell Company for their charges and expenses incident to the operation of this advertising and sales promotion campaign."

On April 30, 1947, plaintiff executed another release to defendants wherein he agreed as follows:

"The Distributor releases Packard-Bell Company and David Fenwick-Advertising jointly and severally from all responsibility and accountability for any and all moneys paid by the Distributor to David Fenwick-Advertising."

It was also alleged that at the time of the execution of the releases plaintiff was acting under duress, coercion, business and economic compulsion inflicted upon him by defendants, and that after being relieved from such pressure he gave notice of the rescission of the releases.

Defendants filed a demurrer to the complaint as amended on the grounds: (1) that each count failed to state sufficient facts to constitute a cause of action, and (2) that plaintiff's alleged cause of action was barred by the provisions of subd. 1, sec. 339 of the Code of Civil Procedure.¹

Questions

[1] First: *Were plaintiff's first and second causes of action, which were predicated upon the theory that plaintiff was entitled to recover money from defendants upon a quasi contractual obligation arising from the fact that defendants had received money from plaintiff because of alleged illegal business compulsion, barred by the provisions of subdivision 1, section 339 of the Code of Civil Procedure?*

Yes. Subdivision 1 of section 339, Code of Civil Procedure, provides that an action upon a contractual obligation or liability not founded upon an instrument in writ-

1. Sec. 339 of the Code of Civil Procedure provides that suit must be filed within two years upon:

"1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code; or an action founded upon a contract, obligation or liability, evidence by a certifi-

cate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidence by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder."

ing must be commenced within two years from the date the cause of action arises.

It is conceded in the instant case that the last money given defendants by plaintiff was in May, 1947. Hence, since the instant action was not filed until July 8, 1949, more than two years elapsed from the time plaintiff's cause of action arose and it was barred by the statute of limitations.

[2] There is no merit in plaintiff's contention that the statute of limitations was tolled during the period that he was acting under alleged duress. Section 312 of the Code of Civil Procedure reads: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

[3] The courts in California have held that statutes of limitation are to be strictly construed and that if there is no express exception in a statute providing for the tolling of the time within which an action can be filed, the court cannot create one. (*Lambert v. McKenzie*, 135 Cal. 100, 103, 67 P. 6; *Morrow v. Barker*, 119 Cal. 65, 66, 51 P. 12; *Lattin v. Gillette*, 95 Cal. 317, 319, 30 P. 545; *Tynan v. Walker*, 35 Cal. 634, 640.)

[4] In view of the decisions of the appellate courts of our own state cases relied on by plaintiff from other states such as *Durazo v. Durazo*, 19 Ariz. 571, 173 P. 350; *Hughes v. Silvers*, 169 Iowa 366, 151 N.W. 514, and *Besteiro v. Besteiro*, Tex.Civ. App., 45 S.W.2d 379, are not controlling. (*Estate of Hampe*, 85 Cal.App.2d 557, 559 [2], 193 P.2d 133; see also cases cited in 4 Cal.Jur., 10 Year Supp. (1943), Courts, sec. 148, note 14, p. 499.)

[5] Second: *Did the third cause of action, predicated upon the theory that plaintiff had paid money to defendants under duress, state a cause of action?*

No. General allegations of duress, co-

ercion, threats, compulsion, etc., are merely conclusions of the pleader and are insufficient without a further statement of particular facts to raise any issue of duress or coercion. (*Metropolis, etc., Sav. Bank v. Monnier*, 169 Cal. 592, 596, 147 P. 265.)

[6] Viewing the facts alleged in the third cause of action in the light of this rule, it is disclosed that the only fact alleged constituting duress was that defendant corporation threatened to deprive plaintiff of his exclusive distributorship in the event he did not make the contributions to the advertising fund which was requested. It is likewise the rule that it does not constitute duress or coercion to threaten to do that which a party has a legal right to do. (*Thomson v. Mortgage Investment Co.*, 99 Cal.App. 205, 213, 278 P. 468; see also cases cited in 17 C.J.S. (1939), Contracts, sec. 172, p. 532.)

[7] It is conceded in the present case that defendant corporation had the right to terminate its distributorship contract with plaintiff at any time. Therefore when it threatened to do so unless plaintiff made a contribution to the advertising fund, such threat did not constitute illegal duress or coercion, as defendant corporation was merely threatening to do something that it was legally entitled to do. Hence plaintiff's contribution was made by him voluntarily.

[8] In addition to the foregoing reason why the third count did not state a cause of action it alleged three separate releases of defendants executed by plaintiff, and since such releases were not executed under duress they are binding since they were in writing, even though there was not any consideration for them. (Civil Code, sec. 1541.2)

For the foregoing reasons the trial court properly sustained the demurrer to plaintiff's complaint as amended without leave to amend.

Affirmed.

MOORE, P. J., concurs.

2. Section 1541 of the Civil Code reads as follows: "An obligation is extinguished by a release therefrom given to the debt-

or by the creditor, upon a new consideration, or in writing, with or without new consideration."

106 Cal.App.2d 831

Cite as 236 P.2d 205

Ralph OTT, Plaintiff and Appellant, v. PACKARD-BELL COMPANY, a corporation, and David Fenwick, an individual doing business as David Fenwick-Advertising, Defendants and Respondents.

Civ. 18415.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1951.

Rehearing Denied Nov. 1, 1951.

Hearing Denied Dec. 13, 1951.

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Elmer H. V. Hoffman and Charles H. Carr, Los Angeles, for appellant.

Todd W. Johnson, Donald C. McGovern, Edward D. Robertson, Los Angeles, for respondents.

McCOMB, Justice.

It has been stipulated that the decision in *Marshall v. Packard-Bell*, Cal.App., 236 P.2d 201, shall be controlling in the above entitled case. Since we have this day filed a decision affirming the judgment in *Marshall v. Packard-Bell*, supra, it is ordered that the judgment in the instant case be affirmed.

MOORE, P. J., concurs.



Fred G. SCRAFIELD, Plaintiff and Appellant, v. PACKARD-BELL COMPANY, a corporation, and David Fenwick, an individual doing business as David Fenwick-Advertising, Defendants and Respondents.

Civ. 18414.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1951.

Rehearing Denied Nov. 1, 1951.

Hearing Denied Dec. 13, 1951.

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Elmer H. V. Hoffman and Charles H. Carr, Los Angeles, for appellant.

Todd W. Johnson, Donald C. McGovern, Edward D. Robertson, Los Angeles, for respondents.

McCOMB, Justice.

It has been stipulated that the decision in *Marshall v. Packard-Bell*, Cal.App., 236 P.2d 201, shall be controlling in the above entitled case. Since we have this day filed a decision affirming the judgment in *Marshall v. Packard-Bell*, supra, it is ordered that the judgment in the instant case be affirmed.

MOORE, P. J., concurs.



106 Cal.App.2d 830

Bruce WHITE, Plaintiff and Appellant, v. PACKARD-BELL COMPANY, a corporation, and David Fenwick, an individual doing business as David Fenwick-Advertising, Defendants and Respondents.

Civ. 18413.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1951.

Rehearing Denied Nov. 1, 1951.

Hearing Denied Dec. 13, 1951.

Elmer H. V. Hoffman and Charles H. Carr, Los Angeles, for appellant.

Todd W. Johnson, Donald C. McGovern, Edward D. Robertson, Los Angeles, for respondents.

McCOMB, Justice.

It has been stipulated that the decision in *Marshall v. Packard-Bell*, Cal.App., 236 P.2d 201, shall be controlling in the above entitled case. Since we have this day filed a decision affirming the judgment in *Marshall v. Packard-Bell*, supra, it is ordered that the judgment in the instant case be affirmed.

MOORE, P. J., concurs.

106 Cal.App.2d 829

G. S. QUINLAN, Plaintiff and Appellant, v. PACKARD-BELL COMPANY, a corporation, and David Fenwick, an individual doing business as David Fenwick-Advertising, Defendants and Respondents.

Civ. 18412.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1951.

Rehearing Denied Nov. 1, 1951.

Hearing Denied Dec. 13, 1951.

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Elmer H. V. Hoffman and Charles H. Carr, Los Angeles, for appellant.

Todd W. Johnson, Donald C. McGovern, Edward D. Robertson, Los Angeles, for respondents.

McCOMB, Justice.

It has been stipulated that the decision in *Marshall v. Packard-Bell*, Cal.App., 236 P.2d 201, shall be controlling in the above entitled case. Since we have this day filed a decision affirming the judgment in *Marshall v. Packard-Bell*, supra, it is ordered that the judgment in the instant case be affirmed.

MOORE, P. J., concurs.



106 Cal.App.2d 823

In re **COLE'S ESTATE.****MORRISON et al. v. MURPHY.**

Civ. 14880.

District Court of Appeal, First District,
Division 1, California.

Oct. 18, 1951.

Proceeding in the matter of the estate of James Michael Cole, deceased, wherein Irene Murphy filed a claim as a creditor of the estate for value of services allegedly rendered to decedent at decedent's request, opposed by John W. Morrison, and others, heirs of the decedent. The Superior Court, City

and County of San Francisco, T. I. Fitzpatrick, J., ordered that the claim be allowed and the heirs appealed. The District Court of Appeal, Peters, P. J., held that under statute providing an appeal may be taken to Supreme Court from an order directing or allowing payment of a debt, claim, legacy or attorney's fee, an appeal is allowed from an order directing or allowing the payment of a debt or claim but not from an order merely allowing or approving the claim and therefore the order was not appealable and the appeal was premature.

Appeal dismissed.

1. Executors and Administrators ⚡256(2)

Under section of Probate Code providing an appeal may be taken to Supreme Court from an order, directing or allowing payment of a debt, claim, legacy or attorney's fee, an appeal is allowed from an order directing or allowing payment of a debtor claim but is not authorized from an order merely allowing or approving the claim. Probate Code, § 1240.

2. Executors and Administrators ⚡256(2)

Order of probate court allowing claim against decedent's estate and providing that it was to be paid in due course of administration was not an order directing or allowing the payment of a debtor claim and therefore was a non-appealable order. Probate Code, §§ 705, 713, 952, 1240.

Mueller & McLeod and Carroll F. Jacoby, all of San Francisco, for appellants.

Henry F. Boyen, Douglas M. Moore and Frank J. Fontes, all of San Francisco, for respondent Phil C. Katz as administrator.

John D. Costello, San Francisco, for respondent Irene Murphy.

PETERS, Presiding Justice.

The heirs of the decedent appeal from an order of the probate court allowing the claim of respondent as a creditor of the estate of Cole. The basis of the appeal is that the claim, as filed, does not comply with the provisions of section 705 of the Probate Code. We are of the opinion that the order appealed from is not an appealable order, and, for that reason, the appeal must be dismissed.

The respondent, Irene Murphy, filed a claim against the estate for \$1,770, the claimed value of services alleged to have been rendered to decedent by the claimant at decedent's request. The claim was first rejected by the administrator, but later he withdrew his objections, and approved the claim. The probate court thereupon approved the claim by an order which reads as follows:

"It appearing to the Court that, through inadvertence, the claim of Irene Murphy for \$1770.00, against the estate of the above named decedent, was rejected; that said claim is a valid and legal claim against the estate of the said decedent, all of which more fully appears in said claim on file herein, and the evidence heretofore introduced in this Court; and notice of rejection of said claim having been withdrawn by said administrator, and said administrator having approved said claim in the full amount; and good cause appearing therefor,—

"It is hereby ordered that the claim of Irene Murphy for \$1770.00 is hereby allowed for the full amount, to be paid in the due course of administration.

"Done in open court this 20th day of October, 1950.

"T. I. FITZPATRICK

Judge of the Superior Court."

The heirs at law purport to appeal from that order. In probate cases, with certain limited exceptions not here applicable, only those orders specified in section 1240 of the Probate Code are appealable. Estate of O'Dea, 15 Cal.2d 637, 638, 104 P.2d 368; Estate of Herrington, 79 Cal.App.2d 389, 390, 179 P.2d 650. That section, so far as pertinent here, provides: "An appeal may be taken to the supreme court from an order * * *; directing or allowing the payment of a debt, claim, legacy or attorney's fee; * * *."

[1] It will be noted that this section allows an appeal from an order "directing or allowing the *payment*" of a debt or claim. It does not authorize an appeal from an order merely allowing or approving the claim. This rule was stated as follows in Miller v. California Trust Co., 15 Cal.App.2d 612,

616, 59 P.2d 1035, 1037: "As appellant points out, section 1240 of the Probate Code, treating of 'Appealable Orders,' includes, as such, an order 'directing or allowing the payment of a debt, claim, legacy or attorney's fee.' But we note a distinction between an order *directing payment or allowing payment* of a claim and an order of the court merely *approving* or *allowing* the claim. We believe that the order which is appealable under this section is an order directing or allowing *payment* of a claim which has already been 'allowed.'" Emphasis by the court. This case has been recently approved in Estate of Girard, 105 Cal.App.2d 102, 233 P.2d 56. (See, also, 2 McBain, California Trial and Appellate Practice, p. 282, § 960.)

[2] The order here appealed from is merely an order allowing the claim. Appellant asserts that the order is more than an order allowing the claim, for the reason, so it is urged, that it directs payment of the claim. In this connection appellant points out that the order, after allowing the claim, provides that such claim is "to be paid in the due course of administration." This quoted provision merely added to the order of allowance what otherwise would have been necessarily implied by reason of the provisions of section 713 of the Probate Code. That section provides: "Every claim allowed by the executor or administrator and *approved* by the judge shall be ranked among the acknowledged debts of the estate, *to be paid in due course of administration*; but the validity thereof may be contested by any person in interest, at any time prior to the settlement of the account of the executor or administrator in which it is first reported as an allowed and approved claim, unless established by a judgment against the executor or administrator. The date of allowance of each claim, together with the amount allowed, must be entered in the register by the clerk after the allowance or approval thereof by the judge." (Italics added.)

This section fixes the status of allowed claims, and it contains the very language of the order appealed from and relied upon by appellants to support their contention that this is not an ordinary order allowing a

claim, but one also directing payment. Had the order not contained the language that the allowed claim was "to be paid in due course of administration", such a direction would have necessarily been implied by virtue of section 713. In other words, the phrase in question merely states the legal effect of a claim allowed by the administrator and approved by the court. At such time it becomes an acknowledged debt of the estate, and should, of course, be ultimately paid. Estate of Thee, 75 Cal.App.2d 308, 310, 171 P.2d 73. The very purpose of securing the allowance of a claim is to have it paid in due course. But that does not make the order so providing a direction to pay. The proper and normal time for the court to order the payment of debts is when the approved claim is reported in an account after the time to file or present claims has expired. Probate Code, § 952; Estate of Brown, 54 Cal.App.2d 575, 580, 129 P.2d 713, 130 P.2d 188. The appellants are fully protected by their right to appeal from such order.

The appeal is premature. It is from a non-appealable order. For that reason the appeal is dismissed.

BRAY and FRED B. WOOD, JJ., concur.



106 Cal.App.2d 782

In re HANNAM'S ESTATE.
GRIFFITH v. HANNAM et al.
Civ. 18065.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Proceeding in the matter of the estate of Walter E. Hannam, deceased, wherein Marietta Hannam, and others, contested a will presented by Marie Antoinette Griffith, petitioner, and presented another will. The Superior Court of Los Angeles County, John Gee Clark, J., entered judgment rejecting will presented by contestants on ground that it

was executed as result of undue influence of testator's wife, and contestants' appeal was opposed by Marie Antoinette Griffith and Grace N. Mackey, legatee. The District Court of Appeal, Hanson, J., pro tem., held that evidence supported judgment based on finding that wife exerted undue influence.

Affirmed.

1. Wills ⇨166(2)

In will contest, evidence supported judgment rejecting will leaving property to wife on ground that it was executed by virtue of undue influence exerted by wife.

2. Wills ⇨151

Instrument which a testator is induced by various means to execute, though in outward form his will, is in reality not his will but that of another.

3. Wills ⇨166(12)

In a will contest, issue of undue influence can be determined by inferences drawn from all the facts and circumstances, if such inferences would be drawn by a reasonable mind.

4. Appeal and Error ⇨1012(1)

It is function of the trial court, and not that of a reviewing court, to weigh the evidence.

David H. Cannon, of Cannon & Callister, Los Angeles, for appellant.

Henry M. Lee, Los Angeles, for respondent Mackey.

Charles E. McGinnis, Los Angeles, for respondent Griffith.

HANSON, Justice pro tem.

This is an appeal from a judgment entered by the trial court based upon its finding that the will presented by appellants for probate was executed by the testator as a result of the undue influence of his wife, one of the appellants herein. The only contention made here by appellants is that the evidence is insufficient to sustain the judgment.

The testator at the time of his death was 78 years old. He left surviving him his wife, to whom he had been married 53 years, a son named Harry and two grand-

daughters, one named Dorothy, the daughter of Harry, and another named Maxine King, the adult daughter of a son who had predeceased the testator. For a period of 30 years prior to his death the decedent had operated a sheet metal and iron shop in Los Angeles. He left an estate derived largely from the business of a value somewhere between \$35,000 and \$80,000.

Early in 1947 decedent employed as a secretary a woman by the name of Grace Mackey. In May, 1948, he went to the office of an attorney to have a power of attorney drawn. He told the lawyer that Miss Mackey was his silent partner in his business and he wished to give her complete authority to manage his business affairs in his absence. Such a power of attorney was drawn and he executed it in August, 1948. On September 22, 1948, he sold his remaining partnership interest in his business to Miss Mackey for \$1,000. The sale was evidenced by a bill of sale which was promptly recorded. At the same time he caused his attorney to prepare a will likewise dated September 22, 1948, which he duly executed. This will, which is not the will here involved but which was the will admitted to probate, made three cash bequests; one of \$100 to his granddaughter Maxine King, another of \$100 to his son Harry and still another of \$1,000 to his secretary and partner. All the rest of his property he bequeathed to his wife for life with the remainder to a trustee who was to pay the sum of \$100 per month to his son during his life and \$50 per month to his granddaughter Maxine King during her life and upon the death of the last of these beneficiaries the remainder was to pass to his secretary, if she was living, otherwise to his granddaughter Dorothy.

Late in January, 1949—about four months after the transactions above narrated—decedent was suddenly taken ill. At the hospital his case was diagnosed as being that of cancer. The will which is here involved which left all his property outright to his wife was executed by the decedent in a sanitarium to which he had been removed. The facts so far stated are undisputed. We pass now to relate further facts which the court upon the evi-

dence and all proper inferences therefrom could have found to be true facts.

The decedent was proud of the business he had established and was anxious to see it carried on under the name he had given it. His son Harry took no interest in the business and the son's endeavors to establish himself in other kinds of businesses had not only been unsuccessful but had caused the father to lose money. As a result of this and primarily because of the son's excessive use of liquor the father and son were not on good terms. The testator's wife, however, always sided with her son and as a consequence he preferred his business to his home. He referred to the latter as being merely a place to sleep. In 1947, as stated, he employed Grace Mackey as his secretary. She quickly impressed him as being able to carry on the business, whereas his son could and would not do so. Notwithstanding the fact that he appears to have resented his wife's contrary attitude toward their son, he nevertheless was anxious to adequately provide for her upon his death, but at the same time he wished to safeguard her against the son for fear the latter would get the estate away from her. When in 1948 he employed an attorney to draw his will he did not consult with his wife nor did he thereafter advise her he had executed his will. Coincident with the execution of this will he left a letter directed to the members of his family which was entrusted to his executor named in the will for delivery to his family upon his death. This letter explained the reasons which actuated him in drawing the will as it was drawn.

While the decedent was in the sanitarium his wife learned from conversations with his secretary that the latter claimed not only that she had purchased his business but that the testator had made a will in which the secretary was named as one of the beneficiaries. Upon learning these facts the wife concluded that she was entitled not only to the business, but to his estate as well. Accordingly, she had a conversation with her husband about the matter suggesting, so she testified, that she was entitled to his property and that he should make a will to that effect. Her tes-

timony is that he agreed to do so. She then got in touch with her son's wife and between them it was arranged that the daughter-in-law, who was employed at a bank, would arrange to have a will drawn giving the testator's wife all his property including his business and that the daughter-in-law would provide witnesses for the will. The will was promptly prepared at the bank and two bank employees—co-employees of the daughter-in-law—appeared at the sanitarium with it and handed it to the testator's wife. She read it over and handed it to her husband who signed it. At the time the decedent was in great pain and even the testator's wife testified that at the time she questioned in her own mind whether he was in a condition to sign the will and thought that perhaps the will should be rewritten and executed anew.

It should also be stated at this point that just six days before the will was executed decedent's wife and his daughter-in-law appeared at his room at the sanitarium with a woman notary—employed at the bank where the daughter-in-law was also employed. The notary testified that decedent's wife handed him two documents; that he signed both and she then notarized them. He said nothing to her, nor did she say anything to him. She further stated that the other women—the two Hannams—conversed, but what they said she did not recall nor did she recall whether the documents were read by the decedent. From her testimony the inference was strong that he did not read them. The two documents were duplicate revocations of the power of attorney decedent had given Miss Mackey. Not only did the documents contain revocatory provisions but likewise they recited he was the owner of the business and that Miss Mackey had paid him nothing for the business. In addition it contained a demand directed to Miss Mackey to surrender the business to Hannam's son and a grant to the latter to take over the business.

[1] Without detailing further the facts surrounding the execution of the will we are of the view that the trial judge was entirely justified in ruling that the will was executed by virtue of the undue influence of his wife.

[2,3] "The theory which underlies the doctrine of undue influence is that testator is induced by various means, to execute an instrument which, although his, in outward form, is in reality not his will, but the will of another person which is substituted for that of testator. Such an instrument is, in legal effect, not a will at all." 1 Page on Wills, 3d Ed., § 184, pp. 368 and 369; see also *Estate of Newhall*, 190 Cal. 709, 214 P. 231, 28 A.L.R. 778; *In re Estate of Hinde*, 200 Cal. 710, 254 P. 561. Direct evidence as to undue influence is rarely obtainable and hence a court or jury must determine the issue of undue influence by inferences drawn from all the facts and circumstances. Taken singly the facts or circumstances may be of little weight, but taken collectively they acquire their proper weight and may then be sufficient to raise a presumption of undue influence. "But it is not possible to say that any single circumstance or group of facts is the invariable mark of such a presumption, or that there is any uniform rule capable of application apart from the facts of each case." 9 Wigmore on Evidence, 3rd ed., sec. 2503, pp. 364-366. It is not necessary to prove any particular group of facts or circumstances, but rather to prove such as sufficiently sustain to a reasonable mind a fair and proper inference of undue influence.

[4] In the case before us the wife stood in a confidential relationship; the will as drawn did not accord with a will of the character which she said he had agreed to sign. According to her testimony he agreed to leave all his property to her but nothing was said to the effect that his son was to take the entire estate if the wife should predecease the testator. The will as drafted was manufactured, innocently or otherwise, by the wife to carry out her wishes and expressed desires which had not been enunciated to her by the testator, i. e., that the son should take the entire estate if his mother predeceased him. Moreover, the will was contrary to the consistent attitude he had taken toward his son and to his granddaughter Maxine King as evidenced by his oral statements and by his earlier will. It was for the trial court, and it is not for us, to weigh the evidence.

As the rules applicable to the facts of the case are so well established in this state we see no need to state in detail the cases which do and do not apply to the facts or to distinguish one case after another which has been cited to us. It is enough for us to say that after a detailed review of the record, we find no error in the judgment rendered below.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J.,
concur.



106 Cal.App.2d 827

CHEESMAN et ux. v. ODERMOTT et al.
Civ. 8060.

District Court of Appeal, Third District,
California.

Oct. 18, 1951.

Loren W. Cheesman and wife brought action against Adolph Odermott and others. From an adverse judgment of the Superior Court, Sacramento County, John Quincy Brown, J., plaintiffs appealed. On appellees' motion to dismiss the appeal, the District Court of Appeal, Adams, P. J., held that appellants had right to appeal upon judgment roll alone.

Motion denied.

Appeal and Error ⇨544(1)

Appellant had right to appeal on judgment roll alone. Rules on Appeal, rule 5(f).

Busick & Busick, Sacramento, for appellants.

Desmond, Miller & Artz, Sacramento, for respondents.

ADAMS, Presiding Justice.

Plaintiffs in this action appealed from the judgment of the trial court rendered in favor of defendant. The record on appeal consists solely of the judgment roll,

two opinions rendered by the trial court, and a temporary restraining order which was issued before the cause was tried and dissolved by the final judgment.

Respondent has moved to dismiss the appeal on the ground "that the points submitted by the appellants on appeal do require a consideration of the oral proceedings and the testimonies of the witnesses in the trial court of the above-entitled matter, and upon the grounds that the appellants have failed to procure the filing of a record of the oral proceedings and have not filed a reporter's transcript or an agreed statement or a settled statement of the oral proceedings at the trial of the above matter."

In support of said motion respondent cited Rules on Appeal, Nos. 4, 6, 7, 8, 9 and 10 only; but on the day of hearing their counsel cited four cases which he stated hold that an appellant may not appeal upon a judgment roll alone, but must include in his record a transcript of the testimony taken. The cases are *Luftenburg v. Luftenburg*, 56 Cal.App.2d 61, 132 P.2d 34; *Alexander v. Mayer*, 39 Cal.App.2d 157, 102 P.2d 540; *Douglass v. Crabtree*, 40 Cal. App.2d 393, 104 P.2d 1066, and *Culver v. Culver*, 65 Cal.App.2d 145, 150 P.2d 292. They are not in point here.

That an appellant has a right to appeal upon a judgment roll alone is clear from Rule 5(f) of the Rules on Appeal, which provides: "Where the appellant has designated only a clerk's transcript consisting of part or all of the matters specified in Rules 5(a) and 5(b) and has not given notice to prepare a reporter's transcript, the respondent may not require the preparation of a reporter's transcript but he may counter-designate any exhibits, affidavits, papers or records, other than instructions, which may properly be included in a clerk's transcript. Where the appellant has designated only the papers and records constituting the judgment roll and has not given notice to prepare a reporter's transcript, the judgment roll shall constitute the record on appeal, and the respondent may not require any addition thereto. In either case, however, on motion of the respondent the reviewing court may allow augmentation of the record whenever it

is necessary to prevent a miscarriage of justice."

The record before us does not show, nor do the moving parties assert, that they counter-designated any portion of the record that they desired to have included in the record on appeal, nor have they sought augmentation thereof.

By the record which appellants have filed in this court they have limited the scope of review to such matters as are properly reviewable thereon; and if their record be insufficient no injury to respondents can result therefrom. See *Tarvin v. Davey*, 51 Cal.App.2d 296, 297, 124 P.2d 624; *North v. Evans*, 136 Cal.App. 434, 436, 28 P.2d 938; *Estate of Larson*, 92 Cal.App.2d 267, 268, 206 P.2d 852; *Pacific Gas & Electric Co. v. Scott*, 10 Cal.2d 581, 584, 75 P.2d 1054; *Ramsay v. Rodgers*, 189 Cal. 100, 101, 207 P. 516; *Swaney v. Black*, 26 Cal. App.2d 314, 315, 79 P.2d 176.

The motion to dismiss is denied.

PEEK, J., and SCHOTTKY, Justice pro tem., concur.



106 Cal.App.2d 775

JOHNSTON v. JOHNSTON et al.
Civ. 18533.

District Court of Appeal, Second District,
Division 2, California.
Oct. 15, 1951.

Rehearing Denied Nov. 1, 1951.

Hearing Denied Dec. 13, 1951.

Maurice C. Johnston sued his wife, Vida C. Johnston, for a divorce on the grounds of adultery and cruelty, naming John H. Dinger, Jr., as co-respondent. Defendant wife filed a cross-complaint for divorce on the ground of extreme cruelty. From a judgment of the Superior Court of Los Angeles County, F. Ray Bennett, J., granting defendant an interlocutory divorce decree on her cross-complaint and denying plaintiff a divorce, plaintiff appealed. The District Court of Appeal, McComb, J., held that the evidence sustained

the trial court's fact findings concerning the spouses' community property, plaintiff's possession of separate property of defendant wife, her innocence of adultery, and plaintiff's extreme cruelty toward her, and that the interlocutory decree was not prejudicially erroneous as attempting to make an immediate division of the community property.

Judgment affirmed.

1. Evidence ⇨265(8)

In husband's divorce suit, plaintiff's admission in one paragraph of complaint that certain real properties, to which spouses held title as joint tenants, were community property, supported trial court's finding that spouses orally agreed that their interests in such properties would be community property.

2. Evidence ⇨265(8)

Admissions and allegations in party's own pleadings sustain trial court's fact finding in accordance therewith.

3. Evidence ⇨383(7)

In husband's divorce suit, plaintiff's exhibits, disclosing that he expended for his own use over \$8,000 of spouses' community property above repayment of community obligations and maintenance of community property, sustained trial court's fact finding that plaintiff collected, received, and expended for his own use approximately such amount of community property.

4. Divorce ⇨253

In husband's divorce suit, defendant wife's testimony that she left at spouses' home many of her personal effects, keepsakes, and boxes containing property belonging to her before her marriage, supported trial court's finding that plaintiff had possession of certain separate property items, consisting of clothing, books, and miscellaneous personal effects, belonging to wife.

5. Appeal and Error ⇨882(17)

A trial judge's fact finding, agreed on by counsel for both parties to action, may not be questioned on appeal.

6. Husband and Wife ⇨264

In husband's divorce suit, trial court's fact findings that described community property, consisting of three automobiles

in plaintiff's possession and one automobile in defendant wife's possession, was on hand, were supported by testimony that automobiles were purchased either with community funds or with funds obtained from community property sold by wife.

7. Husband and Wife ⇐264

In husband's divorce suit, trial court's fact finding that certain life insurance policies were spouses' community property was supported by plaintiff's testimony that community funds were used to pay premiums on such policies.

8. Husband and Wife ⇐262(1)

Where premiums on husband's life insurance policy are paid from spouses' community funds, policy is presumed to be community property, in absence of showing that portion of premiums was paid with husband's separate funds.

9. Divorce ⇐129(2)

In husband's divorce suit, trial court's finding that defendant wife was not guilty of adultery was supported by her testimony that she was not present at her apartment when acts of adultery were alleged to have been committed.

10. Divorce ⇐108

In husband's suit for divorce on ground of wife's adultery, co-respondent's filing of answer denying allegation of adultery in complaint cast burden on plaintiff to prove that alleged acts of adultery were committed.

11. Divorce ⇐130

In husband's divorce suit, wherein wife filed cross-complaint for divorce on ground of extreme cruelty, wife's testimony that plaintiff pushed her around necessitating medical treatment for sprained back, cursed her in front of his friends, demanded that she give him all their property, and discussed sex topics in her friends' presence to her embarrassment, supported trial court's finding that plaintiff was guilty of extreme cruelty toward wife.

12. Divorce ⇐130

There was no substantial evidence to sustain trial court's findings that husband was entitled to divorce on ground of cruelty

where matters testified to by him as constituting acts of cruelty by wife were either trivial or denied by wife whose testimony trial court believed.

13. Courts ⇐104

An appellate court cannot present, by way of opinion, a detailed argument on sufficiency of evidence to support judgment appealed from, where question is purely one of determining which side shall be believed, as trial court's determination of such question, with witnesses before it, settles controversy.

14. Witnesses ⇐275(6)

In husband's divorce suit, trial court properly required plaintiff to answer questions as to reasonable value of use and occupancy of house, constituting spouses' community property, during four year period before trial, for purpose of determining value of such property on division thereof between spouses, as against objection that question was immaterial because plaintiff had right to live on premises.

15. Divorce ⇐286

An interlocutory decree, adjudging wife entitled to divorce, awarding her certain realty as her sole and separate property, and providing that court should grant further relief necessary to complete disposition of action at time of entering final judgment on expiration of year after entry of such decree was not prejudicially erroneous as attempting to make immediate division of community property.

16. Divorce ⇐254

Final division of divorced spouses' community property should be made in final divorce decree, not in interlocutory decree.

17. Divorce ⇐254

Language in interlocutory divorce decree, purporting to make present final disposition of spouses' community property, will be considered in conjunction with remainder of decree, and if it includes provision for granting of further relief at time of entry of final decree, interlocutory decree will be construed as determining manner in which community property is to be assigned at time of entry of final decree,

and language purporting to make final disposition of such property will be disregarded as surplusage.

Kenneth M. Liskum, Huntington Park, for appellant.

Hugh E. McManus, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment granting defendant an interlocutory decree of divorce from plaintiff on her cross-complaint, and denying plaintiff a divorce from defendant on his complaint.

Questions: First: *Was there substantial evidence to sustain the findings of fact set forth below?*

This question must be answered in the affirmative.

I

[1, 2] Finding V: "It is true that after the parties acquired the said two parcels of real property and caused the title to the same to be taken and recorded as joint tenancy property that they orally agreed that their interests in said properties would be community property."

This finding was supported by plaintiff's admission in paragraph V of the complaint wherein he alleged that the property mentioned in the foregoing finding, "same is community property."

Admissions and allegations in a party's own pleadings sustain a finding of fact in accordance therewith. (*Bloss v. Rahilly*, 16 Cal.2d 70, 77, 104 P.2d 1049; *Driver v. International Air Race Ass'n*, 54 Cal.App. 2d 614, 620, 129 P.2d 771.)

II

[3] Finding VII: That since July 16, 1946, and down to the date of trial plaintiff collected and received approximately \$8,000 of community property and expended said sum for his own use and purposes.

Plaintiff, who was an accountant, filed exhibit 8 in which he charged himself with the possession of \$15,555.11 in community property. At his request and without ob-

jection he was allowed to file exhibit 12, wherein he charged himself with \$11,555.20 of community property. The exhibits disclose that at the time of trial he had expended over \$8,000 for his own use above the repayment of community obligations and the maintenance of community property. This evidence sustains the foregoing finding.

III

[4, 5] Finding XIV: "That it is true that Maurice C. Johnston has in his possession certain separate property items belonging to Vida C. Johnston, consisting of clothing, dolls, doll clothing, personal books, child's high chair and rocking chair and other miscellaneous personal effects."

This finding was supported by defendant's testimony wherein she stated that she had left at their home many of her personal effects, keepsakes and boxes containing property belonging to her before her marriage. This finding was agreed upon by counsel for both parties and therefore may not be questioned upon appeal.

IV

[6] Finding XIII, subdivisions 2 and 3: "That it is true that there is now on hand the following described community property of the parties hereto:

* * * * *

"2. Three certain Auburn automobiles now in the possession of Maurice C. Johnston;

"3. One 1947 Hudson automobile now in possession of Vida C. Johnston."

These findings are supported by the testimony that the automobiles were purchased either with community funds or with funds obtained from community property sold by defendant.

V

[7, 8] Finding XIII, subdivision 5: That certain life insurance policies were community property.

This finding is supported by plaintiff's testimony that community funds were used to pay premiums on the life insurance policies. Where premiums on an insurance policy issued on the life of a husband are

paid from community funds the policy is presumed to be community property in the absence of a showing that a portion of the premium was paid with separate funds of the husband. (*Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 507, 238 P. 1034.)

VI

[9] Finding II: That defendant was not guilty of adultery.

This finding is supported by defendant's testimony that she was not present at her apartment at the times when the alleged acts of adultery were committed.

[10] *Carstensen v. Gottesburen*, 215 Cal. 258, 9 P.2d 831, is not here in point for the reason that in the cited case one of the codefendants defaulted and failed to answer the pleading. Such is not the case here. The co-respondent filed his answer denying the allegation of plaintiff's complaint relative to adultery, casting the burden upon plaintiff to prove that the acts of adultery had been committed, which he failed to do in the light of defendant's testimony which the trial court believed.

VII

[11] Finding XII: That plaintiff had been guilty of extreme cruelty toward defendant.

This finding is supported by defendant's testimony that plaintiff pushed her around, necessitating medical treatment for a sprained back; cursed her in front of his friends; demanded that she give him all of their property, and discussed sex topics to her embarrassment in the presence of her friends. (*Price v. Price*, 71 Cal.App. 2d 734, 736, 163 P.2d 501.)

[12] Second: *Was there substantial evidence to sustain findings that plaintiff was entitled to a divorce from defendant?*

No. The various matters testified to by plaintiff constituting acts of cruelty were either trivial, or facts which were denied by defendant whose testimony the trial court believed.

[13] When the sufficiency of evidence to sustain the trial court's finding is brought

Cal.Rep. 235-236 P.2d-31

in question before an appellate court, the following rule should be borne in mind. It is stated succinctly by Mr. Justice Parker in *Behler v. Kunde*, 100 Cal.App. 731, 736, 281 P. 76: "It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled."

[14] Third: *Did the trial court err in requiring plaintiff to answer over objection a question as to the reasonable value of the use and occupancy of one of the houses which was community property during the 4 year period prior to trial?*

No. The objection was that the question was immaterial since plaintiff had the right to live on the premises. This objection was properly overruled since the question was admitted solely for the purpose of determining the value of the property when the trial court made a division thereof between the parties.

[15] Fourth: *Was the interlocutory decree of divorce prejudicially erroneous in that it attempted to make an immediate division of the community property of the parties?*

No. The interlocutory decree of divorce read as follows:

"It is further ordered, adjudged and decreed that cross-complainant, Vida C. Johnston, is entitled to a divorce from the cross-defendant, Maurice C. Johnston; that when one year shall have expired after the entry of this interlocutory judgment a final judgment dissolving the marriage between the cross-complainant and cross-defendant be entered and at that time the Court shall grant such other and further relief as may be necessary to complete the disposition of this action; (Emphasis added.)

"It is further ordered, adjudged and decreed that cross-complainant, Vida C. Johnston, be and she is hereby awarded as her sole and separate property the real property

with improvements thereon known as 2421 and 2423 Sierra Street, in the City of Torrance, County of Los Angeles, State of California, said property being more particularly described as follows:

"Lot 12, Block 80, Torrance Tract, in the City of Torrance, County of Los Angeles, State of California, as per map recorded in Book 22, pages 94 and 95 of Maps in the office of the County Recorder of Los Angeles County, State of California;

"Said cross-defendant, Maurice C. Johnston, is hereby further ordered to transfer, convey, execute and surrender the title and deed and all necessary documents in connection therewith and also the possession of said real property to Vida C. Johnston within ten days after the entry of this decree;

* * * * *

"It is further ordered, adjudged and decreed that all of the cash funds now on hand with R. E. Allen, Court Receiver, are awarded to Maurice C. Johnston, subject to the following disposition: Said R. E. Allen is hereby ordered to pay forthwith from said cash funds the sum of \$400.00 to Edward P. Hart, as attorney fees, and the further sum of \$400.00 directly to Hugh E. McManus, as attorney fees, and the balance of said funds, after the payments above set forth, directly to Maurice C. Johnston."

[16,17] The rule is that the final division of community property should be made in the final decree of divorce and not in the interlocutory decree. (Waters v. Waters, 75 Cal.App.2d 265, 270 [4], 170 P.2d 494.) It is likewise settled that language in an interlocutory decree of divorce purporting to make a present final disposition of community property will be considered in conjunction with the remainder of the decree. If the decree includes a provision for the granting of further relief at the time of entry of the final decree of divorce, similar to the italicized provision in the interlocutory decree set forth supra, the interlocutory decree will be construed as determining the manner in which

the community property is to be assigned at the time of entry of the final decree. The language in the interlocutory decree purporting to make a final disposition of the community property will be disregarded as surplusage. (Webster v. Webster, 216 Cal. 485, 493 [9], 14 P.2d 522; Lo Vasco v. Lo Vasco, 46 Cal.App.2d 242, 247 [4], 115 P.2d 562.)

Affirmed.

MOORE, P. J., concurs.



106 Cal.App.2d 798

**MOISE et al. v. FAIRFAX MARKETS,
Inc. et al.**
Civ. 18410.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Rehearing Denied Nov. 6, 1951.

Hearing Denied Dec. 13, 1951.

Marie Moise and H. P. Moise, husband and wife, brought action against Fairfax Markets, Inc., a corporation, and the West Shore Co., a corporation, to recover for injuries sustained by Marie Moise in fall into unguarded ramp which sloped to exit of food market and which was lower than floor of market. The Superior Court of Los Angeles County, Arthur Crum, J., entered a judgment for the plaintiffs, and the West Shore Co., a corporation, appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding of negligence and that instruction that violation of municipal code requiring such a ramp to be provided with handrails, constitutes negligence as a matter of law, was not reversibly erroneous.

Affirmed.

I. Negligence ⇐ 134(5)

In action by customer against operator of food market for injuries sustained in fall into unguarded ramp which sloped to exit and which was lower than floor of market, evidence sustained finding that maintenance of such ramp was negligence.

2. Appeal and Error ⚡1170(9)

In action by customer against operator of food market for injuries sustained in fall into unguarded ramp which sloped to exit and which was lower than floor of market, instruction that violation of municipal code requiring such a ramp to be provided with handrails constituted negligence as a matter of law, was not reversibly erroneous, where, under the evidence, verdict for operator of food market would have been wholly unwarranted. Code Civ.Proc. § 475; Const. art. 6, § 4½.

Cushman, Lynch & Wetherbee and Robert A. Cushman, Los Angeles, for appellant.

Knight, Gitelson, Ashton & Hagenbaugh and Van A. Hagenbaugh, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal from a judgment in favor of plaintiffs and against appellant, West Shore Co., a corporation, entered upon the verdict of a jury. The action was one to recover damages for personal injuries suffered by plaintiff Marie Moise (hereinafter referred to as plaintiff or "respondent") when she fell in defendant's store at Fairfax Avenue and San Vicente Boulevard in Los Angeles. The sole ground of reversal urged by appellant is that the court committed prejudicial error when it instructed the jury that violation of certain provisions of the Municipal Code of the City of Los Angeles relating to handrails constituted negligence as a matter of law.

Defendant's store, in which plaintiff fell, is a public market, located on a corner. Plaintiff entered the market at its Fairfax Avenue entrance, and visited the meat and bakery displays. After leaving the bakery counter she came into a vacant space ahead of her, which she estimated to be twenty feet, and which space she traversed, keeping near one of the walls of the building. She did not look at any time at the floor of the building ahead of her, but in walking toward the exit, located at the corner of

Fairfax and San Vicente, she viewed certain advertisements or exhibits in the window of the store on the Fairfax Avenue side. While thus engaged, in making her way toward the exit, she came to a ramp that she had not noticed, which sloped toward the exit and out to the sidewalk on the corner, the sidewalk at this point being approximately 15 inches below the level of the market floor. When plaintiff reached the ramp, not having yet noticed it, and approaching it from the side, she fell at a point where there was a vertical drop from the level of the floor to the level of the ramp of perhaps three to six inches, as near as can be ascertained from the testimony and the photographic exhibits.

It is undisputed that at the time of the accident the lighting in the store was adequate and there were no obstructions to plaintiff's view. She saw the doorway as she walked towards it from the bakery section, but she did not look to see if there were any steps or a ramp, "because I never saw anything like that in any store."

The ramp into which plaintiff fell was six feet wide and a little over nine feet long. Five and one-half feet of its length were inside the market. From the floor level to the outside walk it sloped at a grade of 1.26 feet in 10 feet. The exit doors, as indicated, were five and one-half feet from the beginning of the ramp inside the store. The floor of the market on either side of the ramp did not slope to meet the level of the ramp, but was cut off sharply so that the sides of the ramp were vertical.

The trial court instructed the jury that section 91.3309(c) of the Municipal Code of the City of Los Angeles requires that "every ramp having a slope greater than one (1) vertically in ten (10) horizontally shall be provided with handrails as required for stairways". Concededly, the quoted provision of the Municipal Code was applicable to the ramp into which plaintiff fell. The court further instructed the jury that the handrail requirements for an interior stairway between 4 and 8 feet wide were that there should be two handrails, one on each side. The jury was further advised that if it found "that a party to this

action violated any provisions of the Municipal Code read to you," then such conduct "constitutes negligence as a matter of law"; but that "a violation of law is of no consequence unless it was a proximate cause of or contributed in some degree as a proximate cause, to an injury found by you to have been suffered by the plaintiff".

Appellant sets forth five points in support of its contention that the giving of the foregoing instructions on the subject of handrails constituted prejudicial error requiring a reversal of the judgment. These points we quote as follows:

"I. The violation of a city ordinance is negligence only if it had the purposes of preventing the type of accident complained of and was intended to apply to and protect the class of persons injured in the accident.

"II. The ordinance read to the jury was intended to protect people ascending and descending ramps. Its very terms preclude the construction that it imposes an obligation to install a handrail for the protection of people who approach a plainly visible ramp from the side; in other words, the statute was not designed to prevent people from falling when laterally approaching different floor levels plainly visible.

"III. No statute nor rule of law, nor ordinance, forbids the maintenance of clearly visible differences in floor level. Whether their existence in general is negligence or the failure to see them is contributory negligence, are at best questions of fact for the jury.

"IV. Where it is likely that a verdict might have been different, or where the court cannot say whether a verdict would have been different if an instruction complained of had not been given, there is such prejudice resulting from the instruction that the judgment must be reversed and a new trial had.

"V. Statements of counsel * * * and questions of the jury to the court in the course of deliberations * * * clearly indicate the great probability that the verdict of the jury might have been for the defendant had the instructions complained of not been given."

As an abstract proposition, there can be no question as to the correctness of appellant's first point, that the violation of the ordinance constitutes actionable negligence only if the injured party is one of the class of persons for whose benefit the ordinance was enacted. *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 498, 225 P.2d 497. Further, it will be conceded and assumed for the purposes of this decision, but without so deciding, either expressly or by implication, that the ordinance in question was designed for the protection of persons ascending or descending ramps or stairways, and that respondent does not come within the class of persons the ordinance was designed to protect. So assuming, it still does not follow that prejudicial error resulted from the instructions complained of.

Appellant, under its Point IV, urges that where it is likely that a verdict might have been different, or the court cannot say whether a verdict would have been different had the instructions complained of not been given, the resulting prejudice requires a reversal and a new trial. The rule in this respect, as stated in Article VI, section 4½, of the Constitution of this state, is that a judgment shall not be set aside or a new trial, granted, unless, after an examination of the entire cause, including the evidence, the appellate court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Further, section 475 of the Code of Civil Procedure provides: "* * * No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. *There shall be no presumption that error is prejudicial, or that injury was done if error is shown.*" (Emphasis added.) A proper statement of

the applicable rule is set forth in *Haney v. Takakura*, 2 Cal.App.2d 1, 9, 10, 37 P. 2d 170, 174, 38 P.2d 160, where the court said:

"* * * It is not sufficient that the court is able to say that it cannot be determined whether there has or has not been a miscarriage of justice. For a reversal to be ordered on account of errors committed in the giving or refusing of instructions to the jury, it must affirmatively appear, and the court must affirmatively be of the opinion that there has been a miscarriage of justice.

"That the court must be affirmative in its opinion as to there having been a miscarriage of justice, see the case of *Rodetsky v. Nerney*, 72 Cal.App. 545, 237 P. 791, 792, where it is said: '* * * Before an appellate court may reverse the judgment of a trial court it must be of the opinion that the error complained of has resulted in a miscarriage of justice. Such may not be assumed, but the result must fairly and reasonably appear from the whole record. For us to say that we cannot determine therefrom that the error complained of did not have that result is not sufficient. Our conclusion in the premises must be an affirmative one. * * *' * * *"

The exhibits introduced into evidence have been brought here on this appeal, and from an examination of them, and particularly plaintiff's Exhibit 3, it is obvious that the condition of the premises as hereinbefore described was inherently dangerous. Irrespective of the ordinance requirements, in our opinion no trier of fact could reasonably find if not gross negligence, then at least a lack of ordinary care in the failure of the market proprietor to take some measures to warn business invitees of the change in floor level at the sides of the ramp. A conclusion that plaintiff's injuries were not the proximate result of negligence on the part of defendant in failing to provide a suitable barrier or at least a warning would be wholly without support. Appellant urges that no statute or rule of law forbids the maintenance of different floor levels plainly visible, citing among other cases as illustrative of the

rule the case of *Garret v. W. S. Butterfield Theatres, Inc.*, 261 Mich. 262, 246 N.W. 57, 58, where the court said: "Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it. * * *"

It is appellant's position that whether or not the difference in floor levels "constituted negligence" was a question of fact for the jury, and that a reversal should be ordered because the jury might well have based its verdict upon the failure to provide handrails pursuant to the ordinance rather than upon common-law negligence in leaving the ramp unguarded. The views of this court with respect to the negligence of the market proprietor have been heretofore stated. With respect to the liability of store proprietors in circumstances similar to those here involved, it is settled that "it is the duty of storekeepers to keep the floors of their premises safe for those who must pass over them in the transaction of their business * * *. The fact that the attention of persons who visit public markets is attracted by the display of the wares offered for sale and more or less absorbed by the transactions which they have in mind would seem to increase the necessity of exercising care to the end that the floor spaces and aisles allotted to the use of customers should be made safe and kept fit for such purpose. * * *". *Tuttle v. Crawford*, 8 Cal.2d 126, 130, 63 P.2d 1128, 1130. Although by the verdict of the jury plaintiff herein was exonerated of contributory negligence, nevertheless the language of the court in *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 610, 184 P.2d 708, 713, is here pertinent: "The exact point now urged by defendant—that the customer is obligated to keep his eyes on the floor—was decided adversely to defendant's contention in *Wills v. J. J. Newberry Co.*, 43 Cal.App.2d 595, at page 601, 111 P.2d 346, 349, where it was stated: 'Defendant operated a retail store for the

purpose of selling goods to customers. In order to promote sales the goods were displayed on counters to attract the attention of the customers. It should be trite to suggest that a customer could not look at the goods on the counters and at the same time keep his eyes on the floor. Since it was the intention of defendant that its customers should see the goods displayed on the counters, and not have to watch the floor, it should have realized that dangerous substances on the floor would create a dangerous condition and should have acted accordingly.'"

[1,2] With these rules in mind, and considering the virtually undisputed evidence as to the conditions prevailing at the time the accident happened, this court can conclude only that the verdict of the jury herein finds ample support in the evidence and the error complained of did not result in a miscarriage of justice. The distinction between the facts in the instant cause and the situation where a difference in floor level is indicated by steps and is clearly visible, can only be appreciated by an examination of the photographic exhibits, to which reference has heretofore been made. The floor of the market is of a generally uniform level except at either side of the ramp, where there exists a vertical drop to the level of the ramp. The exit or entrance doors, being only a few inches below the general floor level, provide no warning to a person approaching laterally that a difference in floor level is to be expected. On either side of the ramp a substantial expanse of level floor, of substantially the same coloring and texture as the ramp surface itself, adds to a deceiving appearance. Counters or displays on either side of the ramp are not located so as to guide a customer safely to the ramp entrance, but on the contrary are so located that a customer would ordinarily approach the ramp from the side, as did plaintiff here.

In arriving at the conclusion indicated we have not overlooked the contention that the questions of the jury to the trial court in the course of its deliberations "clearly indicate the great probability" that the

verdict might have been for the defendant had the instructions complained of not been given. Aside from the fact, as hereinabove stated, that a verdict for defendant would have been wholly unwarranted, the record discloses that the jury inquired of the court whether a "city inspection" of the ramp would relieve the defendant of liability. Contrary to appellant's contention, this would seem to indicate only that the jury wished to know whether, despite the dangerous condition, a "city inspection" would as a matter of law relieve appellant of liability.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



**GANTNER v. SUPERIOR COURT IN AND
FOR CITY & COUNTY OF SAN FRAN-
CISCO.**

GANTNER v. GANTNER.

Civ. 15007, 15097.

District Court of Appeal, First District,
Division 1, California.

Oct. 11, 1951.

As Modified Oct. 29, 1951.

Rehearing Denied Nov. 10, 1951.

Hearing Granted Dec. 6, 1951.*

Vallejo Gantner, petitioner, brought prohibition proceedings against the Superior Court of the State of California in and for the City and County of San Francisco, respondent, to restrain the respondent from making any order which would permit the temporary removal of two minor children of the petitioner and his divorced wife, Neilma Baillieu Gantner, to a foreign country for a temporary vacation prior to final determination of child custody proceeding, and Neilma Baillieu Gantner, petitioner, opposed by Vallejo Gantner, respondent, filed a petition requesting the District Court of Appeal to issue an order permitting the minor children to leave the jurisdiction for a temporary vacation. The District Court of Appeal, Peters, P. J., held that appeal taken

* Subsequent opinion 242 P.2d 328, 329.

in child custody case did not prevent the Superior Court from making a vacation order, since vacation proceedings were separate, distinct, and independent from custody proceedings.

Petitions denied.

1. Divorce ⇨298(1)

The underlying principle applicable to custody cases involving children of divorced parents, is not what is best for the parents, but what is best for the child.

2. Courts ⇨91(1)

A holding of the Supreme Court is binding on the District Court of Appeal.

3. Divorce ⇨312.4

While an appeal from a custody order involving custody of a child of divorced parents is pending, the trial court is without jurisdiction to make any order that will change the status of the custody of the child pending the appeal, and the appeal maintains the status quo, so far as custody is concerned, as it existed at time custody order was entered.

4. Divorce ⇨312.4

Appeal by divorced husband from judgment of trial court in child custody case did not affect proceedings in the trial court by the divorced wife for permission to take minor children to foreign country for temporary vacation, since the vacation proceeding was separate, distinct, and independent from the custody proceeding.

5. Divorce ⇨312.1, 312.4

If trial court should enter an order permitting divorced wife to take minor children to a foreign country for temporary vacation, the divorced husband would have the legal right to appeal from such order, and either that appeal would have the legal effect of staying the vacation order, or District Court of Appeal, on application to it for writ of supersedeas, could, in its discretion, stay that order.

6. Divorce ⇨312.4

Petition by divorced wife requesting District Court of Appeal to make an order permitting her to take minor children to a foreign country for temporary vacation pending final determination of appeal in child custody proceeding, would be denied

by the District Court of Appeal, since vacation order was a trial and not an appellate function.

Morris Lowenthal, Juliet Lowenthal, San Francisco, for Vallejo Gantner.

Young, Rabinowitz & Chouteau and John E. Anderton, all of San Francisco, for Superior Court, City and County of San Francisco and Neilma B. Gantner.

PETERS, Presiding Justice.

By this petition for a writ of prohibition (1 Civ. 15,007) Vallejo Gantner seeks to restrain the trial court from making any order which would permit the temporary removal of two minor children of the petitioner from this jurisdiction prior to the final determination of a proceeding brought by him to modify the custody provisions of a final decree of divorce between petitioner, and Neilma Baillieu Gantner, former wife of petitioner and mother of the two minor children. The theory of the petition is that, while the custody proceeding is pending, the trial court has no jurisdiction to make any order that would permit the children temporarily to leave this state. For reasons hereafter appearing we do not think that is or should be the law.

Mrs. Gantner has filed a petition (1 Civ. 15,097) requesting this court to issue an order permitting the minor children to leave this jurisdiction pending final determination of the custody appeal. This petition, too, should be denied.

The facts as disclosed from the record are as follows: The Gantners were married in Australia in 1941, and thereafter resided in California. Two children were born of that marriage, Vallejo Gantner, Jr., now nine years of age, and Carrillo Gantner, now aged seven. In 1948 the husband and wife separated, and the wife thereafter instituted a divorce proceeding. The husband filed a cross-complaint. The record demonstrates that the main contested issue in those actions centered upon the custody of the children. The wife sought custody of both children, and sought permission to remove them to Australia and to have them reside there permanently with her and her

family. This was vigorously opposed by the father. Pending and during the trial, the trial court made an order that the children should not be removed by either parent more than fifty miles from San Francisco except by mutual agreement or order of the court. After a contested trial, centering upon this custody issue, the trial judge filed a memorandum opinion on July 28, 1949. In that opinion, after first reciting that Mrs. Gantner married Gantner well knowing that his business and home were in San Francisco, the court stated:

"The principal issue in the case is whether or not the children should be permitted to leave California and reside in Australia with their mother during their early school years. Plaintiff has urged upon the Court that this would be for the best interests and welfare of the children, and that plaintiff's entire family reside in Australia, and that by reason of this plaintiff could make a better home both for herself and her children.

"Defendant, on the other hand, has urged upon the Court that his children were born here in California as American citizens, that they have been raised as Americans, and by spending their early school years in California they can be instilled with true American ideals, and enjoy the security that only American citizens can enjoy.

"This Court is convinced that the mother's main interest in going to Australia is primarily for her own convenience, and not solely for the best interests and welfare of the children. These children have lived in San Francisco all their lives. To remove them from San Francisco and from their father would be an unwarranted and unwholesome influence on their future lives. The father has the right, even in case of divorce, to have some future supervision and control over his own children. The Court does not feel that it can deny these children the right to be raised and educated as American citizens in America, nor does it feel it should take them completely away from their father.

"While it is true that the plaintiff has offered to bring the children back to California during their school vacation each year, this would not even begin to solve

the problem. Both children are boys, and as such they are entitled to their father's influence and supervision. The Court feels that it would be for the best interests and welfare of the children for them to be in their mother's physical custody, but to remain in California, to be raised in our American way of life. The Australian family of plaintiff can well afford to make numerous visits to California so as to give the children the benefit of their comfort and society, if they so desire."

Thereafter, on August 9, 1949, a decree was entered, by which the wife was granted an interlocutory decree of divorce. Joint legal custody of the children was granted to both parents, and their physical custody was granted to the mother with the right of visitation granted to the father. This decree expressly provided that the "children reside, remain and be educated in the State of California subject to the further order of this court." The fifty-mile order was vacated, but it was expressly provided that neither parent should "take said children outside the boundaries of the State of California without the consent of said parties and without the approval of this court." The final decree, entered August 15, 1950, embodies these same provisions as to custody and residence of the children, and contains a provision that both parents are "enjoined and restrained from taking said children, or either of them, outside the boundaries of the State of California, subject to further order of this court."

On March 1, 1951, the wife served and filed a notice of motion seeking an order from the trial court permitting her to take the children to Australia for a three-month vacation trip. The husband not only opposed this motion, but also filed a motion seeking an order modifying that portion of the final decree of divorce giving physical custody of the children to the mother to provide that he should be awarded their physical custody.

Thus, at this stage of the proceedings, there were two separate, distinct and independent matters pending before the trial court—a request by the mother for permission to take the children on a vacation trip to Australia for a period not to exceed three

months, and a request by the father for a modification of the custody order so as to change physical custody from the mother to the father.

Both proceedings were heard at the same time. A five-day hotly contested trial was had before the same judge that had tried the divorce proceedings. After trial, but while these two matters were still under submission, this petition for prohibition was filed on June 5, 1951. By this writ the petitioner seeks to prohibit the trial court from entering any order in the proceeding involving the wife's application to take the children to Australia for a vacation until it not only decides the custody proceeding, but until that order in the custody proceeding becomes final after an appeal. This court issued a temporary stay order prohibiting any determination of the vacation application until further order of this court, in order to give this court time to study the problem, and thereafter, on June 18, 1951, an alternative writ of prohibition was issued. In the meantime, and on June 6, 1951, the trial court rendered its order in the custody proceeding. In that order the court found that the mother is a fit and proper person to have physical custody of the children; that it is for the best interests of the children that they remain in her custody; that there has been no change in circumstances making it proper, necessary, or for the best interests of the children, to change the order relating to their physical custody, and that it would not be for the children's best interests for their father to have their physical custody or control. Thus, by this order, the court unequivocally denied the application of the father for a modification of the custody order contained in the final decree of divorce. In addition to deciding this issue, the trial court, in this same order, referred to the other proceeding pending before it in reference to the motion of the wife to be permitted to take the children to Australia for a vacation, and in connection therewith found: "That it is for the best interests and welfare of said minor children * * * that they be permitted to visit their mother's family in Australia during

the school vacation period in the year 1951, and for that purpose they should be permitted to travel with their mother to Australia, upon posting a cash bond in an amount and conditioned as ordered by this Court." The court also found "That it is for the best interests and welfare of said minor children * * * that they be permitted to travel with their mother to places without the jurisdiction of this Court, on vacation visits, providing this Court first grants its approval for any such travel."

Based on these findings, the court entered its order as follows:

(1) The motion of the father for a change of physical custody and control is denied, the mother to have the exclusive physical custody and control of the minor children, subject to the right of visitation on the part of the father on every Sunday from the breakfast time of the children to their bed time; provided further that the court will permit the father to have the children during Christmas holidays and vacation periods as may be hereafter ordered by the court.

(2) "No order is made at this time relative to permitting plaintiff to travel on vacation visits with said minor children to places without the jurisdiction of this Court for the reason that this Court is under prohibition from making any such order, but when, and only when, such restraint is lifted, this Court will make an appropriate order. Pending such further order of this Court, plaintiff is prohibited from taking or removing said minor children from the State of California."

Thus the trial court, by this order, carefully complied with the order of this court prohibiting it from entering any order in the vacation proceeding, but, in fairness to all concerned, indicated how it would decide that issue when the restraint was removed.

The petitioner promptly appealed from this order of June 6, 1951, on the very same day that it was filed. It is his theory that, until the appeal from the order refusing to disturb custody is finally decided, the trial court lacks jurisdiction to make any

order in the proceedings instituted by the mother to be permitted to take the children out of the state for a vacation.

If this theory is sound, petitioner has discovered a legal procedure that will, for all practical purposes, prohibit a trial court from entering an order permitting the temporary removal of the children from the state for at least two years, or longer, even though the best interests of the children will be served by the entry of such an order. Thus, according to this theory, in the present case the trial court lacks jurisdiction to make any order permitting the children to leave this state until the custody proceeding is finally determined on appeal. In that appeal the request for a reporter's and clerk's transcript was filed on June 15, 1951, and to date neither transcript has been filed in this court. It is obvious that, by the time briefs are filed, the case will not reach our calendar until near the end of this year or the first of next year. Then this court has ninety days within which to write an opinion, and, after our opinion is filed, another sixty days must expire before our decision becomes final. Thus, at the earliest, the appeal in the custody case will not become final until near the middle of next year, about a year after that order was made by the trial court. But that is not all. When that decision becomes final, assuming an affirmance, then the trial court, according to petitioner, may enter its order in the vacation proceeding. But petitioner may not appeal from that order, stay its operation by the appeal or by supersedeas, and thus delay its effectiveness while that appeal is pending, presumptively another period of a year. By that time nearly two years will have elapsed. Perhaps petitioner could then file, before the vacation order becomes final, another petition for a change of physical custody on the ground of changed conditions, and contend that the vacation order could not become final until the custody proceeding was finally determined. This could be continued *ad infinitum*, so that no final order in the vacation proceeding could ever be entered.

The possible results of such a holding are apparent. We can well imagine a situation where a parent, with or without legal

custody, wants to remove a child to some other state for an operation necessary to save the life of the child, and which can only be performed in that other state or country. But if the other parent files a custody proceeding, then, according to petitioner's argument, the trial court lacks power to enter any order permitting the child to be taken out of the state while the custody proceeding is pending.

[1] Such a rule of law would completely disregard the fundamental and underlying principle applicable to such cases—namely, not what is best for the parents, but what is best for the child. Any rule of law that would not only countenance but compel the courts to disregard the best interests of a child because the parents are fighting over his custody, just cannot be sound.

[2] Petitioner places his main reliance to establish his contentions upon the case of *Foster v. Superior Court*, 4 Cal.2d 125, 47 P.2d 701, contending that that case not only suggests such a conclusion, but compels it. Of course, if that case establishes the claimed for contention, the holding is binding on this intermediate court, but an examination of that case demonstrates that it does not go to the extent claimed by petitioner.

The *Foster* case involved solely questions of custody. No question of permitting the temporary removal of a child from this state was involved. There, the South Dakota court had, in 1933, in a divorce proceeding, divided the custody of a minor child between the two spouses, the wife to have the custody from June 1st to September 1st, and the husband to have the child the remainder of the year. The wife thereafter established her residence in California, while the husband retained his residence in South Dakota. In 1934 the wife, during the three-month period she was entitled to custody, secured a South Dakota court order permitting her to bring the child to California. She then instituted a proceeding in California while she had lawful custody of the child to secure exclusive custody, claiming changed conditions warranted a change in the custody provisions. The trial judge, after a contested hearing,

filed a memorandum opinion in which he indicated that he intended to deny the request to change the existing custody order, and intended to enforce the provisions of the South Dakota decree without change. No such order was then entered, but the trial court did make an order granting temporary custody of the child to the mother pending entry of his order in the custody proceeding, and for ten days thereafter. About a week later, and also before entry of any final order in the custody proceeding, the trial judge modified his earlier order and granted temporary custody of the child to the father subject to the condition that the child be kept in California until ten days after entry of the order in the custody proceeding. The father then moved to vacate all existing orders purporting to give temporary custody to the mother. The mother, who still had physical custody of the child, then sought a writ of prohibition to restrain the trial court from making any order affecting the custody of the child while her appeal from the custody order refusing to modify it was pending. It was a conceded fact that, unless prohibition issued, the trial court intended to give the father temporary and full custody of the child with authority to remove the child out of the state and beyond the effective reach of process of the California courts. In other words, the court, before it entered its order refusing to change the custody order, wanted to get the child into the hands of the father, thus changing its physical custody, so that when the custody order was entered the father would have custody. Thus, if the mother appealed, the status quo, when the order was entered, would be that the father had custody and could remove the child to South Dakota pending the appeal. The Supreme Court very properly held that such legal maneuvers were not permissible. At page 127 of 4 Cal.2d, at page 702 of 47 P.2d the court stated: "It seems clear that an order which so disturbs the custody of the child as to permit him to be taken beyond the operation of process of the courts of California, pending final determination of the cause involving his custody, would be an act in excess of jurisdiction."

Based on this reasoning the Supreme Court issued a writ of prohibition restraining the trial court "* * * from making or ordering the execution of any judgment or decree which shall have the effect of placing said infant, Whitney Foster, beyond the operation of process of the court prior to the final determination of the action * * * which involves his custody." 4 Cal.2d at page 128, 47 P.2d at page 702.

After the issuance of this writ the trial court entered its order adopting the provisions of the South Dakota decree on the issue of custody and refusing to disturb that foreign decree. That order specifically provided: "Nothing herein contained shall have the effect of placing, or shall place, Whitney Foster beyond the operation of the process of the courts of the State of California prior to the final determination of this action."

The mother appealed and filed a petition for a writ of supersedeas. The propriety of issuing such a writ was passed upon in *Foster v. Foster*, 5 Cal.2d 669, 55 P.2d 1175. The writ was denied, the Supreme Court holding that there was no need for it because the appeal from the custody order acted as an automatic stay and precluded the trial court from interfering with custody as it existed at the time the appeal was taken. Because of the prior *Foster* decision the mother had the actual custody of the child when the order refusing to modify the provisions of the South Dakota decree was entered. She was a resident of California. Thus, although the order appealed from awarded the custody to the father, since the appeal stayed that order, the mother retained custody pending the appeal.

The *Foster* cases did not establish any new law. They are in accord with the many cases holding that, during the pendency of an appeal involving custody, the trial court has no power to make any order affecting custody. *Ritter v. Superior Court*, 99 Cal.App. 121, 278 P. 240; *Browning v. Browning*, 208 Cal. 518, 282 P. 503; *In re Browning*, 108 Cal.App. 503, 291 P. 650; see cases collected and discussed 9 Cal.Jur. p. 799, § 141; 5 Cal.Jur.Supp. p. 340, § 141.

[3] The petitioner interprets the Foster and other cases as prohibiting the trial court from making any order, pending the appeal from the custody order, that would permit the children to leave California. The cases stand for no such broad proposition. They stand for the proposition that, while an appeal from a custody order is pending, the trial court is without jurisdiction to make any order that would change the status of the custody of the child pending the appeal. The appeal maintains the status quo, so far as custody is concerned, as it existed at the time that the custody order was entered. The Foster and other cases involved only questions of custody. As applied to the existing problem, the rule of these cases would prohibit the trial court from making any order that would change the custody status of the children as such status existed on June 6, 1951. The rule of those cases would prohibit the trial court, pending the appeal, from making any order that would change the physical custody from the mother to the father, or that would change the provisions of the original custody order so as to permit the mother to take the children to Australia and establish their permanent residence in that country.

[4] But that is not the purpose of the prohibition sought by petitioner. He seeks to prevent the trial court, pending the appeal in the custody proceeding, from making any order that would permit the mother to remove the children from the state temporarily for vacation purposes. The vacation proceeding is separate, distinct and independent from the custody proceeding. Neither the rule of the Foster cases, nor any other rule of law, operates to prevent the trial court from entering any order it finds to be in the best interests of the children that does not affect their custody. It is quite clear that the vacation order in no way affects the custody of the children. It could be entered regardless of which parent has legal custody. Such an order could be entered so as to permit the parent that does not have physical or legal custody to temporarily take the children out of the state if their best interests required such temporary removal. The appeal in the

custody case in no way affects this vacation proceeding.

Petitioner expresses great fear that if the mother is permitted to take the children to Australia for a vacation, she will keep them there and not return to California, so that if he secures a reversal of the custody order it will be unenforceable by the California courts. That is a possibility, of course. It is a factor which the trial court undoubtedly will consider before it enters any vacation order. It has seen these parents. It is in a position to judge whether the mother is a person who would deliberately violate the orders of the California court so as to place herself in a position of being prosecuted for a contempt if she should ever return to this state. Moreover, the trial court, as a condition of granting the vacation order, can exact a bond from the mother to assure compliance with this order. It has already indicated that such a bond will be imposed as a condition of the order. Undoubtedly, that bond will be fixed in such an amount that will make it reasonably probable that there will be compliance with the order to return the children at the close of the vacation period. Moreover, if the wife should deliberately flaunt the orders of the California court, we have no reasonable doubt but that the Australian courts would enforce the provisions of the California judgment.

[5] In the instant case when, as, and if the vacation order is entered, the father has the legal right to appeal. Either that appeal will have the legal effect of staying the vacation order, or this court, upon application to it for a writ of supersedeas, could, in its discretion, stay that order. That is the only protection that the father should have, or needs. He does not need, and is not entitled to, two separate stays as he claims.

Respondent urges that, since the vacation period has now elapsed, the whole problem is now moot. We are not inclined to treat the matter as being moot. Obviously, the problem presented is one that constantly will recur between these parents. The interests of justice require that the power of the trial court be determined. This we have done. Moreover, the order of June 6,

1951, definitely indicates that the trial court intends to make a ruling that will not only affect the vacation period of 1951, but future vacations as well.

[6] Neilma Gantner has filed a petition requesting this court to make an order permitting the minor children to leave the jurisdiction for vacation purposes pending the final determination of the appeal in the custody proceeding. This petition must be denied, first, because we have held that the appeal in the custody proceeding in no way affects the power of the trial court to enter the order desired, and second, because it is a trial and not an appellate function to make such an order.

The petition for a peremptory writ of prohibition is denied; the application that this court make an order temporarily permitting the children to leave this state pending appeal is denied.

BRAY and FRED B. WOOD, JJ., concur.



LERNER v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY.

Civ. 15069.

District Court of Appeal, First District,
Division 1, California.

Oct. 11, 1951.

Hearing Granted Dec. 6, 1951.*

Betty F. Lerner, petitioner, brought original prohibition proceedings against the Superior Court of the State of California, in and for the County of San Mateo, respondent, to restrain the respondent from making any order which permit the removal of one of the minor children of the petitioner and her divorced husband from the state prior to final determination of an appeal involving the custody of the child. The District Court of Appeal, Peters, P. J., held that appeal in child custody case in no way affected proceedings by divorced husband to have the

child temporarily taken from the state for purpose of attending school.

Petition denied.

1. Appeal and Error ⇨154(4)

Appeal, which was apparently from all provisions of order, was ineffectual insofar as it related to that portion of the order which merely continued in effect a prior order entered by stipulation and consent, since no appeal will lie from a judgment or order entered by consent.

2. Divorce ⇨312.4

Where divorced wife was given legal custody of son by divorce decree, but thereafter trial court awarded custody of the son to the divorced husband, and the divorced wife appealed, the appeal stayed the modifying order, and the divorced wife was entitled to the custody of the son pending final determination of that appeal.

3. Divorce ⇨312.4

Where divorce decree gave legal custody of son to divorced wife, but thereafter trial court awarded custody to the divorced husband, and the divorced wife appealed, trial court was without jurisdiction to make any order that would change custody pending final determination of appeal by divorced wife.

4. Divorce ⇨312.4

Appeal by divorced wife from order awarding to divorced husband the custody of child whose custody had previously been awarded to divorced wife, in no way affected proceedings by divorced husband for permission to have the child sent to a school in a foreign state, since the proceeding to have the child sent to a school in a foreign state was separate, distinct and independent from the custody proceeding.

5. Prohibition ⇨35

In prohibition proceedings brought against the superior court by divorced wife to restrain claimed erroneous exercise of judicial power, District Court of Appeal did not possess the power to make an award against either the state or against divorced husband, as real party in interest, for costs and attorney's fees incurred by divorced

* Subsequent opinion 242 P.2d 321.

wife in filing the petition for writ of prohibition.

Marvin E. Lewis and Goldstein, Lewis & Barceloux, all of San Francisco, for petitioner.

Cosgriff, Carr, McClellan & Ingersoll, Burlingame, Frank V. Kington, Redwood City (Luther M. Carr, Burlingame, of counsel), for respondent.

PETERS, Presiding Justice.

Petition for a writ of prohibition. This proceeding involves substantially similar legal problems to those involved in *Gantner v. Superior Court*, Cal.App., 236 P.2d 220.

By this proceeding Betty Lerner seeks to restrain the trial court from making any order which would permit the temporary removal of one of the two minor children of petitioner and Clarence Lerner from this state prior to the final determination of an appeal involving the custody of such child now pending in this court.

[1] Betty and Clarence Lerner were married and had two children, Linda and Gerard. By the provisions of an interlocutory and a final decree of divorce (the latter entered May 10, 1948), the custody of the children was awarded the mother. On May 23, 1950, the trial court upon stipulation and consent of all concerned, ordered that the boy, Gerard, be enrolled in the Menlo School for Boys as a full-time student, and that the girl, Linda, be enrolled in a girls' school as a day student, staying at nights with her mother. No appeal was taken from that order, and it long since has become final. The children were thereupon duly enrolled in the respective schools as directed by that order. On March 9, 1951, the trial court, on the petition of the father, made an order modifying the provisions of the interlocutory and final decrees relating to the custody of Gerard by providing that the boy's custody was changed from the mother to the father "subject to the condition that the boy be kept enrolled in school as at present." The mother, the petitioner herein, promptly

appealed from that order changing custody of Gerard. The notice to prepare the transcripts on that appeal was given on May 8, 1951, but to date such transcripts have not as yet been filed with this court. It will be noted that, although this appeal is apparently from all of the provisions of the order of March 9, 1951, it is ineffectual insofar as it relates to keeping Gerard in the Menlo school because that portion of the order merely continued in effect the 1950 order, which was entered by stipulation and consent. It is elementary, of course, that no appeal will lie from a judgment or order entered by consent. (See cases collected 2 Cal.Jur. p. 225, § 62; 1 Cal.Jur.Supp. p. 306, § 62.)

On July 16, 1951, the father served and filed a notice of motion that on July 23, 1951, he would move the Superior Court for an order authorizing the removal of Gerard from the Menlo school in California to the Oxford Academy of Individual Education in New Jersey. It is claimed that this motion was filed on the advice of the authorities of the Menlo school who, it is asserted, do not believe that their school possesses the facilities to meet the psychological needs of this boy, and on the advice of other educators and doctors who, it is claimed, have advised the father that the New Jersey school is the only establishment in the United States that can adequately fulfill the educational and mental needs of this boy. The mother opposes the granting of this motion. After a partial hearing on that motion she applied for this writ of prohibition, and an alternative writ was issued.

It is the theory of this petition that, prior to the order of March 9, 1951, the petitioner, the mother, had legal custody of the boy; that her appeal from that order operated as a stay of that order, and, until that appeal is finally decided, it operated to divest the trial court of jurisdiction from making any order that would permit the child temporarily to be removed to New Jersey for educational purposes.

[2-4] There can be no doubt but that an appeal from the custody order deprives the court from making any order affecting the

custody of the child while the appeal is pending. *Foster v. Superior Court*, 4 Cal. 2d 125, 47 P.2d 701; *Foster v. Foster*, 5 Cal.2d 669, 55 P.2d 1175; *Ritter v. Superior Court*, 99 Cal.App. 121, 278 P. 240; *Browning v. Browning*, 208 Cal. 518, 282 P. 503; *In re Browning*, 108 Cal.App. 503, 291 P. 650; see cases collected and discussed in 9 Cal.Jur. p. 799, § 141; 5 Cal.Jur.Supp. p. 340, § 141. This principle of law has been fully discussed in the *Gantner* case, *supra*. But that rule of law is not necessarily decisive of the problem here presented. Here the mother has legal custody, subject to the child being kept full time in the Menlo school. The trial court has awarded custody to the father. The mother has appealed. That appeal stays the modifying order and the mother is entitled to custody of the boy pending final determination of that appeal. The trial court is without jurisdiction to make any order that would change custody pending the final determination of the appeal. But, as was pointed out in the *Gantner* case, the motion to remove the child from the state temporarily on the ground that the best interests of the child require it, does not affect custody. It is separate and distinct from custody. When, as, and if such an order is entered the wife may appeal from that order. Either that appeal would automatically stay that order, or the wife may apply to the proper court for supersedeas, which in the discretion of the appellate court, could issue if the facts warrant it. But petitioner is not entitled to two stays—one while the appeal from the custody order is pending, and one while the subsequent appeal from the order permitting the temporary removal of the child to New Jersey, if such an order is entered, is pending.

It must be remembered that the trial court will enter its order permitting the child to go to New Jersey only if it first finds that it will be to the best interests of this child that he be permitted to enroll in the New Jersey school. The desires of the parents are not to be considered except as they may relate to the best interests of the child. If it should appear, as the

father claims it will appear, that this boy needs special care and attention and that the New Jersey school is best equipped to give that care and attention, the desire of the mother or father to keep the child here should not be controlling. Such an order permitting the child to go to school outside the state in no way affects custody. The legal control and custody of the child will remain with the mother pending the final determination of her appeal in the custody order. Both the mother and father are residents of California and intend to continue their residence here. The child's legal residence is to remain here. The order here questioned will, at most, merely permit the temporary removal of the child to New Jersey for educational and health purposes. Ever since the order of May 23, 1950, entered with the consent of both parents, the mother's legal right to custody has been limited by the educational provisions of that order. The requested order, if granted, will not affect her right to custody as thus limited. It will merely change the place where the education is to be secured.

Any other rule of law than the one herein announced might have disastrous effects on the child. If petitioner is correct, she could, by appealing from the custody order and then appealing from the order permitting the child to go to New Jersey, and then perhaps instituting a new custody proceeding, prohibit, for several years or more, the making of any effective order permitting the child to go to New Jersey. Thus, assuming that this child right now needs the care and attention that can only be given in New Jersey, the mother could prevent the child from receiving that necessary care and attention for at least several years, and just at a time when this child may need that care and attention. Any claimed rule of law that would thus defeat the best interests of the child is and must be unsound.

[5] The petitioner has filed a motion in this court for an allowance of attorney's fees and costs incurred in filing this petition for a writ of prohibition. In this

proceeding brought against the Superior Court to restrain the claimed erroneous exercise of judicial power we do not think that this court possesses the power to make an award against either the state or Mr. Lerner, as the real party in interest, for costs and attorney's fees. *McCarthy v. Superior Court*, 65 Cal.App.2d 42, 149 P.2d 871. If we possess such power, this, in our opinion, is not a proper case in which to exercise it.

The alternative writ is discharged and the petition for a peremptory writ of prohibition is denied. The motion for attorney's fees and costs is denied.

BRAY and FRED B. WOOD, JJ., concur.



PATERSON v. COMASTRI et al.

Civ. 14444.

District Court of Appeal, First District,
Division 2, California.

Oct. 18, 1951.

Hearing Granted Dec. 13, 1951.*

Actions by Jessie H. Paterson against Alcide Comastri, and others to determine the ownership of three joint tenancy bank accounts. The actions were consolidated and tried together. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Goodell, J., held that the writings effecting the transfers of the accounts as joint tenancy bank accounts in the name of plaintiff and her sister, who was named defendant's wife, being clear and complete in their terms, the three accounts were true joint tenancy accounts and the appropriation by defendant's deceased wife of the accounts and the creation of new accounts in the name of defendant and deceased wife, did not bind plaintiff as to her share or interest without her consent, since the appropriation effected a severance of the joint tenancies.

Judgments reversed.

* Subsequent opinion 244 P.2d 902.

1. Evidence ⇨426

Where writings effecting transfer of money of defendant's deceased wife into three joint tenancy accounts with plaintiff, her sister, were clear and complete in their terms, plaintiff's testimony that if she needed money her sister, defendant's wife, would certainly have allowed her to have some from her bank as she would from her own if she needed money, which testimony went in without objection, at most indicated an inaccurate comprehension by plaintiff of her legal rights as a joint tenant and was incompetent to vary or affect written contracts. Civ.Code, § 683.

2. Joint Tenancy ⇨12

One joint tenant has not by reason of relationship any authority to bind his cotenant with respect to latter's interest in common property.

3. Joint Tenancy ⇨13

Where defendant's deceased wife deposited funds into three joint tenancy accounts with plaintiff, her sister, and after marriage to defendant changed the accounts into names of herself and defendant as joint tenants, by making the appropriation defendant's deceased wife did not bind plaintiff as to her share or interest without her consent although defendant's deceased wife could dispose of her own interest without such consent and appropriation effected a severance of the joint tenancies. Civ. Code, § 683.

Stanley Burke, San Francisco, for appellant.

Thomas P. Kelleher, Frank J. Fontes, San Francisco, for respondents.

GOODELL, Justice.

Appellant filed three actions against respondent Alcide Comastri, in one of which American Trust Company was joined as a defendant, in another Hibernia Savings & Loan Society, and in the other Bank of America N. T. & S. A. The subject matter of the actions (which were consolidated and tried together) was the ownership of three joint tenancy accounts, one in each bank. It was stipulated that the banks were

merely stakeholders. The court made findings in each case, holding that appellant should recover nothing. From judgments entered thereon the plaintiff has appealed.

Appellant and Mary Blair Gilmour were sisters. After Mr. Gilmour's death in the early 1930's Mrs. Gilmour opened the three accounts in the names of herself and appellant as joint tenants. On July 7, 1945 Mrs. Gilmour married respondent Comastri and about a month later she caused the three accounts to be transferred in the respective banks from the Gilmour-Paterson names into the names of Mary B. Comastri and Alcide Comastri, in joint tenancy. Appellant learned of these transfers only after Mrs. Comastri's death, which was on January 8, 1947.

In each of the complaints it was alleged that the transfer "effected a severance of the joint tenancy" with plaintiff "and to the * * * monies standing on deposit with said bank and created a tenancy in common therein between said deceased and the plaintiff which tenancy in common remained operative and existing continuously thereafter" until Mrs. Comastri's death.

In each of his answers respondent Comastri alleged that all deposits in the accounts were the separate property of Mary Comastri, and that plaintiff at no time had any right, title or interest therein, nor did she at any time exercise any right or control over them, but that both sisters "treated said sums of money and said accounts as the sole and separate property of Mary Blair Comastri."

Appellant's position is stated in her brief as follows: "Appellant is not claiming joint tenancy in the monies transferred to the final accounts, but rather that her sister was privileged to withdraw one-half of the monies, and having done so, effected a severance of the unity of title, upon completion of which act, appellant became entitled as a tenant in common to one-half of the whole of each deposit existing at the time." For such one-half appellant seeks a money judgment and a decree quieting her title.

Respondent's position is that Mrs. Comastri had the right to appropriate all these funds to herself for two reasons: First, be-

cause in law and in fact she was the real owner of the money, and, second, because the interests acquired by appellant "are by implication or express contract subject to destruction."

The Bank of America account was opened on December 4, 1934 with the deposit of \$649.68, and at the time of the transfer from the Gilmour-Paterson names there was \$6,497.49 therein.

The Hibernia account was opened on December 6, 1934 with the deposit of \$4,000, and at the time of the transfer there was \$6,486 therein.

The American Trust Co. account was opened on January 6, 1939 with the deposit of \$210, and at the time of the transfer there was \$5,385.63 therein.

Respondent Comastri, as survivor of the joint tenancies created in August, 1945, claims the balances in all three accounts.

The only question in the case is whether, as appellant contends, the three accounts were joint tenancy accounts in the true legal sense or, as the court held, merely accounts owned solely by Mary Gilmour Comastri and carried in the Gilmour-Paterson names for her own purposes.

It is undisputed that all three accounts were opened with Mrs. Gilmour's money; that the withdrawals from time to time were all made by her; that the passbooks were held by her throughout, and that the transfers in August, 1945, were negotiated by her without the knowledge or consent of appellant. Appellant does not dispute that all deposits were made by Mrs. Gilmour except one for \$2,000 which the appellant claims to have made on September 11, 1936, (but the court found otherwise).

The court found that Mrs. Gilmour never intended, and appellant never understood or believed, that the addition of appellant's name endowed her with a vested property interest. It found that the accounts were not joint tenancy accounts; that Mrs. Gilmour and appellant agreed that they would have a different character, namely, that of sole and absolute ownership in Mrs. Gilmour with appellant succeeding upon Mrs. Gilmour's death to whatever was left; that the joint tenancies created in the names of

Mary and Alcide Comastri were "conclusive evidence of the intention of the depositor to vest title to the deposit[s] and all additions thereto in the survivor, Alcide Comastri"; and that the presumption arising from the form of the accounts in the Gilmour-Paterson names had been overcome by evidence that the tenancies were in truth not joint tenancies, but that Mary was the sole and exclusive owner with the absolute power of appropriation and disposition.

When the Bank of America account was opened a writing was signed by Mary B. Gilmour and Jessie H. Paterson entitled "Joint Tenancy and Power of Attorney Agreement" reading in part as follows: "The undersigned depositors agree as follows with Bank of America * * * (1) That this account is to be carried * * * as a savings account * * * (2) That all funds now to the credit of or which may hereafter be placed to the credit of this account are and shall be the property of the undersigned as joint tenants to be withdrawn as follows: Upon the signature * * * of * * * either * * * of us or of the survivor * * *".

In 1943 when the passbook for the account was lost or mislaid, a new book was issued in the same Gilmour-Paterson names and a new agreement was signed by both in substantially the same form as the original agreement.

When the American Trust account was opened Mary B. Gilmour and Jessie H. Paterson signed a writing entitled "Subscription to by-laws and to survivorship agreement", reading in part as follows: "And we further agree, with each other and with the Bank, that all moneys now or hereafter deposited by us or either of us with the Bank in this account * * * shall be so deposited, and shall be received and held by the Bank, with the understanding and upon the condition that said money as deposited, without consideration of its previous ownership, and all interest or dividends thereon and all accumulations thereof, shall be the property of both of us as joint tenants, and shall be payable to and collectible by either of us during our joint lives, and after the death of one of us,

shall belong to and be the sole property of the survivor and shall be payable to and collectible by such survivor."

When the Hibernia account was opened a card was filled out and signed reading as follows:

"Mary B. Gilmour or Payable to either or to 18 849
(Mrs.) Jessie H. Pat- the survivor of them
erson

"I hereby agree to the by-laws and rules of The Hibernia Savings and Loan Society as to all deposits and withdrawals made on this account.

"[signed] Mrs. Mary B. Gilmour
"[signed] (Mrs.) Jessie H. Paterson"

Beneath is the data respecting the residence, birthplace and mother's maiden name of each signer.

The findings summarized above were based on appellant's testimony respecting the circumstances of the opening of the accounts, on conversations with Mrs. Gilmour during the ten-year period, on appellant's ideas as to the meaning of a joint tenancy account, and on the fact that Mrs. Gilmour made all the deposits and withdrawals and always held on to the passbooks. Although her testimony was very lengthy and repetitious, nothing much was brought out beyond what we have just said.

She testified that in two of the three instances her sister had asked her to accompany her to the bank for the purpose of opening a joint tenancy account; she had done so and had signed whatever there was to sign. On the other occasion the cards were mailed to her for signature. Thereafter from time to time she said her "sister would occasionally tell me this account has earned so much interest or I have added to this." She testified that when the Bank of America and American Trust accounts were opened her sister had said "it was a joint account, and it was to come to me automatically at her death." She testified that on one occasion her sister said "I have so much money I don't know what to do. I am worth \$125,000, and you have done so much * * *". She gave as her understanding of a joint account that it was "the property of both of us during the years the joint account existed * * the one-half to one and one-half to the

other, if that person dies it then becomes the entire property of that person." She testified that her sister talked about nothing but her investments, and that she, appellant, was thoroughly familiar with them. She recalled her sister "talking constantly month in and month out about her finances and what I would receive from her, and all that sort of thing. It went on for years."

With respect to the Bank of America and American Trust accounts this case is ruled by *Estate of Gaines*, 1940, 15 Cal.2d 255, 100 P.2d 1055, 1061. There two joint tenancy cards showed that the joint tenants agreed that all sums deposited by either would be owned by them jointly with right of survivorship. The issue before the probate court was essentially the same as that in this case, namely, whether the bank accounts which bore, as these do, all the indicia of true joint tenancies were in law and in fact that which they purported to be. The probate court found, as the trial court found here, that it was not the intention of the parties to create joint tenancy accounts. In reversing the judgment the Supreme Court said: "It follows that the findings of the trial court cannot be sustained. The evidence clearly establishes that decedent, not acting under fraud or undue influence, and with full knowledge and understanding of the legal effect of his acts, made transfers of personal property to himself and appellant in joint tenancy. The writings effecting the transfers were clear and complete in their terms, and the record does not contain sufficient evidence to bring the case within any of the exceptions to the parol evidence rule."

There were several factors in that case which are present herein, namely, the control and possession of the passbooks by the person who opened the accounts and made all the deposits therein and withdrawals therefrom. In the *Gaines* case no significance was attached to those factors. See, in the same connection *Kennedy v. McMurray*, 169 Cal. 287, 295, 146 P. 647.

In the *Gaines* case the nephew after his uncle's death had repeatedly and unreservedly stated that he understood and believed that his uncle "did not intend that the

property should go to him individually." (Nothing anywhere approaching this is to be found in this record.) But the court held that such utterances, and others like them, were simply expressions of the nephew's opinion or conclusion, and not competent evidence respecting an agreement. One statement, however, was held to be competent evidence as an admission against interest, and that was the repetition by the nephew, without any denial or challenge by him, of what his uncle had said respecting intent. This, however, was held to be insufficient to vary or affect the terms of the written agreement.

It is solely on appellant's testimony and conduct that respondent relies to support the findings. Aside from the fact that Mrs. Paterson never had the passbooks in her possession, and never (as the court found) deposited anything in the accounts or withdrew therefrom, the only piece of evidence which might be claimed to weaken appellant's position is her statement that she felt that if she "needed money * * * my sister would certainly have allowed me to have a certain sum from her bank, as I would from my own if she needed money." This at most indicated an inaccurate comprehension by appellant of her legal rights as a joint tenant.

Appellant, on the other hand, did not hesitate to assert her joint tenant status, as appears from the following:

"Q. She had free will to do as she pleased with these moneys, is that correct? A. I don't think she had free will just exactly to give my money away * * *

"Q. You don't recollect any time she gave away any of your money? A. Well, I would say when she married a man, another man, and my money was in these accounts, I would feel she was giving my money away and would ask my permission to do it." Her sister, she said, "never thought of any other way except 'our account'."

As in the *Gaines* case, the most that can be said respecting appellant's testimony is that she freely expressed her views, such as they were, in answer to counsel's questions, but even such parol evidence does

not by any means show any agreement or understanding running counter to the written agreements.

As said in the Gaines case "The writings effecting the transfers were clear and complete in their terms, and the record does not contain sufficient evidence to bring the case within any of the exceptions to the parol evidence rule."

[1] The fact that the evidence just discussed went in without objection, or even under the examination of appellant's own counsel, makes no difference. It must be disregarded as of no legal import. Its incompetency to vary or affect the written contracts appears as a matter of law. *Lifton v. Harshman*, 80 Cal.App.2d 422, 423, 182 P.2d 222, and cases cited.

The Gaines case was a reaffirmance of the law as it had been settled in this state for 25 years. In *Kennedy v. McMurray*, 1915, 169 Cal. 287, 146 P. 647, 650, *supra*, the account was opened by Kennedy with the deposit of his own \$3,000 (just as in the Gaines case both accounts were opened with Gaines' own money, and here the three accounts were opened with Mrs. Gilmour's). In discussing the question whether Kennedy in opening the account intended to give his daughter a joint interest therein the court said: "Whether he intended to do so or not is the essential element in the case, and if that clearly appears from the instruments executed by him and his daughter when he made the deposit in their names we cannot look beyond those instruments. If it is clear on the question of intent the right of the parties must be determined solely from its consideration. No parol evidence could affect it." (Emphasis added.)

Estate of Harris, 1915, 169 Cal. 725, 726, 147 P. 967; *Estate of Gurnsey*, 1918, 177 Cal. 211, 215, 170 P. 402, 403, and *Siberell v. Siberell*, 1932, 214 Cal. 767, 774, 7 P.2d 1003, follow *Kennedy v. McMurray*.

In *Estate of Gurnsey* the court said: "The agreement * * * is in no respects uncertain or ambiguous. Its meaning is entirely clear. No testimony by either party was admissible to change its terms or its legal effect, in the absence of fraud or mistake. * * * The effect of the

agreement was to create a joint estate in the property to which it relates, and the evidence introduced could not, under these circumstances, be allowed in any way to change the terms or legal effect of the agreement. The title to the money deposited passed out of the community at the time of the deposit, and it then became the joint property of the husband and wife, invested with all the attributes of such property, whether the wife understood its exact nature when she signed the agreement and accepted its benefits or not." (Emphasis added.)

See, also, *Siberell v. Siberell*, 214 Cal. 767, 774, 7 P.2d 1003, *supra*.

Kennedy v. McMurray was followed by this court in *Conneally v. San Francisco Sav. & Loan Society*, 70 Cal.App. 180, 182, 232 P. 755; *Hill v. Badeljy*, 107 Cal.App. 598, 605, 290 P. 637, and *Estate of Fritz*, 130 Cal.App. 725, 729, 20 P.2d 361. It has been followed in other district court of appeal decisions including *Crowley v. Savings Union etc. Co.*, 30 Cal.App. 144, 151, 157 P. 516; *Estate of Fingland*, 129 Cal. App. 395, 397, 18 P.2d 747; *Estate of McCoin*, 9 Cal.App.2d 480, 482, 50 P.2d 114 and *Tobola v. Wholey*, 75 Cal.App.2d 351, 357, 170 P.2d 952.

With respect to the *Hibernia* account, where the writing was less formal than in the other two banks, respondent in discussing the parol evidence rule says: "We must * * * conclude that no distinction need be made in the instant case between the accounts in these banks employing the printed form of signature card, and the account in the *Hibernia* Savings and Loan Society". This dispenses with any further discussion on that score.

In conclusion: for the reasons already given and on the authorities cited, the three Gilmour-Paterson accounts must be held to have been true joint tenancy accounts. "A joint interest", says § 683, Civ. Code, "is one owned by two or more persons in equal shares * * *". "One of the characteristics of joint tenancy is the equality of the interest held by the respective tenants; Civ.Code, § 683 * * *." *Stark v. Coker*, 20 Cal.2d 839, 844, 129 P.2d 390, 393.

The "appropriation" (quoting respondent's language) of the three accounts was accomplished by Mrs. Comastri as follows: she and her husband went to each of the three banks where she explained that she desired to change the Gilmour-Paterson account into the names of herself and her husband as joint tenants, and this was done. In each instance the bank made out a new passbook in the new names and had the parties sign the signature cards and whatever other papers were necessary to effect the changes. The new accounts were given new numbers. *In each instance the interest which had accrued to the Gilmour-Paterson account was carried over and became a credit on the new account.* At that time there was a balance of \$6,497.49 in the Bank of America account, \$6,486 in the Hibernia account, and \$5,385.63 in the American Trust account, in the Gilmour-Paterson names, and these balances became the opening deposits in the respective banks in the names of Mary and Alcide Comastri.

[2,3] "It has been consistently held" said the court in *Stark v. Coker*, supra, 20 Cal.2d 839, 844-845, 129 P.2d 390, "that one joint tenant has not by reason of the relationship any authority to bind his cotenant with respect to the latter's interest in the common property. See *Oberwise v. Poulos*, 124 Cal.App. 247, 12 P.2d 156; *Simpson v. Bergmann*, 125 Cal.App. 1, 13 P.2d 531; *Swartzbaugh v. Sampson*, 11 Cal.App.2d 451, 54 P.2d 73." Hence in making the appropriation Mrs. Comastri could in no way bind appellant as to the latter's share or interest without her consent, and it is undisputed that appellant knew nothing of the transfers until at least 17 months after they were made. Mrs. Comastri could, of course, dispose of her own interest without such consent. *Wilk v. Vencill*, 30 Cal.2d 104, 108-109, 180 P.2d 351. The appropriation effected a severance of the joint tenancies, *Hammond v. McArthur*, 30 Cal.2d 512, 514-515, 183 P.2d 1; *Delanoy v. Delanoy*, 216 Cal. 23, 26, 13 P.2d 513; *Green v. Skinner*, 185 Cal. 435, 438, 197 P. 60, as contended by appellant.

The judgments are, and each is, reversed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur, somewhat reluctantly, because I feel that *Estate of Gaines*, 15 Cal.2d 255, 100 P.2d 1055 is controlling. There is respectable authority for the rule that while under sec. 15a of the Bank Act, Gen. Laws, Act 652, a bank account in the form of a joint tenancy is conclusively presumed upon the death of one depositor to constitute a joint tenancy in fact and to vest title in the survivor, this is not so where the persons are both living or where withdrawals have been made during the lifetime of both depositors, and the presumption of joint tenancy from the form of the account can in such cases be rebutted by evidence showing another intention of the parties. *Wallace v. Riley*, 23 Cal.App.2d 654, 74 P. 2d 807; *Wallace v. Riley*, 23 Cal.App.2d 669, 74 P.2d 800; *Spear v. Farwell*, 5 Cal. App.2d 111, 42 P.2d 391; *In re Kellogg*, 41 Cal.App.2d 833, 107 P.2d 964; *Copprell v. Copprell*, 87 Cal.App.2d 4, 195 P.2d 868; *Bassi v. Bassi*, 89 Cal.App.2d 886, 202 P.2d 96.

But *Estate of Gaines*, supra, held squarely that a writing signed by the parties creating a joint tenancy in a bank account cannot be varied by parol, and so held without considering the effect of sec. 15a of the Bank Act. See 15 Cal.2d at pages 264-265 and 267, 100 P.2d 1055. It seems to me that this holding leaves no room for the distinction made in the cases cited. If the writing is governed by the parol evidence rule it cannot be varied by parol whether the parties are living or dead.

Some confusion is created by the later case of *Wheeland v. Rogers*, 20 Cal.2d 218, 124 P.2d 816, which permitted parol evidence to prove that a bank account joint in form was not joint in fact on the ground that the account was created before the adoption of sec. 15a of the Bank Act; a completely untenable distinction if the parol evidence rule applies. However since these bank accounts were created after the enactment of sec. 15a of the Bank Act, *Estate of Gaines*, supra, controls us rather than *Wheeland v. Rogers*, supra.

In my judgment the rule of *Wallace v. Riley*, supra, is the more reasonable one since parties undoubtedly frequently create bank accounts joint in form for the sole purpose of vesting title in the survivor without intending a gift *inter vivos*. But until the Supreme Court clarifies *Estate of Gaines*, supra, I feel bound by that decision.



106 Cal.App.2d Supp. 833

DIVISION OF LABOR LAW ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS v. RYAN AERONAUTICAL CO.

No. 166054.

Appellate Department, Superior Court,
San Diego County, California.

Sept. 28, 1951.

Action by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California against the Ryan Aeronautical Co., a corporation, to recover an employee's vacation pay upon termination of employment. The Municipal Court, City of San Diego, Philip Smith, J., rendered judgment for plaintiff and the defendant appealed. The Superior Court in and for the County of San Diego, Appellate Department, Burch, J., held that where collective bargaining agreement provided that each hourly paid employee on the completion of a year's service shall be granted during the following 12 month period a leave of absence with pay, which may be used by the employee as vacation or for sick leave, an employee who was discharged through no fault of his own with only five more working days left to complete his year of employment was entitled to vacation pay.

Affirmed.

I. Labor Relations ⇨257

Provision of a collective bargaining agreement that each hourly paid employee upon completion of a year's service shall be granted during following 12-month period a leave of absence with pay at

straight time which may be used by employee as vacation or for sick leave was ambiguous and did not necessarily purport to declare a condition precedent before employee could receive vacation.

2. Labor Relations ⇨257

Where clause of collective bargaining agreement provided that each hourly paid employee upon completion of a year's service shall be granted during following 12-month period a leave of absence with pay, which may be used by employee as vacation or for sick leave, and clause was inserted in contract to accomplish continuous and faithful service and as an inducement to employees to remain in employment, an employee who was discharged through no fault of his own with only five more working days left to complete his year of employment had substantially performed promise of employer and was entitled to vacation benefits.

3. Contracts ⇨219

Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise.

4. Master and Servant ⇨72

A contractual provision for vacation with pay is neither a gratuity nor a gift, but is a supplement to employment agreement which in effect constitutes an offer of reward or additional wages for constant and continuous service.

5. Contracts ⇨294, 323(1)

Substantial compliance meets requirements of any obligation, and what acts may constitute a compliance sufficient to meet requirements of law is a question to be determined on facts in each individual case.

6. Appeal and Error ⇨852

In action to recover vacation pay, where recovery in trial court depended upon substantial performance under collective bargaining contract, equitable right to vacation pay based on unjust enrichment was not before court on appeal.

B. Kenneth Goodman, San Diego, for appellant.

Pauline Nightingale, Edward M. Belasco and Leon H. Berger, Los Angeles, for respondent.

BURCH, Judge.

Defendant appeals from a judgment for \$107.52, representing an employee's vacation pay. The employment of plaintiff's assignor by the defendant was under the provisions of a collective bargaining agreement signed by defendant, The Ryan Aeronautical Company, a corporation, and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 506, an affiliate of the Congress of Industrial Organizations.

Article XVII of the agreement has to do with "Leaves with Pay, Vacation, Sick Leave, Etc." It provides, "Each hourly paid employee upon the completion of a year's service shall be granted during the following twelve month period a leave of absence with pay at straight time rate plus any applicable shift differential, of twelve (12) eight (8) hour work days (ninety-six (96) hours) which may be used by the employee as vacation, and/or sick leave. * * Employees with more than one year's service will be given credit for the pro rata part of the year worked past their anniversary and/or accrual date when laid off because of a reduction in the working forces. * * *"

Plaintiff's assignor, Donald Ellis Westcoat, was employed November 8, 1948, by defendant as a shipping clerk at the rate of \$1.12 an hour, and continued in this employment through October 31, 1949. Without fault on his part the employment was discontinued by the employer because of a reduction in working forces. It is stipulated that if the plaintiff's assignor is entitled under the contract to vacation with pay, he is likewise entitled to pay in lieu thereof in the amount of the judgment, \$107.52.

It is the contention of defendant that the quoted clause of the collective bargaining agreement discloses an intent by the contracting parties to make the right of the

employee to vacation with pay dependent upon the completion to the letter of a full year's service, and implies a provision that there can be no credit in favor of the plaintiff until the full year has expired.

We assume that the contract clause controls and its applicability is established. Literal performance would have been complete after five more working days. The trial court applied to this issue the doctrine of substantial performance, found that there had been substantial performance, and rendered the judgment. Our sole question is whether the trial court has reasonably and properly applied to this part of the contract the doctrine of substantial performance.

[1,2] The contention of the defendant assumes that the clause must be read as stating a condition precedent to the right to recovery. In this respect we believe the clause is ambiguous and does not necessarily purport to declare a condition precedent. It was conceded at the trial that the clause was inserted in the contract to accomplish continuous and faithful service and as an inducement to the employee to remain in the employment. Under these circumstances, the object having been substantially procured, the benefits of which have inured to the employer, equity and justice would seem to require a liberal construction of the clause as a promise rather than a condition precedent. In this connection it has been stated: "'Courts are disinclined * * * to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed.' *Front St. [M. & O. R.] Co. v. Butler*, 50 Cal. [574] 577; *Deacon v. Blodget*, 111 Cal. [416] 418, 44 P. 159 and particularly so when the result would be to work a forfeiture. *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. [309] 315, 73 P. 966. If the proposition contended for had been in the minds of the parties, it is difficult to believe that they would not have found clearer language in which to express it. * * *

The parties must be supposed to have made the contract in the belief that its terms would be fulfilled; that the pay-

ments stipulated would be made * * *." *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 556, 166 P. 325, 329.

[3] The Restatement of Contract, section 261, provides: "Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise; * * *" and Professor Williston in his work on contracts (section 665) says thereof: "Such an interpretation protects both parties to the transaction and also does not involve the consequences that a slight failure to perform wholly destroys all right under the contract."

[4] Decisions have made clear that a contractual provision for vacation with pay is neither a gratuity nor a gift. It is a supplement to the employment agreement which in effect constitutes an offer of reward or additional wages for constant and continuous service. *Division of Labor Law Enforcement v. U. S. Electrical Motors*, Appellate Department, Superior Court of Los Angeles County, Superior Court No. Civ. A 6838; *In re Wm-Low Cafeterias, Inc.*, 2 Cir., 1940, 111 F.2d 429, 432; *Zwolaneck v. Baker Mfg. Co.*, 150 Wis. 517, 137 N.W. 769, 44 L.R.A.,N.S., 1214; *Pohle v. Christian*, 1942, 21 Cal.2d 83, 89-90, 130 P.2d 417; *Clark v. State Personnel Board*, 1943, 56 Cal.App.2d 499, 500-502, 133 P.2d 11; *Verry v. Eckel*, 1943, 61 Cal.App.2d 595, 143 P.2d 394.

[5] Substantial compliance, it has been said, meets the requirements of any obliga-

tion and what acts may constitute a compliance sufficient to meet the requirements of the law is a question to be determined on the facts in each individual case. *Bavin & Burch Co. v. Bard*, 81 Cal.App. 722, 729, 255 P. 2000.

[6] We held in *Division of Labor Law Enforcement v. Mayfair Markets*, 102 Cal. App.2d Supp. 943, 227 P.2d 463, in affirming a judgment for defendant in a case somewhat similar to this one, that we were bound on appeal on the judgment roll alone to presume that any question of substantial performance of a contract of employment entitling the employee to vacation pay after twelve months of employment was passed on by the trial court. The present appeal is likewise on the judgment roll alone, without findings. Judgment below went in favor of substantial performance by plaintiff's assignor under the vacation clause. The rule on appeal there stated applies here with equal force. This makes it unnecessary to consider further the question of *quasi* contractual right for part performance where the service has been terminated by act of the employer without fault on either side. Since recovery here depends upon substantial performance under the contract, the equitable right based on unjust enrichment is not before us.

Upon consideration of the contract clause, the extent of performance thereunder and the supporting evidence presumed on this appeal, the judgment must be affirmed.

TURRENTINE, P. J., concurs.

37 Cal.2d 838

BANKS et al. v. PUMA et ux.**L. A. 21376.**

Supreme Court of California, in Bank.

Oct. 26, 1951.

Lyle H. Banks and Maydelle Golenor Baker brought action against Samuel J. Puma and Catherine Puma, husband and wife, to recover part of profits realized by defendants in sale of lots. The Superior Court of Los Angeles County, Edward R. Brand, J., entered a judgment for the plaintiffs, and the defendants appealed. The Supreme Court, Schauer, J., held that plaintiffs were entitled to part of profits realized in joint adventure.

Judgment affirmed.

Prior opinion, 227 P.2d 853.

Joint Adventures ¶4(1)

Where contract provided that houses which were to be removed from certain realty should be acquired and that new lots should be purchased and houses moved onto such lots, and that all proceeds from all property sold should accrue to defendants until their invested capital was repaid and thereafter all profits and proceeds should be divided between plaintiffs and defendants in specified percentages, and the lots were purchased by defendants with their money, but action of federal agencies made it impossible to remove houses to the new lots, and defendants therefore sold the new lots at a profit, plaintiffs were entitled to a share in such profits.

Michael F. Shannon and Thomas A. Wood, Los Angeles, for appellants.

Don Laké, Los Angeles, for respondents.

SCHAUER, Justice.

Defendants appeal from an adverse judgment in plaintiffs' action for an accounting and to recover a share of profits realized on the sale of certain land to which defendants held title. It appears that the trial court correctly determined that plaintiffs are entitled to participate in such profits, and that the judgment should be affirmed.

The controversy was submitted to the trial court on a stipulation of the following facts: Plaintiff Mrs. Baker by reason

of her position as a director of the firm of Mullen & Bluett, learned that that firm planned to construct a new building on land which was already improved with five occupied residential buildings which were to be moved therefrom and sold. She consulted plaintiff Mr. Banks, who was "in the real estate business," and the two plaintiffs then obtained an option from Mullen & Bluett to purchase the five buildings. They lacked sufficient funds for the transaction, but arranged with a Mr. and Mrs. Royden for the latter to furnish the money. The Roydens deposited \$5,000 with Mullen & Bluett, and on October 12, 1945, a written agreement to sell the buildings for \$19,000 was executed by that firm, with Mr. Royden named as buyer; the buyer agreed to take the steps necessary to evict the tenants, including securing Certificates of Eviction from the Office of Price Administration and to then move the buildings. Banks thereafter negotiated for the purchase of certain vacant lots to which the buildings were to be moved; the Roydens were to furnish the entire purchase price of the lots.

On November 1, 1945, a written agreement was entered into between the Roydens and plaintiffs covering the transaction to this point. The agreement recited that Mrs. Baker, as a director of Mullen & Bluett, had learned of the firm's intention to sell the five buildings; that plaintiffs had determined that if the buildings could be purchased from Mullen & Bluett and new lots acquired for them at a reasonable price, the venture would show a profit; that plaintiff Mrs. Baker had agreed with Mullen & Bluett to purchase the buildings for \$19,000; that plaintiff Banks then negotiated the purchase of seven lots for the buildings "at a price considerably under the existing market value" and an escrow was opened for such purchase; that Banks also secured from the Department of Building and Safety of the City of Los Angeles "their approval for the severance and removal of said five buildings to the lots purchased"; that thereafter plaintiffs "determined that they would need further finances than at their command to" complete the project. The parties therefore agreed that

the project "is the sole and original idea of the" plaintiffs; that the Roydens would furnish "all funds for the purchase, moving, reconstruction, * * * necessary to complete the buildings in their new location"; that plaintiffs would "to the utmost of their ability, aid and assist in all negotiations, supervision and transactions pertaining to the moving, reconstruction and sale of said five buildings" and "if and when, said properties are sold by either of the parties hereto, any commission accruing from said sale shall be waived and be considered as a part of the profit of this transaction and be participated in by all parties hereto"; that all parties entered into the transaction "for the sole purpose of selling said property at the most advantageous time and price, and that all parties hereto will do their utmost to obtain a maximum profit from the sale thereof"; that "the time and effort and commission contributed by" plaintiffs "offset, more or less, the interest on funds invested by" the Roydens, and therefore the latter agreed "to waive any interest charge on funds invested by them" in the enterprise; that title to all property "entailed in this transaction be vested in" the Roydens and that plaintiffs "are in no wise to be held responsible for any loss or damage resulting from" the enterprise; that "before any of said property is sold an agreement to sell same shall be confirmed by no less than three of the parties"; that "all proceeds from all property sold" would "accrue to" the Roydens until their "invested capital has been repaid" and thereafter "all profit and proceeds from the sale of said properties shall be divided" 50% to the Roydens and 25% each to plaintiffs Mrs. Baker and Mr. Banks; in the event "it is not deemed advisable to sell" the buildings by at least three of the parties and "it is decided to rent them, the net profit accruing from said rentals * * * shall be divided on the same basis as above."

Thereafter defendants Mr. and Mrs. Puma acquired the interest of the Roydens, reimbursing the latter for the \$5,000 deposit made with Mullen & Bluett. In a new written contract between the Pumas and plaintiffs in which the purchase by the Pumas of the interest of the Roydens is

recited, the Pumas assumed the obligations of the Roydens under the agreement of November 1, and specifically agreed to furnish all funds for the purchase, moving and reconstruction of the buildings in the new location; the parties further agreed that "title on deeds and Bill of Sale on all property entailed in" the transaction be vested in the Pumas; that after reimbursement to the Pumas of all funds advanced "all profit and proceeds from the sale" of the properties would be divided as follows: 37½% to the Pumas; 25% to plaintiff Mrs. Baker and 37½% to plaintiff Banks.

Defendants, the Pumas, then deposited in escrow the full purchase price of the lots to which the buildings were to be moved. Thereafter, pursuant to permission from the Office of Price Administration, notices to vacate were given to the tenants of such buildings. The following day the federal agency which handled the permit which was necessary for Mullen & Bluett to erect its building, cancelled such permit; and thereupon the OPA cancelled the notices to the tenants, thus interrupting their eviction and removal of the buildings. Thereafter plaintiffs gave to defendants a letter stating that "This letter is your authority to cancel all negotiations with" Mullen & Bluett for purchase of the buildings, and that "In this cancellation you will receive personally the deposit money paid on said contract by" the Roydens; such negotiations were then terminated and the \$5,000 returned by Mullen & Bluett to defendants. At that time title to the seven lots stood in the names of defendants Puma, who had advanced \$19,171.85 as the purchase price and incidental costs. Banks and Puma, in an attempt to sell the lots, placed a sign thereon with the names, addresses and telephone numbers of Banks and of Mrs. Baker. Thereafter defendants sold the lots for \$25,000 without the knowledge or consent of plaintiffs, and plaintiffs brought this action to recover their claimed proportionate shares of the profits on the sale, pleading the two written agreements described hereinabove. The court found that after payment of certain expenses there was a profit of \$4,276.69 from the sale, and awarded 25% thereof to plaintiff Mrs.

Baker and 37½% thereof to plaintiff Banks.

Defendants urge that since the action of the two federal agencies made it impossible to remove the buildings to the new lots "this resulted in a complete economic frustration without fault of the defendants, and that the contract [between defendants and plaintiffs] by reason thereof came to an end," and entitled defendants to keep the entire profits realized from the purchase and sale of the seven lots without accounting to plaintiffs for any share thereof. In effect defendants' claim is that because performance of the enterprise in its contemplated entirety became impossible the purchase and sale of the lots should not be regarded as a part of the joint enterprise. But the fact is inescapable that it was in part performance and for the benefit of the joint enterprise that the lots were acquired. Having been so acquired it must follow that they were held and disposed of for the joint venture unless that result is precluded by the agreement of the parties or by operation of law. We find neither such agreement nor law.

Although we may assume that the doctrine of economic frustration might have excused performance by any of the parties to the contract by which Mullen & Bluett agreed to sell and the parties to this action agreed to buy the buildings which were to be moved (a matter, however, which is not before us here), defendants cite no authority and we are aware of none in which that doctrine has been held to excuse the accounting by one of the parties to a joint enterprise of profits therefrom which have come into his possession through part performance. Rather, the doctrine, as indicated by the cases cited by defendants, has operated, in actions for damages or for breach of contract, to excuse a performance by one of the parties, which had become impossible to complete. (See *Metropolitan Water Board v. Dick, Kerr & Co.*, [1917] 2 K.B. 1, 8, *affd.* [1918] A.C. 119; *Texas Company v. Hogarth Shipping Company* (1921), 256 U.S. 619, 41 S.Ct. 612, 65 L.Ed. 1123; *H. Hackfeld & Co., Ltd. v. Castle* (1921), 186 Cal. 53, 198 P. 1041; *Johnson*

v. Atkins (1942), 53 Cal.App.2d 430, 127 P.2d 1027.)

Although failure to acquire the buildings and add them to the lots resulted in a smaller profit than anticipated by the parties to the joint enterprise, the contracts between them specifically provide that "all proceeds from all property sold" would "accrue to" defendants until their "invested capital has been repaid" and thereafter "all profit and proceeds from the sale of said properties shall be divided" in the specified percentages among the parties. The references to "all property" and "said properties" appear by their very terms to include both houses and lots, and not to exclude profits from either if sold separately; pertinent to the issue here, they were impliedly determined by the trial court, upon all the evidence before it, not to have contemplated that a profit from sale of the lots without the houses should belong exclusively to defendants. A part of the project could not be consummated but in part it reached fruition. The failure of the part did not work legal frustration of the enterprise insofar as it was accomplished. The fact that Puma cooperated with Banks in placing a for sale sign on the lots, carrying the names, addresses and telephone numbers of plaintiffs, tends to indicate that the parties themselves understood that sale of the lots was a step in winding up the affairs of their joint enterprise and that profits therefrom would fall within the contractual purview. Under the circumstances shown the interpretation of the trial court is conclusive here. (See *Edwards v. Billow* (1948), 31 Cal.2d 350, 359, 188 P.2d 748, and cases there cited; *Quader-Kino A. G. v. Nebenzal* (1950), 35 Cal.2d 287, 294, 217 P.2d 650.)

We find untenable defendants' contention that they alone contributed consideration and value toward the enterprise and assumed all the risk incident thereto. The record shows and the contracts between the parties recite the contribution of plaintiff Mrs. Baker of the information that the buildings were available, and the efforts and initiative invested thereafter by both plaintiffs in negotiating the purchase of the

buildings, the purchase of the lots at a price "considerably under the existing market value," the securing of permits to remove the buildings, etc. Viewing the entire transaction it appears that all contracting parties made substantial contributions to the project and that plaintiffs are fairly entitled to the proportions of the profits as awarded.

The judgment is affirmed.

GIBSON, C. J., and SHENK, ED-
MONDS, CARTER, TRAYNOR and
SPENCE, JJ., concur.



37 Cal.2d 827

In re KNAPP'S ESTATE.

GODLEY v. STATE.

L. A. 21178.

Supreme Court of California, in Bank.

Oct. 23, 1951.

Rehearing Denied Nov. 19, 1951.

Proceeding in the matter of the estate of George Owen Knapp, deceased, in which Frederick A. Goodley, as executor filed objections to the report of the state inheritance tax appraiser. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., overruled the executor's objections and ordered the inheritance tax fixed in accord with the report, and the executor appealed. The Supreme Court, Traynor, J., held that where deceased bequeathed an annuity from trusts to his son for life and upon the son's death to the son's wife for life, and the son died prior to the determination of the value of the life interest for purposes of taxation, the trial court properly fixed the tax, based on the actual duration of the son's life, on the transfer of the wife's interest.

Order affirmed.

Spence, Schenk, and Schauer, JJ., dissented.

Prior opinion, Cal.App., 222 P.2d 61.

1. Taxation $\S$ 896, 897

When a will creates a life interest and remainder interests in same property, it

is necessary to divide value of property at date of decedent's death between life interest and remainders for purposes of inheritance tax, which is generally done by deducting value of life interest from total value of property, and difference represents value of remainders. Administrative Code, Tit. 18, $\S$ 793.

2. Taxation $\S$ 895(1, 6), 896, 897

Inheritance tax is imposed upon net clear value of what transferee receives, and to ascertain this the value of what he does not receive, in contemplation of law, must be deducted from the value of what the decedent left, and therefore the valuation of the life interest serves as a measure of the tax on its own transfer and also as the means of determining the value of the remainder interests.

3. Taxation $\S$ 896, 897

Section of revenue and taxation code providing method for determining value of life interest given by decedent based on actual duration of life tenant's life when life tenant dies before determination of tax calls for more accurate apportionment of taxes between transfers of life interest and remainders than section providing method based on life tenant's life expectancy as of date of decedent's death. Revenue and Taxation Code, $\S$ 13953, 13955.

4. Taxation $\S$ 896

Section of revenue and taxation code providing that if a life estate is terminated by death of life tenant and tax upon transfer of estate has not been determined, value of estate is present value of date of transferor's death of amount of income actually paid or payable to life tenant during period he was in possession of life estate, could not be limited to determining tax on transfer of life interest alone, but could also be used for purposes of taxation generally. Revenue and Taxation Code, $\S$ 13952 to 13955.

5. Taxation $\S$ 896

Value of life interest of testamentary trust for inheritance tax purposes is value of life interest as of date of decedent's death. Revenue and Taxation Code, $\S$ 13951-13953, 13955.

6. Evidence ◀364
Taxation ◀896

Mortality tables should not be used to determine value of life tenant's interest in testamentary trust for inheritance tax purposes when fact of life tenant's death is known before tax upon transfer has been determined. Revenue and Taxation Code, § 13955.

7. Taxation ◀897

Where life tenant of testamentary trust died prior to determination of value of life interest for purpose of inheritance tax, value of remainder was determined by subtracting value of life interest, based on actual duration of life tenant's life, from value of entire property as of date of decedent's death. Revenue and Taxation Code, §§ 13953, 13955.

8. Taxation ◀896

Where testator bequeathed annuity from trusts to son for life and upon son's death to son's wife for life and upon her death remainders to testator's grandchildren, and testator's son died prior to determination of value of life interest for purpose of taxation, and rate with respect to wife's interest was higher than that with respect to grandchildren's interest, trial court properly fixed tax, based on actual duration of son's life, on transfer of wife's interest. Revenue and Taxation Code, §§ 13411, 13955.

Heaney, Price, Postel & Parma, Santa Barbara, for appellant.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Morton L. Barker, Los Angeles, and Raymond G. LaNoue,

Deputy Inheritance Tax Attys., Sacramento, and Bert G. Wetherby, Asst. Inheritance Tax Atty., Los Angeles, for respondent.

TRAYNOR, Justice.

The testator, George Owen Knapp, bequeathed to his son William Jared Knapp an annuity of \$10,000 per year from each of five testamentary trusts, a total of \$50,000 per year for life. Upon William's death his wife Louise Allen Knapp, if then living, was to receive an annuity of \$15,000 per year from each of the five trusts, a total of \$75,000 per year for life. Upon Louise's death, or upon William's death if Louise was not then living, the remainders were to go to certain named grandchildren of the testator.

In the first report filed by the state inheritance tax appraiser William's interest was appraised pursuant to section 13953¹ of the Revenue and Taxation Code, and the value of that interest was deducted from the value of the entire property involved at the date of the testator's death to determine the value of the remainders. Before any action was taken by the court on the report, William died leaving his wife Louise surviving. The inheritance tax appraiser filed a second report pursuant to section 13955² of the Revenue and Taxation Code, and the value of William's interest as determined under that section was deducted from the entire value of the property involved to determine the value of the remainders. In the first report William's interest was valued at \$463,161.35 and the tax with respect thereto computed at \$33,834.52. Louise's interest was valued at \$96,346.65 and the tax with respect thereto

1. "The value of a future, contingent, or limited estate, income, or interest is determined in accordance with the rules, methods, and standards of mortality and value that are set forth in the actuaries' combined experience tables of mortality, as extended, for ascertaining the values of life insurance policies and annuities and for determining the liabilities of life insurance companies, save that the rate of interest used in computing the present value of the estate, income, or interest is four (4) per cent per annum." Revenue and Taxation Code, § 13953.

2. "If an annuity or a life estate is terminated by the death of the annuitant or life tenant or by the happening of a contingency, and the tax upon the transfer of the annuity or estate has not been determined, the value of the annuity or estate is the present value, at the date of the transferor's death, of the amount of the annuity or income actually paid or payable to the annuitant or life tenant during the period he was entitled to the annuity or was in possession of the estate." Revenue and Taxation Code, § 13955.

computed at \$7,534.67. In the second report William's interest was reappraised at \$99,726.03 and the tax with respect thereto computed at \$3,139.04. Louise's interest was reappraised at \$546,032.04 and the tax with respect thereto recomputed at \$66,804.81.

The executor filed objections to the second report. Upon the hearing it was stipulated that (a) at the death of William the tax on his life interest had not been determined; and (b) the only point in dispute related to the correctness of the tax charged against Louise. The court overruled the objections and entered its order fixing the inheritance tax in accord with the inheritance tax appraiser's second report. From that order the executor appeals.

[1-4] When, as in the present case, a will creates a life interest and remainder interests in the same property, it is necessary to divide the value of the property at the date of the decedent's death between the life interest and the remainders for the purposes of inheritance taxation. This division is generally made by deducting the value of the life interest from the total value of the property. The difference represents the value of the remainders. Adm. Code, Title 18, § 793. "It is the settled law of this state that the inheritance tax is imposed upon the net clear * * * value of what the transferee receives, and that to ascertain this the value of what he does not receive, in contemplation of law, must be deducted from the value of what the decedent left." *In re Estate of Miller*, 184 Cal. 674, 682, 195 P. 413, 416, 16 A.L.R. 694; see, 28 AmJur., Inheritance, Estate and Gift Taxes § 232, p. 117; 47 Yale L.J. 1354, 1357.

Under the foregoing rule the valuation of the life interest serves two purposes. It serves as a measure of the tax on its own transfer and also as the means of determining the value of the remainder interests. The Revenue and Taxation Code provides two alternative methods for determining its value, one based on the life

tenant's life expectancy as of the date of the decedent's death, § 13953, and the other based on the actual duration of his life when he dies before the determination of the tax. § 13955. Reasonable symmetry suggests that whatever method is used to determine the value of the life interest for one purpose should also be used for the other. By requiring the substitution of fact for probabilities, section 13955 calls for a more accurate apportionment of the taxes between the transfers of the life interest and the remainders than section 13953. Section 13955 cannot reasonably be construed as limited to the purpose of determining the tax on the transfer of the life interest alone.

Appellant agrees that since William died before the determination of the tax, his interest must be valued under section 13955. He agrees also that the value of the remainder interests is determined by deducting the value of the life interest from the value of the entire property. He contends, however, that in determining the value of the remainder interests, the value of William's interest must be determined under section 13953 by reference to William's life expectancy as of the date of decedent's death. This contention is based on the theory that, with the exception of a life interest valued under section 13955, the statutes require that all interests be valued as of the date of the decedent's death. Thus it is argued that if the remainder interests are to be valued as of that date, the value of the life interest used to determine the value of the remainders must be its value as determined by the life tenant's life expectancy at that date rather than its value as determined by its actual duration.

[5] This contention overlooks the fact that whether the life interest is valued under section 13953 or section 13955, it is still the value of that interest as of the date of the decedent's death that is being determined. Valuation as of that date is prescribed not only by the general provisions of section 13951³ relating to prop-

3. "For the purpose of this part, the value of property included in any transfer

subject to this part, whether or not the transfer was made during the lifetime of

erty included in any transfer, but by the provisions of section 13952⁴ relating specifically to an estate or interest for a term of years or for life. Thus, the value of a life interest determined under either section 13953 or 13955 is the value of that interest as of the date of the decedent's death. Section 13955 makes this clear by the specific provision that "the value of the annuity or estate is the present value, at the date of the transferor's death, of the amount of the annuity * * * actually paid or payable to the annuitant or life tenant during the period he was entitled to the annuity or was in possession of the estate." (Italics added.) Such value is found by discounting back to the date of the decedent's death the payments paid or payable to the annuitant or life tenant while he lived.

[6] If it were known at the date of the decedent's death exactly when the annuitant or life tenant would die, it would be known how many years he would receive the annuity or income specified. The annuity or estate for his life would be equivalent to an annuity or estate for a term for years, the value of which could be readily determined. Since no one can know how long an annuitant or life tenant will live, it is necessary to determine the probable duration of his life and to translate the annuity or estate for life into an annuity or estate for a term for years. That translation is generally made according to the combined experience tables of mortality, as extended, for ascertaining the value of life insurance policies and annuities. When the annuitant or life tenant dies, and it is therefore known how long he lived and how much he received, there is no need to resort to mortality tables, certainty has taken the place of probabilities and an annuity or estate for life has become an annuity or estate for years. The con-

tinued use of mortality tables would nullify the requirement of accuracy in valuation prescribed by section 13955, when the fact of the annuitant's or life tenant's death is known before the tax upon the transfer has been determined.

There is nothing expressed in the statutes or that can be reasonably implied therefrom that would justify placing one value on a life interest in determining the tax on its transfer and placing another value on that interest for deduction from the value of the entire property in determining what the remaindermen receive. That section 13955 was not intended to provide a method for evaluating the life interest solely for the purpose of determining the tax on its own transfer is made clear by the provisions of subsection 8 of section 8 of the Inheritance Tax Act of 1935. Stats.1935, p. 1279. Those provisions were codified in section 13953 to 13955 of the Revenue and Taxation Code.

Subsection 8 provided: "The value of every future, or contingent or limited estate, income or interest, shall, for the purposes of this act be determined by the rule, methods and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality * * *. When an annuity or a life estate is terminated by the death of the annuitant or life tenant, and the tax upon such interest has not been fixed and determined, the value of said interest *for the purpose of taxation under this act* shall be the amount of the annuity or income actually paid or payable to the annuitant or life tenant during the period for which such annuitant or life tenant was entitled to the annuity or was in possession of the life estate." (Italics added.)

[7] Thus under the express language of the statute as it then read the valuation of the life estate on the basis of its actual

the transferor, is the market value of the property as of the date of the transferor's death." Revenue and Taxation Code, § 13951.

4. "In the case of a transfer of any estate, income, or interest (a) for a term of years or for life, or (b) determinable

upon any future or contingent event, or (c) constituting a remainder, reversion, or other expectancy, the entire property by which the estate, income, or interest is supported, or of which it is a part, is valued as of the date of the decedent's death." Revenue and Taxation Code, § 13952. "

duration was to be made, not solely for the purpose of taxing the transfer of that interest, but for the purpose of taxation generally under the act. Similarly, under the codification of subsection 8 found in section 13955 there is no indication that the value of the life interest as determined under that section is not the value it should be assigned for all purposes of inheritance taxation. To hold otherwise would create a conflict with section 13952 of the Revenue and Taxation Code, which requires that the entire property be valued as of the date of the decedent's death. That objective may be achieved by the consistent application of section 13953 to determine the value of both the life interest and the remainder interests, if the tax is determined before the life tenant dies, or by the consistent application of section 13955 to determine the value of the life interest and the remainder interests, if the life tenant dies before the tax has been determined. If the present value of the entire property is divided between the respective interests by the use of mortality tables, the entire property will be valued as of the date of the decedent's death. Similarly, if the present value of the entire property is divided between the respective interests in accord with the actual duration of the life interest under section 13955 the entire property will still be valued as of the date of the decedent's death. On the other hand, if section 13955 is applied only for the purpose of computing the tax on the transfer of the life interest and section 13953 is applied to determine the value of the life interest for the purpose of evaluating the remainder, section 13952 will be violated. In such case the entire property by which the respective interests are

supported will not be valued as of the date of the decedent's death, but part of the entire property will escape valuation altogether.⁵ Accordingly, section 13955 must be used for all purposes or for none. It provides an alternative method of evaluating the life interest, when the life tenant dies before the determination of the tax. In that contingency the valuation of the life interest is removed from the operation of section 13953, and the value of the remainder must be determined according to the general rule by subtracting the present value of the life interest as determined under section 13955 from the present value of the entire property as of the date of the decedent's death.

[8] Since in this case the rate with respect to Louise's interest is higher than that with respect to the grandchildren's interest, the trial court under the provisions of section 13411 of the Revenue and Taxation Code⁶ correctly fixed the tax on the transfer of her interest.

The order is affirmed.

GIBSON, C. J., and EDMONDS and CARTER, JJ., concur.

SPENCE, Justice.

I dissent.

The majority opinion sustains the order of the probate court under which the value of the interest of Louise, the succeeding life tenant, which was originally computed in the first report of the inheritance tax appraiser as of the date of the testator's death, was recomputed in the second report after the death of William, the first life tenant, at its then assumed value so as to impose a greater tax on Louise's interest

5. In the present case William's interest as determined under section 13953 had a present value of \$463,161.35 based on his life expectancy of 13.18 years. As determined under section 13955 William's interest had a present value of only \$39,726.03. If the value as determined under section 13953 rather than under 13955 is used to determine the value of the remainder interests, approximately \$363,000 of the present value of decedent's estate as of the date of his death would escape valuation completely.

6. "In the case of a transfer made subject to a contingency or condition upon the occurrence of which the right, interest, or estate of the transferee may, in whole or in part, be created, defeated, extended, or abridged, the tax is computed as though the contingency or condition has occurred, and at the highest rate possible." Revenue and Taxation Code, § 13411.

than that authorized by the value of her interest at the date of the death of the testator. I am of the view that there is no statutory authority for such procedure, and that the order of the probate court should be reversed.

The result reached in the majority opinion is there justified on the ground that it accomplishes "reasonable symmetry" in the valuation of the several interests. However, the question here is not whether the Legislature could have provided for such revaluation of Louise's interest upon the death of the first life tenant, but whether the Legislature has so provided. In my opinion, it has not so provided but, on the other hand, has provided directly to the contrary.

It must be remembered that an inheritance tax is not a tax upon property as such, as implied in the majority opinion, but upon the privilege of succeeding to property. 24 Cal.Jur. § 395, p. 425; *In re Estate of Miller*, 184 Cal. 674, 678, 195 P. 413, 16 A.L.R. 694; *In re Estate of Watkinson*, 191 Cal. 591, 597, 217 P. 1073, and that ordinarily the value of that privilege is to be determined as of the date of the testator's death. Thus the general rule with respect to the valuation as of that date, 24 Cal.Jur. § 422, p. 463; *In re Estate of Hite*, 159 Cal. 392, 395, 113 P. 1072, 32 L.R.A.,N.S., 1167; *Riley v. Howard*, 193 Cal. 522, 528, 226 P. 393, has been carried into the statutory provisions declaring the date for valuation, Rev. & Tax. Code, §§ 13311, 13951, the interests which are affected, Rev. & Tax.Code, § 13952, and the method for determining the value of the particular interests here involved according to the mortality tables. Rev. & Tax.Code, § 13953.

It is thus recognized in the cited sections that whenever the law deals with the valuation of the privilege of succeeding to successive life interests, it is necessarily dealing with probabilities, and that a date must be fixed for determining the value of such successive interests based upon such probabilities. With one single exception, the general provisions all relate to valuation as of the date of the transferor's death. Rev. & Tax. Code, §§ 13311, 13951,

13952, supra. That single exception covers any life tenant who may die before the tax is fixed, Rev. & Tax.Code, § 13955, in which case the "life estate is terminated by the death" and the value of the interest of such deceased life tenant may be computed with certainty. The value of the interest of any succeeding life tenant, living at the date of the fixing of the inheritance tax, is not thereby rendered certain, and as to such life tenant, it cannot be said that "certainty has taken the place of probabilities". Any such succeeding life tenant might die shortly after the order fixing the tax had become final and the tax had been paid; and it may well be for this reason that the Legislature has made no provision for the recomputation of value for inheritance tax purposes based upon shifting probabilities which may ultimately prove to be very inaccurate in forecasting subsequent events. But whatever the reason may have been, the Legislature has not provided for any recomputation of the value of Louise's interest following the death of William.

The majority opinion relies strongly upon the forerunner of the above mentioned section 13955, Stats.1935, p. 1279, and the following phrase is quoted with the indicated emphasis: "When an annuity or a life estate is terminated by the death of the annuitant or life tenant, and the tax upon such interest has not been fixed and determined, the value of said interest *for the purpose of taxation under this act* shall be the amount of the annuity or income actually paid or payable to the annuitant or life tenant during the period for which such annuitant or life tenant was entitled to the annuity or was in possession of the life estate." The emphasis should have been placed upon the words "the value of said interest", but with or without emphasis, it is too clear to require further discussion that neither its forerunner nor the present section 13955 was or is concerned with anything other than the valuation of the interest of a life tenant who may die before the inheritance tax may have been fixed.

While the cited statutory provisions appear to be entirely clear upon the point

here involved, it may now be assumed solely for the purpose of this discussion that some uncertainty exists concerning their application to the facts before us. This assumption brings into play the well settled rule that "Since tax proceedings are *in invitum*, tax laws are strictly construed in favor of the taxpayer and against the state * * *. Strict construction in such cases is reasonable, because presumptively the legislature has given in plain terms all the power intended to be exercised." 24 Cal.Jur. § 11, pp. 27-28; see also, *In re Estate of Potter*, 188 Cal. 55, 64-65, 204 P. 826; *In re Estate of Steehler*, 195 Cal. 386, 389, 233 P. 972. I am of the view that this salutary rule should be followed rather than repudiated, and that the majority opinion constitutes a wide departure therefrom.

I would therefore reverse the order of the probate court, with directions to tax the interest of Louise Allen Knapp according to its value as of the date of the death of the testator as determined in the first report of the inheritance tax appraiser.

SHENK and SCHAUER, JJ., concur.

Rehearing denied; **SHENK, SCHAUER, and SPENCE, JJ., dissenting.**



ALLEN v. FRANCHISE TAX BOARD.

Civ. 18279.

District Court of Appeal, Second District,
Division 1, California.

Oct. 22, 1951.

Hearing Granted Dec. 18, 1951.*

L. J. Allen sued **Charles J. McColgan**, Franchise Tax Commissioner of the State of California, to recover income tax paid under protest. The Superior Court, Los Angeles County, **Edward R. Brand, J.**, rendered judgment for plaintiff, and defendant appealed. On appeal an order was made, pursuant to statute, substituting the Franchise Tax Board of the State of California in the place of the Commissioner. The District Court of Appeal, **White, P. J.**, held that the petitioner had not been entitled to a deduction for de-

pletion with respect to accumulations on an oil royalty interest which petitioner had been successful in establishing for his client, since, petitioner's right to share in such accumulations had not accrued until he had successfully completed litigation to establish his client's rights therein and therefore, prior to the completion of his performance under the agreement, the petitioner had had no economic interest in the oil and gas in place.

Reversed and remanded with directions.

1. Taxation ☞1099

In statute transferring powers and duties of Franchise Tax Commissioner to Franchise Tax Board, provision that pending actions against Franchise Tax Commissioner should continue in name of board and that board should be substituted for commissioner by court wherein action was pending was self-executing, and therefore District Court of Appeal would make appropriate order of substitution in such case even though Superior Court in which action originated had failed to make such order. Revenue and Taxation Code, § 17001 et seq.; St.1949, p. 2108, § 1; Rules on Appeal, rule 48(a).

2. States ☞119

In determining whether an appropriation of public money is to be considered a gift within constitutional prohibition, primary question is whether funds are to be used for public or private purpose, and if money is for public purpose appropriation is not gift even though private persons are benefited by expenditures. Gen.Laws, Act 8494, §§ 7.1, 8(j), 9.5(3); Const. art. 4, § 31; St.1941, p. 471, §§ 1, 2.

3. Constitutional Law ☞70(3)

Courts will not disturb legislative determination of what constitutes public purpose so long as it has reasonable basis. Gen.Laws, Act, 8494, §§ 7.1, 8(j), 9.5(3); Const. art. 4, § 31; St.1941, p. 471, § 1, 2.

4. States ☞119

Personal income tax act section, authorizing apportionment of compensation for services rendered during period of five years or more, was for public purpose, to wit, rectification of inequity in income tax law, and there was reasonable basis for retroactive effect given such equitable re-

* Subsequent opinion 245 P.2d 297.

adjustment of tax burden, and therefore such statute did not violate constitutional prohibition against gifts of public money and presented no other constitutional infirmity. Gen.Laws, Act, 8494, §§ 7.1, 8(j), 9.5(3); Const. art. 4, § 31; St.1941, p. 471, §§ 1, 2.

5. Appeal and Error ⇨1011(1)

In face of conflicting evidence, power of appellate tribunal begins and ends with determination as to whether there is any substantial evidence in record, contradicted or uncontradicted, to support judgment.

6. Taxation ⇨1099

In taxpayer's suit to recover additional income taxes paid under protest, evidence sustained trial court's finding that interest in leasehold, received by taxpayer as part payment for services rendered to client, had had no value at time of its receipt by taxpayer.

7. Taxation ⇨1044

Where attorney completed successfully, in 1940, litigation under contingency agreement made in 1933, whereby, if successful in establishing his client's right to oil royalty interest, attorney was to receive one-half of his client's interest in lease and one-half of any accumulation thereon during pendency of controversy, in apportioning fee received over years during which services were rendered, attorney was not entitled to deduction for depletion with respect to accumulation received, since prior to completion of performance of his agreement he had no economic interest in oil and gas in place. Gen.Laws, Act 8494, §§ 7.1, 8(j), 9.5(3); Const. art. 4, § 31; St. 1941, p. 471, §§ 1, 2.

Edmund G. Brown, Atty. Gen., James E. Sabine, Edward Sumner, Deputy Attys. Gen., for appellants.

Harold E. Prudhon, Los Angeles, for respondent.

WHITE, Presiding Justice.

[1] In this appeal from a judgment directing the refund of personal income taxes paid by respondent under protest to the State of California, the official charged with

administration and enforcement of the Personal Income Tax Law (Rev. & Tax. Code, Part 10, Div. 2, § 17001 et seq.), at the time of the institution of the suit was Charles J. McColgan, Franchise Tax Commissioner. By Statutes of 1949, p. 2108, Chapter 1188, section 1, effective January 1, 1950, the powers and duties of the Franchise Tax Commissioner were transferred to the "Franchise Tax Board", it being further provided that pending actions against the Franchise Tax Commissioner as of January 1, 1950, should continue in the name of the Franchise Tax Board and that the board should be substituted for the commissioner by the court wherein the action is pending. The superior court failed to make an order of substitution. While Rule 48(a) of Rules on Appeal provides that when a substitution of parties becomes necessary in a pending appeal, such substitution shall be made by the superior court, and upon presentation of a certified copy of such order made in the superior court a like order shall be made in the reviewing court, we conclude that the aforesaid statute, providing as it does for substitution of parties in cases such as this "by the court wherein the action is pending" is self-executing. We have therefore made the appropriate order of substitution.

In March, 1933, respondent, an attorney, entered into an oral agreement with his client, Sutphin, whereby respondent was retained to prosecute Sutphin's claim to a 5% royalty interest in an oil leasehold, and was to receive as compensation in the event he established the claim one-half of the 5% interest and one-half of any accumulations thereon. The litigation was brought to a successful conclusion in the year 1940, and respondent received as his share of the accumulated royalties \$32,178.-64 and an assignment of one-half of the five per cent interest.

In his state income tax return for the calendar year 1940, Allen reported his fee received in the following manner:

1. He reported the one-half of the 5% royalty interest as being of no value.

2. He reported as income for 1940 one-eighth of the accumulated royalties, and one-eighth thereof on each of five amended

returns for the five preceding years, 1935 to 1939. (The state income tax was first imposed for the year 1935.)

3. He deducted from the one-eighth accumulated royalties reported on his amended returns and his 1940 return a "depletion allowance" of $27\frac{1}{2}$ per cent.

In auditing the return, the Franchise Tax Commissioner notified respondent that an additional assessment would be made against him upon the grounds that (1) the entire accumulated royalties should have been reported as taxable income for the year 1940; (2) the royalty interest should be valued at \$3,483.90 instead of as being of no value; and (3) that respondent was not entitled to take the depletion allowance of $27\frac{1}{2}$ per cent. After due hearings before the Franchise Tax Commissioner and the State Board of Equalization, in which the proposed additional assessment was upheld, respondent paid the additional taxes under protest, and thereupon brought this action to recover the amount so paid. The trial court found on all issues in favor of respondent.

The issues presented in the court below and now presented in this court are as follows:

1. Should the entire fee received by respondent in 1940 have been reported by him on his return for that year, or did section 7.1 of the Personal Income Tax Act, Gen.Laws, Act 8494, which was added in 1941, constitutionally apply to the computation of taxes for the year 1940?

2. Was respondent entitled to deduct $27\frac{1}{2}$ per cent of his fee as a "depletion allowance" pursuant to the provisions of sections 8(j) and 9.5(3) of the Personal Income Tax Act?

3. Should the portion of respondent's fee consisting of one-half of his client's 5% royalty interest be valued at \$3,483.90, as determined by the Franchise Tax Board, or at nothing, as reported by respondent?

Taking up the first issue just stated, it appears that prior to 1941, under the Personal Income Tax Act, a person who received compensation in a given year for services covering a number of previous years, was required to report and pay a

tax upon the full amount for the year in which the compensation was received. In 1941 the Legislature added section 7.1, Stats.1941, p. 471, Ch. 31, to the Act, which section became effective February 4, 1941, prior to the time that returns were due for the calendar year 1940. This section provided as follows: "In the case of compensation (a) received for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per cent of which is paid) only on completion of such services, and (c) required to be included in the gross income of such individual for any taxable year, beginning after December 31, 1939, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period."

Appellant contends that the Legislature could not constitutionally provide that section 7.1 supra, should apply to the computation of taxes for the calendar year 1940, for the reason that, as asserted by appellant, the tax liability for that year was accrued and fixed as of December 31, 1940; and the reduction or cancellation of such accrued taxes amounts to the making of a gift of public money to an individual, in violation of section 31, Article IV of the California Constitution, which provides, so far as here pertinent, that the Legislature shall have no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; * * *."

Concededly, section 7.1, by its terms, purports to apply to the computation of income tax for the calendar year 1940, and the Legislature unequivocally stated its intention in this respect by the following language of its enactment:

"Sec. 2. This act is hereby declared to be an urgency measure, necessary for the immediate preservation of the public peace, health and safety within the meaning of

Section 1 of Article IV of the Constitution of the State of California, and therefore shall take effect immediately. The facts constituting such necessity are as follows:

"There are many taxpayers in this State who have received in the past year lump sum payments for services rendered by them over the preceding five years or more. Since the State income tax rates are graduated, these individuals will be required to pay considerably more upon their income than they would have had to pay in the aggregate if their income had been received in equal portions during the years in which it was actually * * * earned. There is thus a clear disparity in the treatment of taxpayers who receive the same income, merely because of the fortuitous circumstance that some of them are paid all at once. Such a situation leads to economic inequality and is productive of unrest, thus directly affecting the public peace, health and safety.

"This act will eliminate the inequality now existing, but since income tax returns must be filed and the tax for 1940 be paid on April 15 of this year, it is imperative that this act go into effect immediately."

Appellant's basic position is that respondent's tax liability for the year 1940 had accrued under the Personal Income Tax Act as of December 31, 1940, and that the reduction of such liability by the enactment which took effect February 4, 1941, permitting the spreading of income earned over a period of years, amounted to a gift of public money in contravention of section 31 of Article IV of the Constitution of California. We are convinced that appellant's contention is unsound. The cases hereinafter discussed and quoted from, to our minds, illustrate and typify the type of legislation which is permissible under the Constitution as not constituting a gift of public money, but a salutary enactment in aid of the public welfare. We are further convinced that the legislation here in question falls within the category of legislation for the public welfare and does not constitute a "gift" of public money.

First, there is the line of cases upholding legislation granting tax relief to distressed tax districts or municipalities. *Gartner v. Roth*, 26 Cal.2d 184, 157 P.2d 361; *S. Siwell & Company v. County of Los Angeles*, 27 Cal.2d 724, 167 P.2d 177; *City of Ojai v. Chaffee*, 60 Cal.App.2d 54, 140 P.2d 116. Second, we find a series of decisions defining public welfare and holding that various appropriations by the Legislature did not violate the constitutional prohibition for the reason that the questioned appropriation was for "a public purpose". *County of Los Angeles v. La Fuente*, 20 Cal. 2d 870, at page 877, 129 P.2d 378, at page 382, and cases cited.

The Legislature, in providing that the legislation in question should go into effect immediately—that is, in February, 1941, and should apply to the computation of 1940 personal income taxes, set forth facts (which we have hereinabove quoted) which in its view justified the legislation as an enactment for the public welfare.

[2] In *County of Los Angeles v. La Fuente*, supra, 20 Cal.2d at pages 876, and 877, 129 P.2d at page 382, the supreme court declared: "In determining whether an appropriation of public money is to be considered a gift within the constitutional prohibition, the primary question is whether the funds are to be used for a public or a private purpose. If the money is for a public purpose, the appropriation is not a gift even though private persons are benefited by the expenditure."

[3] Further the court said, 20 Cal.2d at page 877, 129 P.2d at page 382: "The courts will not disturb a legislative determination of what constitutes a public purpose so long as it has a reasonable basis. *Nebbia v. [People of State of] New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; *Powell v. [Commonwealth of] Pennsylvania*, 127 U.S. 678, 8 S.Ct. 992, 1257, 32 L.Ed. 253; * * *."

[4] Surely the purpose indicated by the Legislature in its enactment, viz., the rectification of an inequity in the income tax law, is as much a public purpose as

the various public purposes set forth by the supreme court, 20 Cal.2d on page 877, 129 P.2d 378, County of Los Angeles v. La Fuente, supra, in each of which cited instances private persons were directly benefited. Further, the decision of the Legislature that the public welfare required such equitable readjustment of the tax burden should take effect retroactively has a reasonable basis. We conclude, therefore, that the legislative enactment presents no constitutional infirmity.

[5] Bearing in mind the familiar rule that in the face of conflicting evidence the power of the appellate tribunal begins and ends with a determination as to whether there is any substantial evidence in the record, contradicted or uncontradicted, to support the judgment, we find that the record reflects testimony which, if believed by the court, was sufficient to sustain the finding and conclusion of law that respondent's leasehold had no value at the time of its receipt by him and that appellant board was in error in determining that the portion of respondent's fee consisting of one-half of his client's five per cent royalty interest be valued at \$3,483.90.

[6] The remaining issue confronting us, as to the right of respondent to take a "depletion allowance", presents the greatest difficulty. We have concluded that on this point the judgment of the court below was in error. In a proceeding instituted by petitioner and respondent herein against the Commissioner of Internal Revenue. *Allen v. Commissioner*, 5 T. C. 1232, the issue was decided against him on the theory that he was not entitled to the depletion deduction because he was not possessed of an interest in the oil and gas during the time the royalties were being accumulated. On this issue we find ourselves in accord with the decision of the United States Tax Court, wherein it is stated:

"In computing his tax petitioner took a depletion deduction of 27½ per cent of the cash fee received in 1940. Respondent disallowed this deduction. Whether petitioner is entitled to such a deduction de-

pends upon whether he had an economic interest in the oil in place. *Helvering v. O'Donnell*, 303 U.S. 370 [58 S.Ct. 619, 82 L.Ed. 903], and cases there cited. Oil and gas reserves, like other minerals in place, are recognized as wasting assets. A deduction for depletion of such assets is allowed to one who has a capital investment in the minerals in place. The deduction is intended as compensation for the capital assets consumed in the production of income through the severance of the minerals. The holder of a royalty interest has an economic interest which entitles him to a deduction for depletion. *Anderson v. Helvering*, [Commissioner of Internal Revenue] 310 U.S. 404 [60 S.Ct. 952, 84 L.Ed. 1277]. Allen's client held such a royalty interest. In 1933 Allen by contract acquired the right, contingent upon successful completion of his services, to receive a fee consisting of two parts, (1) a part of his client's royalty interest, and (2) any accumulations on that part of the interest, if there was production. Allen made no capital investment in the oil and gas in place in 1933. The conditions upon which his rights depended were satisfied in 1940 and at that time his interest in the property and his right to any accumulations from production from that interest became fixed. The right to accumulations was the right to a cash sum measured by half the accumulated royalties upon his client's 5 percent interest. Petitioner did not have an economic interest in the oil in place during the years prior to 1940. His client had such an interest to the extent of the entire 5 percent share. In 1940 petitioner acquired an economic interest in any oil or gas thereafter extracted, but the assignment could not convey an economic interest with respect to the prior production represented by the accumulations. This was not subject to depletion. Cf. *Massey v. Commissioner* [of Internal Revenue, 5 Cir.], 143 F.2d 429, affirming B.T.A. memorandum opinion on this point. In the cases cited by petitioner in support of his position * * * the taxpayers had acquired present interests in the property by contract for the performance of services

to be rendered. Allen, however, had a contract to receive an interest at a future date if his services met with success.

"We conclude that petitioner is not entitled to the deduction for depletion."

The judgment is reversed and the cause remanded with directions to the court below to amend its findings of fact Nos. XIV and XV and its Conclusion of Law No. II to find that plaintiff is not entitled to an allowance for depletion, and thereupon to enter an appropriate judgment in accordance with the views herein expressed. Costs on appeal to respondent.

DORAN and DRAPEAU, JJ., concur.



107 Cal.App.2d 21

**BORSOOK et ux. v. CONTINENTAL CAS.
CO. et al.**
Civ. 18514.

District Court of Appeal, Second District,
Division 2, California.
Oct. 23, 1951.

Hearing Denied Dec. 20, 1951.

Action by Dr. Mann E. Borsook and wife against Continental Casualty Company as surety on contractor's completion bond of contractor defendant, Charles Hasekian, and against other defendants, for judgment reforming completion bond and to compel defendant surety to discharge all liens of record against property of plaintiffs. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for plaintiff, and defendant Continental Casualty Company appealed. The District Court of Appeal, Moore, P. J., held that erroneous recital in bond with reference to construction contract to which it related had resulted from mutual mistake of parties and from fact that bonding company knew or suspected or should have known or suspected that reference to contract of certain date did not truly express intention of parties.

Judgment affirmed.

1. Reformation of Instruments ⇐19(1)

In order that reformation of instrument be granted, there must have been mutual mistake or mistake of party seeking reformation which was known or suspected by other party. Civ.Code, § 3399.

2. Reformation of Instruments ⇐45(13)

In action to reform completion bond wherein it appeared that contractor at time of application therefor had submitted mere illustrated form of construction contract dated October 7 and that construction contract providing different method of payment had been executed on October 12, evidence sustained finding that erroneous recital and reference to October 7 contract had been result of mutual mistake of parties and that bonding company knew or suspected, or should have known or suspected, that contract of October 7 did not purport to embody terms of contract to be completed.

3. Principal and Surety ⇐117

As general rule premature payments by obligee on contractor's completion bond is such material alteration of principal's obligation to operate as discharge of surety in absence of consent thereto by surety.

4. Principal and Surety ⇐128(1)

Where surety on contractor's completion bond had consented to modification, alteration, or deviation from contract by principal and obligee, premature payments by obligee did not operate to discharge surety.

5. Principal and Surety ⇐59

In determining extent of surety's undertaking on completion bond, reference must be had to performance bond itself, but such bond must be read and construed in light of provisions of building contract under which performance is guaranteed.

6. Appeal and Error ⇐1008(1)

Where surety on contractor's completion bond did not, on appeal, attack finding of trial court that surety had consented to alteration of construction contract, such finding would be considered as supported by record.

7. Appeal and Error ⇐911(3)

Where trial court had rendered judgment in favor of cross complainant material

and labor suppliers in action on contractor's completion bond, in absence of showing that surety had not been served with cross complaint, it would be presumed on appeal that court had had jurisdiction to render such judgment.

Anderson, McPharlin & Connors, Los Angeles, for appellant.

J. E. Simpson and James C. R. McCall, Los Angeles, for respondents Borsook.

MOORE, Presiding Justice.

This is an appeal from an interlocutory judgment reforming a completion bond, awarding plaintiffs damages and ordering appellant to discharge all liens of record against the property of plaintiffs.

Under date of October 12, 1948, respondent Dr. Borsook as owner, and one Hasekian as builder, executed an agreement whereby the latter was to construct a medical office building for the doctor at a cost of \$15,000. Under such contract Hasekian was to furnish a satisfactory completion bond. Accordingly, on the same date, he submitted an application for such bond to appellant through one Jones, an insurance broker. The application recited that the bond was to be given to Dr. Borsook as provided by his agreement with Hasekian and contained full and complete provisions for indemnification of the surety by Hasekian. The bond as subsequently issued, however, referred to a contract between the parties dated October 7, 1948. A bonding company representative, Mr. Jonas, testified that Jones submitted to him a copy of an incomplete and unexecuted draft of a contract bearing date of October 7 and that it was under this contract appellant purported to guarantee Hasekian's performance. The document dated October 7, 1948, appears to have been a mere illustrative form. The agreement actually executed on October 12 provided for payment to the contractor of fifty per cent when the contract was executed, 30 per cent when notice of completion was filed and the remainder within 30 days thereafter. Jonas testified that it was represented to him that

payments would be in the normal manner of five equal installments.

Hasekian began construction under the building contract but breached it in many particulars and failed to complete the building. During the period of construction certain extras to cost \$1730.90 were agreed upon between owner and builder, raising the total construction cost to \$16,730.90. Thereafter numerous mechanics' liens were filed against the property whereupon Dr. Borsook instituted this action against Hasekian and the lien claimants to settle all disputes in one action. Pursuant to an arbitration provision in the contract, a Board of Arbiters awarded \$3,962.06 to Borsook as damages for the contractor's breach. Such award was later confirmed by the court.

[1] The Continental Casualty Company alone appeals from the judgment. The first ground urged for reversal is that the trial court erred in granting reformation of the bond changing the date of the contract referred to from October 7 to October 12, 1948. It is argued that there was no mutual mistake, as required under section 3399 of the Civil Code, since appellant had no knowledge of the contract of October 12 and thus did not know or suspect the presence of any mistake, citing *Menning v. Sourisseau*, 128 Cal.App. 635, 18 P.2d 77, and *Goodfellow v. Barritt*, 130 Cal.App. 548, 20 P.2d 740. These decisions set forth the general, familiar rule that for reformation to be granted there must be a mutual mistake or a mistake of the party seeking reformation which was known or suspected by the other.

[2] However, the court below found specifically that the erroneous recital in the bond resulted "from a mutual mistake of the parties and from the fact that the bonding company knew or suspected, or should have known or suspected, that the reference to a contract dated October 7, 1948, did not truly express the intention of the parties * * *." This finding is supported by the evidence. Dr. Borsook testified that he intended the bond to secure performance of the October 12 agreement as there was no other contract executed between the parties. Hasekian testified to the same effect, and

that his application to the surety company so stated. Mr. Jonas testified, though, that he thought the contract was dated October 7 despite the fact that the application was the basis for the bond later issued.

Obviously, it was the intention of all parties that Hasekian's promised performance be guaranteed by a binding contract executed between the owner and contractor and not by an unexecuted document which did not even mention the cost of construction of the building or the method and percentage of installment payments. This mistake is similar to that found to exist in *Bank of America v. Granger*, 115 Cal.App. 210, 1 P.2d 479, where reformation was permitted when the parties had mistakenly executed guaranties in favor of an extinct corporation. Reformation was also ordered in *Genuser v. Ocean Accident Company*, 57 Cal.App.2d 979, 135 P.2d 670, 672, of an insurance policy so that it would correctly "describe a car which plaintiff owned, not one which he did not own."

[3-6] Appellant's second contention is that it was discharged from liability on its bond by reason of respondent's premature payments to the contractor. Such a material alteration of the principal's obligation by the creditor generally operates to discharge the surety. *Pacific Coast Eng. Company v. Detroit Fidelity & Surety Company*, 214 Cal. 384, 395, 5 P.2d 888. But this is not the case where the surety has consented to such alteration. *Ganahl v. Weir*, 130 Cal. 237, 240, 62 P. 512; *American Trust Company v. Jones*, 130 Cal.App. 651, 655, 20 P.2d 346. Herein the trial court found that appellant "consented and agreed that the said contract could be modified, or altered, deviated from, added to, or omissions made therein * * *." Evidentiary support for this finding is found in the contract between owner and builder wherein such modifications and alterations are provided for. In determining the extent of the surety's undertaking reference must be had to the performance bond itself but read

and construed in the light of the provisions of the building contract under which performance is guaranteed. *Ryan v. Shanahan*, 209 Cal. 98, 101-102, 285 P. 1045. In any case, since appellant has not attacked such finding, it must be considered as supported by the record. *Miles v. Miles*, 77 Cal.App. 219, 227, 246 P. 143.

[7] Appellant also asserts that the court below exceeded its jurisdiction in awarding judgments in favor of the four labor and material suppliers since appellant was never served with their cross complaints. In the absence of a showing that appellant was not served with the cross complaints, it will be presumed on appeal that the court had jurisdiction to render judgments. 2 Cal.Jur., Appeal and Error, pp. 858 et seq. Moreover, the record does reveal that counsel for appellant entered into a stipulation that judgment could be rendered in favor of Dalton Electric Company and M & B Floor Coverings and against Hasekian and also against appellant if it should be found liable on its bond. The record also discloses that Underwood's counsel in open court stated that the cross complaint of Robbins and Underwood was served on appellant.

With reference to the fourth claimant, White Electric Company, appellant's contention is technically correct since appellant is not even named cross defendant in the cross complaint of White Company. However, the latter corporation did file a mechanic's lien against the Borsook property. Since appellant is required by the judgment to "pay all unpaid bills for labor and materials * * * furnished by all persons through defendant Hasekian in or for the performance of the building contract dated October 12, 1948," appellant can suffer no prejudice by reason of the judgment's provision for recovery by White Electric Company for the amount of its lien.

Judgment affirmed.

McCOMB, J., concurs.

NEPTUNE PIER CO. v. COASTER
CO. et al.
Civ. 18335.

District Court of Appeal, Second District,
Division 1, California.

Oct. 18, 1951.

Rehearing Denied Nov. 13, 1951.

Hearing Denied Dec. 13, 1951.

Action by the Neptune Pier Company, lessee, against the Coaster Company, sub-lessee, and the City of Long Beach, lessor, in which the lessee claimed that, by negotiating a new lease to the exclusion of the present lessee, defendants had unlawfully conspired to defeat plaintiff's right to take over, under the terms of the sub-lease, a roller coaster erected on the leased premises by the sub-lessee. The Superior Court, Los Angeles County, Irvin Taplin, J., entered judgment adverse to plaintiff, and the plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that plaintiff had suffered no damage by reason of the alleged conspiracy or as result of his inability to take possession of the premises during the five day period between the expiration of the sub-lease and the commencement of new lease term.

Affirmed.

1. Evidence ⇨91

Party making an affirmative allegation has burden of proof.

2. Conspiracy ⇨21

In action by lessee against its sub-lessee and its lessor, in which lessee claimed that, by negotiating new lease to exclusion of present lessee, defendants had unlawfully conspired to defeat plaintiff's right to take over, under terms of sub-lease, roller coaster erected on leased premises by sub-lessee, whether there existed between lessor and sub-lessee conspiracy to defeat lessee's rights under sub-lease was question of fact.

3. Conspiracy ⇨19

In action by lessee against its sub-lessee and its lessor, in which lessee claimed that, by negotiating new lease to exclusion of present lessee, defendants had unlawfully conspired to defeat plaintiff's right to take over, under terms of sub-lease, roller coaster erected on leased premises by sub-lessee, where it appeared that plaintiff's lease, requiring removal of all structures prior to its

expiration, would expire five days after termination of sub-lease and that removal of roller coaster would require 75 days, evidence sustained finding that plaintiff had suffered no damage by reason of alleged conspiracy or as result of being prevented from taking possession of premises during 5 day period between expiration of sub-lease and commencement of new lease term.

4. Appeal and Error ⇨1012(1)

Where some evidence sustained appellant's contentions but trial court's findings against those contentions were adequately supported by evidence, reviewing court would not weigh the evidence.

Gibson, Dunn & Crutcher, Los Angeles, by Ira C. Powers, Sherman Welpton, Jr., and William F. Spalding, all of Los Angeles, for appellant.

Neil S. McCarthy, and Cosgrove, Cramer, Diether & Rindge, John N. Cramer, Leonard A. Diether, and Frank D. MacDowell, all of Los Angeles, for respondent, Coaster Co.

Irving M. Smith, City Atty., Joseph B. Lamb, Asst. City Atty., Long Beach, for respondent, City of Long Beach.

DORAN, Justice.

The controversy herein is an outgrowth of a so-called lease-franchise dated May 29, 1914, whereby respondent City of Long Beach leased certain tidelands to appellant Neptune Pier Company for a term of 35 years expiring December 1, 1948. The franchised premises had been acquired by the City under a state grant, and are described as lying 376 feet along the line of ordinary high tide and extending 600 feet southerly into the Pacific Ocean. As a part of the consideration Neptune conveyed to the city two parcels of land, namely a 396 foot strip (east and west) and two feet in width, along the high tide line, and a second strip conveyed for sidewalk purposes 396 feet long (east and west) and 25 feet wide, lying immediately north of a 64 foot strip owned by Neptune. The lease franchise contained no provision for renewal or extension of the term, and required Neptune

to remove all structures prior to the expiration date "at its own expense and surrender the same to the City of Long Beach."

On May 7, 1914 appellant Neptune subleased a portion of said premises to the respondent Coaster Company for a similar period of 35 years, which period was later shortened so that the sub-lease would expire November 25, 1948, or five days before the expiration of Neptune's basic lease-franchise. Upon this subleased property the Coaster Company erected a roller coaster which was demolished in 1930, a new structure of similar nature being then constructed.

Title to the roller coaster at the expiration of the sublease is now claimed by the Neptune Company. This claim is predicated upon a sub-lease provision that Coaster Company "shall, at the expiration of the term herein limited, or upon sooner termination of this lease, at its option (1) turn over to (appellant) * * * the said demised premises with all structures and improvements in good and safe condition, or (2) at its own expense clear said demised premises and leave the same" in their original condition. Appellant Neptune was given a right of entry for conditions broken, but the sub-lease contained no express provisions relative to method, manner or time by which respondent Coaster Company was to exercise the option. There was evidence that removal of the extensive roller coaster structure would require 75 days.

In 1944-45, it appears that sub-lessee Coaster Company attempted without success to negotiate some arrangement with Neptune for a renewal of the sublease at its termination in 1948 so that Coaster's investment would be protected. Coaster offered to cooperate in securing a new basic lease from the City. Failing in these efforts, Coaster, in May, 1946, wrote the City Manager of Long Beach: "Coaster Company has been unable to obtain from Neptune any expression of its intention relative to applying for a new franchise lease and has therefore determined to seek a lease-franchise from the City covering the space now occupied by its operations and upon which it has expended over \$250,000". Coaster proposed a payment of \$20,000 to the City

"providing Coaster Company has obtained the franchise and is in full possession of its improvements—the City to waive the removal of Coaster Company's improvements as required in Neptune's franchise".

Thereafter, according to appellant's brief, "The City in disregard of Plaintiff's tenancy and reversionary interest entered into a new lease with Coaster Company for the operation of the coaster for twenty-one years beginning December 1, 1948". There is evidence indicating that the City requested information from Neptune relative to the latter's intention to apply for a new franchise, but that such information was not furnished.

On July 15, 1947 the electors approved the granting of the new franchise to Coaster. A resolution was passed by the City extending the time for removal of the structure "to the date of termination of the (new) lease franchise granted to Coaster Company". Appellant claims that this was done without notice to Neptune; there is also evidence indicating that Neptune could hardly have been ignorant of what was going on in this respect.

A conspiracy between the City and Coaster "to deprive Plaintiff of its contract and property rights", and to prevent plaintiff from obtaining the valuable improvements, is alleged. Coaster Company is said to have "fraudulently" written Neptune that Coaster "will at its own expense clear said demised premises", etc., whereas Coaster never intended to so remove the structure, and in fact never did remove it. It is Neptune's contention that "Upon vesting of the reversion and Coaster Company's refusal to avail itself of the provision for removal of the structures, plaintiff (Neptune) became entitled to the exclusive possession and right of disposition of the structures".

The trial court found that Coaster's sublease came to an end on November 25, 1948, but that "Respondent Coaster still had the right of ingress and egress for the purpose of removing the structures it had placed on the subleased property". It was also found that although Coaster had hired armed guards and had thus prevented Nep-

tune from taking possession, there was reasonable and justifiable cause to engage and maintain such guards, and that "none of them did or performed any act or engaged in any activity that was not reasonably necessary to protect the structures and improvements on the subleased premises". The trial court concluded that Neptune had suffered no damage and was entitled to no relief. It is maintained by the respondents that the findings and judgment are amply sustained by the record evidence.

It is pointed out in a brief filed by the City of Long Beach that "The City has never exercised any dominion" over the coaster structure, and claims no interest whatever in the improvements". It is also noted that the City, as the owner of the property, "had the right to re-lease it at the termination of Neptune's lease-franchise without undue or unnecessary delay or loss of income. Neptune had no priority right to be considered ahead of others. However Neptune appears to take the position that it was the City's duty to do nothing with its property, but to sit idly by and await a determination of a dispute between it and Coaster as to which owned the improvements".

Although various decisions have been cited in support of appellant's contention that the trial court erred in its decision, such cases do no more than reiterate certain fundamental rules about which there can be no serious controversy. For example, the general rights, duties and liabilities of landlords, tenants and sub-tenants are well established and can hardly be questioned at this late date. It is to be noted that none of the cited cases involve a factual situation in any way comparable with that here presented.

Although, as appellant maintains, the Coaster Company possessed only the limited rights of a sub-lessee, it must be borne in mind that Neptune itself was a mere lessee of the City under a lease which makes no provision for renewal or extension. Without some renewal or extension, and Neptune appears to have done nothing to secure any reinstatement of its tenancy status, its tenancy rights came to an end only five

days after termination of Coaster's sub-lease. As noted in the City's brief, the Neptune Company possessed no "priority right" so far as relates to the granting of a new franchise-lease by the City.

As hereinbefore indicated, the fundamental question litigated at the trial and now made one of the chief issues on appeal, concerns the ownership and disposition of the structures erected by the sub-lessee. It is apparent that this coaster structure was primarily valuable as a going concern, and that such value was to a very great extent dependent upon two contributing factors,—namely the favorable amusement—beach location, and the long term continuance of the enterprise. The City of Long Beach by way of a franchise lease, was obviously the fountain head of both of these elements. The Neptune Company, itself a lessee, occupied the position of a middle man. Neptune contributed nothing towards construction or maintenance of the roller coaster, and, it may be noted, apparently made no claim of ownership prior to the final controversy.

Renewal of the basic franchise at the close of Neptune's term was a matter important to both Neptune and Coaster, yet it seems that Neptune made no effort towards securing a renewal of this basic right. Under one view of the evidence it might reasonably be inferred that Neptune was primarily concerned with securing title to this valuable asset before negotiating any new arrangement with the city. Coaster, on the other hand, was determined that "The Neptune Pier Company was not going to steal the coaster", and failing to secure cooperation from Neptune, proceeded to make its own arrangement with the City of Long Beach for the purpose of protecting its large investment.

The matter of removal of the roller coaster at the expiration of the sub-lease was not one which could be effected in a few hours or even in a few days. There was evidence that such removal would require a period of 75 days. If it be assumed, as appellant's position seems to require, that Coaster must either have the structure removed before the expiration date of the sub-lease, or lose title thereto,

it necessarily follows that the Coaster Company would be compelled to start such removal activities 75 days before the expiration date. Financially, then, the last two and one-half months of the sub-lease period would be a total loss so far as income is concerned. The sub-lease, however, contains no such requirement, but merely provides that "at the expiration of the term" Coaster shall exercise its option of turning over to Neptune the structure in question, or shall "at its own expense clear said demised premises".

By notice given, the Coaster Company made a formal election to remove the structure, although as appellant states, no removal was ever made and it is questionable whether Coaster ever intended to remove it. It is at least clear that Coaster had no intention of turning over the property to Neptune. As already noted, however, the sublease was silent as to the exact method, manner or time in which Coaster was to perform. Detailed and express provisions governing such an important matter might well have been contained in the instrument. Such foresight might have rendered the present litigation unnecessary or at least have clarified the issues as to the exact rights, duties and liabilities of the various parties.

[1,2] The alleged conspiracy between Coaster and the City, designed to defeat Neptune's right to take over the structure, was one of appellant's affirmative allegations, therefore the burden of proving such fact rested upon appellant's shoulders. The fact that Coaster had offered the City \$20,000 "provided Coaster Company has obtained the franchise and is in full possession of its improvements—the City to waive removal of * * * improvements as required in Neptune's franchise", can hardly be said to establish such a conspiracy, standing alone. Whether a conspiracy did exist, involving an unlawful act or a lawful act done in an unlawful manner, was clearly a question of fact.

[3] The trial court was confronted with appellant's theory that Coaster and the City had unlawfully combined to "freeze out" Neptune, and on the other hand with re-

spondent's theory that following Neptune's non-cooperation, Coaster had merely sought to protect its rights and insure future operation, by opening direct negotiations with the city. Certainly the record discloses evidence from which the trial court could draw the latter conclusion.

The record also affords substantial evidence in support of the trial court's finding that Neptune had suffered no damage. In this connection the court found that "the reversionary interest of Neptune in the premises referred to in Coaster's sublease on or after November 26, 1948, was of no market value", and that Neptune's nearby fee property "was not damaged or depreciated in value by virtue of the maintenance and operation of the structures and improvements referred to in Coaster's sublease on November 26, 1948, or at any time thereafter". The trial court also noted that had the roller coaster been turned over by Coaster, Neptune, under the basic lease with the City would have been obliged to remove such structure at great expense, thus rendering the possession of the coaster a detriment rather than a benefit to Neptune.

[4] The most superficial examination of the voluminous record demonstrates that at almost every point, the trial court was confronted with conflicting evidence and diverse theories. Only in respect to the bare details of what finally happened is the record free from such confusion. More than 1,200 pages of testimony make it clear that the issues in question were thoroughly canvassed. While it is doubtless true that certain items of evidence may tend to support some of appellant's contentions, it is nevertheless certain that the trial court's findings against those contentions are adequately supported. Under the usual rules, the appellate court in such a situation is not empowered to weigh the evidence or enter into what amounts to a retrial of the case.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SCHAUER, J., dissenting.

**AETNA BLDG. MAINTENANCE CO., Inc.
v. WEST.
Civ. 18434.**

District Court of Appeal, Second District,
Division 2, California.

Oct. 23, 1951.

Rehearing Denied Nov. 8, 1951.

Hearing Granted Dec. 20, 1951.*

Action by the Aetna Building Maintenance Co., Inc., against James A. West for damages resulting from defendant's alleged acts of unfair competition and for an injunction prohibiting defendant from wrongfully soliciting plaintiff's customers. The Superior Court, Los Angeles County, Harold B. Jeffrey, J., gave judgment for the plaintiff, and the defendant appealed. The District Court of Appeals, Moore, P. J., held that the evidence sustained the finding that defendant wrongfully solicited and enticed away plaintiff's customers.

Judgment affirmed.

1. Fraud ☞20

The law is loath to give approval to any conduct designed to assist a party to overreach another who has good reason to expect only kindness and fair dealing.

2. Trade-Marks and Trade-Names and Unfair Competition ☞93(3)

In action by building maintenance company against former employee for damages for soliciting and diverting away customers and for an injunction prohibiting former employee from performing work for company's former customers, divulging confidential information, and attempting to induce other customers to leave company, evidence sustained finding that former employee had wrongfully solicited and enticed away company's former customers

3. Master and Servant ☞60

Knowledge of a former employer's customers and their habits, fancies and requirements is a trade secret, even though the identity of the customer might not be so considered.

4. Trade-Marks and Trade-Names and Unfair Competition ☞77

Where former employee's knowledge of building maintenance company's cus-

tomers, their requirements and caprices was detailed and of an important, confidential nature, embracing every facet of the company-customer relationship, as opposed to being of a general nature known to all in trade, equity would restrict former employee's wrongful use of such knowledge when company was being harmed thereby.

5. Damages ☞85

Where, in unfair competition case, employment contract containing liquidated damages clause was found to be too ambiguous to be enforced, and former employee of building maintenance company did not attack such finding, court properly assessed company's damages as they proximately arose from former employee's unfair competition, and was not restricted to amount provided as liquidated damages in employment agreement.

6. Trade-Marks and Trade-Names and Unfair Competition ☞98

Award of \$1,467, as damages for unfair competition by former employee of building maintenance company, was sustained by evidence.

Matot, Gabrielson & Manley, Los Angeles, for defendant, Arthur J. Manley, Los Angeles.

Victor S. Cogen, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent was awarded damages resulting from defendant's acts of unfair competition. The latter was enjoined from "soliciting, diverting or taking away, directly or indirectly, any customers of plaintiff," from performing work for plaintiff's customers whom defendant had previously persuaded to terminate their contracts with plaintiff, and from divulging confidential information pertaining to plaintiff's customers.

Respondent is a corporation organized January 2, 1948. It then took over the assets and obligations of a partnership of the same name which had been engaged in

* Subsequent opinion 246 P.2d 11.

rendering cleaning and janitorial service to office buildings. All references to "respondent" will include the partnership as well as the corporation. Prior to the date of his resignation from respondent's employ, appellant had worked for respondent approximately four years as janitor, superintendent and salesman. During such period of service appellant gained a great deal of confidential information pertaining to respondent's equipment, materials used, methods of performance and types of janitorial service rendered satisfactorily and charges made by respondent to its several customers. Also, he gained a detailed knowledge of the costs and time allocations for each job and profit margins and the peculiarities of each patron of respondent.

While in respondent's employ appellant had signed an "Employment Agreement" whereby he contracted that he "will not during his employment and for a period of two years subsequent to the termination thereof, directly or indirectly, disclose to any person, firm or corporation, the names, addresses and/or requirements of any customers of the company or any of its branches, and that he will not divulge trade secrets and other business information that he has acquired or that he shall acquire hereafter during the period of his employment." He further promised, upon leaving respondent's employ to surrender to respondent all lists, books and records of respondent's customers' requirements, and for a period of two years after the termination of his employment not to solicit, serve or cater to any of such customers served in any way by him while in respondent's employment. Also, he agreed to pay such damages as respondent might suffer as a result of his breach of the agreement.

After resigning as such employee of respondent, appellant entered into the building maintenance business for himself and began to solicit the janitorial and window cleaning business of respondent's customers, of whom and of whose requirements appellant had gained a generous knowledge while at work for respondent, and caused them to terminate their contracts

with respondent and to enter into new contracts with appellant.

The trial court determined that through the use of trade secrets and confidential information gained while in respondent's employ appellant solicited and enticed away from respondent three valuable accounts and determined that respondent had been damaged by such acts and assessed the damages at \$1,467 and enjoined appellant from divulging any confidential information pertaining to respondent's customers and from attempting to induce such customers to leave respondent.

Appellant seeks a reversal on three grounds: (1) there is no evidence to support the finding that there was any solicitation of respondent's customers; (2) there are no trade secrets in a business such as respondent's; (3) the court erred in assessing the damages.

[1] The evidence of appellant's soliciting is ample. His argument to the contrary notwithstanding, the evidence is clear that in the case of each customer that forsook respondent appellant made it a point to inform them that he was leaving Aetna Building Maintenance Company and going into business for himself. An employee of one of respondent's former patrons testified that appellant visited her without invitation at the firm's offices three times after March 1, 1949, and informed her that he was in business for himself. The witness McPherson, an employee of Shell Oil Company, another Aetna customer, testified that after he had learned from Aetna of appellant's retirement from respondent's employ he called appellant who stated to McPherson that he was operating his own janitorial service and would like the Shell contract. In subsequent testimony the witness admitted that he might first have learned of appellant's new business venture from a visit by appellant in April or May, 1949. The court's findings conclusively dispose of appellant's contention that respondent's customers had contacted him and extended an invitation to him to call and discuss a contract for maintenance work. One who

is employed by another impliedly promises not to rob his employer; he becomes obligated never to open the familiar vaults of one who has trusted him and direct a meticulous burglar how to lift out the treasured gold. A reading of the contract by its four corners leaves no doubt that appellant thereby agreed to deal honorably with respondent at all times and not at anytime within two years to resort to finagling in order to deprive respondent of his established trade. Although such contract was found to be so wanting in certainty as to render it unfit as the basis for the relief granted, it is clear that its provisions, in general, encompassed only the usual obligations commonly due to an employer from an employee who stands in a fiduciary relationship. The law is loth to give approval to any conduct designed to assist a party to overreach another who has good reason to expect only kindness and fair dealing.

A representative of Bell Brand Foods testified that appellant had told him, prior to leaving respondent's employ, that he was about to enter business for himself; that appellant contacted him later and informed him that he no longer was connected with Aetna; that subsequently when he asked appellant West about janitor work, the latter called on him with two proposed contracts for such service and that they were almost identical with the Aetna agreements.

In each case appellant through his previous position with respondent was thoroughly familiar with the customer's janitorial requirements and the cost of such service, having known and dealt with each customer personally in previous years. The price charged by appellant was in each instance a shade under the contract price charged by Aetna.

[2] From all the testimony, the court was fully justified in its determination that appellant had wrongfully solicited and enticed away Aetna's former clients and that he had been able to accomplish this by reason of his knowledge and use of the

information gained while in respondent's employ.

[3, 4] The argument that there are no trade secrets in the building maintenance business is a novel contention. Knowledge of a former employer's customers and their habits, fancies and requirements is held to be a trade secret, even though the identity of the customer might not be so considered. *George v. Burdusis*, 21 Cal.2d 153, 160, 130 P.2d 399. Likewise is knowledge as to which customer's business is profitable a trade secret. *Scavengers' Protective Association v. Serv-U-Garbage Company*, 218 Cal. 568, 572-573, 24 P.2d 489. Appellant's knowledge of respondent's customers, their requirements and caprices was detailed and of an important, confidential nature, embracing every facet of the Aetna-customer relationship as opposed to being of a general nature known to all in the trade. See discussion in *California Intelligence Bureau v. Cunningham*, 83 Cal.App.2d 197, 201, et seq., 188 P.2d 303. Accordingly, equity will not hesitate to restrict its wrongful use when the former employer is thereby being harmed.

[5, 6] Neither is there error in the court's determination that damages should be assessed in the amount of \$1,467. The court was not restricted to the \$1,000 provided as liquidated damages in the Employment Agreement since that document was found too ambiguous to be enforced. Appellant has not attacked this finding. It follows that the court could assess damages as they proximately arose from appellant's wrong. Such finding is supported by the testimony of the president of respondent that the selling price of such maintenance contracts in the city of Los Angeles was three times the monthly billing to the customer. Herein, the monthly charge to the Shell Oil Company was \$135 and that to Bell Brand Foods was \$485.

Judgment affirmed.

McCOMB, J., concurs.

107 Cal.App.2d 129

RAST et al. v. FISCHER et ux.

Civ. 18433.

District Court of Appeal, Second District,
Division 1, California.

Oct. 25, 1951.

Rehearing Denied Nov. 15, 1951.

Joseph Blanton Rast, and another, brought an action against Adolph G. Fischer, and wife, wherein they sought declaratory relief, damages, a decree establishing a certain line as the true boundary between the property of plaintiffs and property of defendants, quieting plaintiffs' title by adverse possession to a triangular strip of land constituting the property in dispute and enjoining defendants from building so as to encroach upon the asserted true boundary. By cross-complaint defendants sought to quiet title, to have an encroaching eave removed and damages. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, White, P. J., held, *inter alia*, that evidence sustained findings on issues of agreed boundaries, estoppel and adverse possession.

Affirmed.

1. Boundaries ⇨46(1), 48(7)

An agreement or acquiescence in a wrong boundary when the true boundary is known or can be ascertained from the deed is treated as a mistake, and neither party is estopped from claiming the true line.

2. Boundaries ⇨46(2)

Where there exists or is believed by all parties to exist an uncertainty as to the location of true boundary line and they fix the boundary line by agreement, such agreement will bind all consenting parties.

3. Boundaries ⇨48(7)

Where adjoining landowners, instead of having a survey according to the descriptions of their deeds, assumed that certain stakes found by them denoted the true boundary line and accepted it, their acquiescence was treated as a mistake, and neither party was estopped from claiming the true line.

4. Boundaries ⇨37(5)

In action between adjoining landowners to quiet title to a strip of land, evidence sus-

tained findings that plaintiffs' allegations relating to agreed boundary line and adverse possession were untrue, that plaintiffs were estopped to assert their claims against defendants and that title should be quieted in defendants. Code of Civil Procedure, § 1962, subd. 3.

5. Quieting Title ⇨44(3), 51

In action between adjoining landowners to quiet title to a strip of land, evidence sustained finding that projecting eaves of plaintiffs' building could be removed from defendants' land at slight cost and without substantial damage to the building, and award of nominal damages was justified. Civ.Code, § 3360.

6. Appeal and Error ⇨989

The duty of appellate court begins and ends with a determination as to whether there is any substantial evidence which supports findings of the lower court.

7. Quieting Title ⇨47(1)

In action between adjoining landowners to quiet title to a strip of land, weight to be given the testimony, the credibility of witnesses and the inferences to be drawn were matters for trier of fact.

Harold N. Nuzum, Montrose, for appellants.

William H. Keepin, Glendale, for respondents.

WHITE, Presiding Justice.

This is an appeal from a judgment in favor of defendants in an action brought by plaintiffs wherein they sought declaratory relief, damages, a decree establishing a certain line as the true boundary between the property of plaintiffs and the property of defendants, quieting plaintiffs' title by adverse possession to a triangular strip of land constituting the property in dispute, and enjoining defendants from building so as to encroach upon the asserted true boundary.

Plaintiffs alleged in their complaint that a common boundary line was established in 1924 and was accepted as the true boundary until June, 1948; that plaintiffs and their predecessors in interest had used the

disputed land continuously, openly, unquestioned, and adversely to defendants and their predecessors under a claim of right for more than twenty years; that defendants purchased a portion of the lot adjoining plaintiffs' lot on the south, saw the concrete rubble wall which marked the boundary line claimed by plaintiffs, and had notice of plaintiffs' use and possession of the land up to the said wall.

By their answer, in addition to certain denials, defendants alleged that plaintiffs were estopped from showing the true facts by reason of the conduct of plaintiff Joseph Blanton Rast, in that he represented to defendant Adolph G. Fischer, in May, 1949, and while the Fischers' purchase was still in escrow, that the correct boundary line was indicated not by the concrete rubble wall, but by certain survey stakes affixed as the result of surveys made in June, 1948. Defendants further averred that the use of the disputed strip by plaintiffs was not adverse, but with the consent of defendants' predecessors and purely as a neighborly accommodation. By cross-complaint defendants sought to quiet title, removal of an encroaching eave, and damages.

Upon trial before the court, sitting without a jury, findings were made in favor of defendants, finding that plaintiffs' allegations relating to the boundary line, adverse possession and interference with plaintiffs' possession, were untrue; that plaintiffs were estopped; that the line fixed by the two surveys of 1948 is the true boundary; that the eave of plaintiffs' "garage house" constituted an encroachment and nuisance which could be removed without substantial damage and at nominal cost; and that title to the disputed strip should be quieted in defendants. Judgment was entered accordingly.

Appellants contend that the findings of the trial court that there was no "agreed boundary" and no adverse possession by appellants are not supported by the evidence; that the evidence does not support the findings that plaintiffs were estopped; and that it was error to find that plaintiffs' use of the disputed strip was merely permissive. A brief discussion of the pertinent

facts and testimony adduced at the trial will suffice to demonstrate that these contentions are not well founded.

The present dispute concerns the boundary line between Lot 349, the south half of which is owned by plaintiffs, and Lot 348, which adjoins Lot 349 on the south. In 1922 or 1923, Alvin and Elmer Vilmur, predecessors in interest of plaintiffs, purchased the south half of Lot 349 from a Mr. Nidever, who was then the owner of Lot 348. The Vilmurs and Nidever found some stakes which they assumed marked the boundary, and Nidever built a temporary rock wall along the line indicated by the stakes. In 1924 the Vilmurs built a concrete rubble wall along this line. The Vilmurs resided on the premises for about 13 years, after which the property passed to various persons until it was acquired in 1938 by plaintiff Marinda W. Dudley. On June 1, 1939, plaintiff Rast became a joint tenant with Mrs. Dudley, and in October, 1940, he became owner in fee with a life estate reserved in Mrs. Dudley. Lot 348, owned by Mr. Nidever, passed by deed to various persons until, in April, 1948, Carl and Verna Hereford acquired a portion of Lot 348 adjoining plaintiffs' portion of Lot 349 on the south. Mr. Hereford had a survey made in May, 1948, and thereupon the discrepancy between the correct survey line and the rock wall was discovered, it appearing that the true line was six inches north of the wall at the west corner and approximately 2.9 feet north of the wall at the east end. Mr. Rast and Mr. Hereford then communicated with each other with a view to an amicable arrangement, Hereford in the meantime proceeding with the erection of a house on Lot 348. The defendants purchased the Hereford property in May, 1949.

Taking up first the contention that the court by its findings disregarded the doctrine of "agreed boundaries", the record discloses evidence which if believed by the trial court supports the view that there was no "agreed" boundary, but rather a mistaken acquiescence in what was believed by all concerned to be the true boundary, such belief being based upon the location

of the surveyor's stakes found in 1923 or 1924. From the testimony of Alvin M. Vilmur, it appears that when they purchased Lot 349 in 1923 or 1924 they found two stakes; that they checked these stakes with the map "and they looked perfect, and we thought that was the line." "We just had a casual conversation" (with Mr. Nidever, owner of Lot 348) "and agreed that was the property line." "Q. In other words, you both thought that was the true line? A. From the maps and stakes that were there at that time. Q. In other words, there was no doubt in your mind that wasn't the true property line? A. We had no doubt in our minds that really was the property line." Elmer Vilmur testified that there never was any dispute with Mr. Nidever about the location of the line; that they never intended to occupy any of his property, and only wanted what was theirs according to their deed.

[1] Thus we have at the outset a situation in which there was no disputed boundary, but a mistake as to the true boundary by the parties concerned. As was said in *Pedersen v. Reynolds*, 31 Cal.App.2d 18, 28, 87 P.2d 51, quoting from 4 Thompson on Real Property, page 210, section 3115, "An agreement or acquiescence in a wrong boundary when the true boundary is known, or can be ascertained from the deed, is treated both in law and equity as a mistake, and neither party is estopped from claiming the true line."

[2] In *Clapp v. Churchill*, 164 Cal. 741, 745, 130 P. 1061, 1062, it is stated that the doctrine of an agreed boundary line "rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement fix the boundary line, and that agreement will bind all the consenting parties."

The evidence must disclose "a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line. But what is meant is that this inference of a doubtful boundary will not prevail against the proved fact

to the contrary, namely, that there was no question or doubt or dispute between both parties over the boundary." *Clapp v. Churchill*, supra, 164 Cal. at page 746, 130 P. at page 1063.

Also in *Huddart v. McGirk*, 186 Cal. 386, 388, 199 P. 494, 495, there was testimony that the parties in conversation agreed that a certain ditch was the boundary. The court said: "This is a very different thing from fixing a disputed or doubtful boundary, and if in fact the understanding of the parties as to the location of the true line was in error, they are not bound by their mistaken understanding."

[3] So here, the parties, instead of having a survey according to the descriptions of their deeds, assumed that the stakes found by them denoted the true line and accepted it. In such circumstances their acquiescence is treated as a mistake and neither party is estopped from claiming the true line. *Pedersen v. Reynolds*, supra; *Janke v. McMahon*, 21 Cal.App. 781, 133 P. 21; *Garrett v. Cook*, 89 Cal.App.2d 98, 200 P.2d 21.

So far as the claim of adverse possession is concerned, the evidence supports the view that the successive owners of the two parcels acquiesced in the mistaken boundary, but that they paid taxes according to the descriptions in their respective deeds.

When, in May, 1949, plaintiff Rast learned that the defendants were purchasing the adjacent property, he went to the office of the real estate agent who negotiated the sale and said that he wanted to "straighten something out that needs it". Thereafter he met Mr. Fischer, who asked Mr. Rast if he was satisfied with the surveys made in 1948, and Mr. Rast said he was, that he had to be, and asked Fischer for an easement to clear the roof of Mr. Rast's garage house. Mr. Rast himself testified that Mr. Fischer asked him if he was satisfied with the line according to the new surveys and Mr. Rast said, "No, but I am satisfied it is a line, because it has been found to be a line by two different surveys."

[4] Further discussion of the testimony or contentions of the appellants would serve no purpose, since it is clear that there was substantial evidence to support the trial court's findings on the issue of agreed boundaries and on the issue of estoppel. Mr. Rast did not have his lot surveyed until the Herefords commenced the building of their duplex on Lot 348, when he sought to buy Lot 348 or obtain an easement for his garage house roof. His conduct not only affords support to a finding against an agreed boundary and against adverse possession by him, but also supports a finding that he was estopped to assert his claims in that regard against the defendants. He permitted defendants to consummate their purchase and make costly improvements in the belief that he acquiesced in the accuracy of the 1948 surveys. "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ.Proc. § 1962, subd. 3.

[5] The contention that the court erred in awarding damages of one dollar and ordering the removal of the projecting eaves of the garage house, is without merit in view of our conclusions on the main issues heretofore considered. The evidence supports the finding that the projecting eaves could be removed at slight cost and without substantial damage to the building. The award of nominal damages was justified "When a breach of duty has caused no appreciable detriment." Civ.Code, § 3360.

[6,7] Consideration of the entire record discloses substantial evidence to support the findings made, and under well settled rules, assuming the existence of contradictory evidence or that opposing inferences might be drawn from the evidence presented, the duty of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or not, which supports the findings. The weight to be given the testimony, the credibility of witnesses, and the

inferences to be drawn, were matters for the trier of fact. Upon the record, the findings of the trial court find support in the evidence.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



107 Cal.App.2d 44

PEOPLE v. FREEMAN.

Cr. 757.

District Court of Appeal, Fourth District,
California.

Oct. 23, 1951.

Rehearing Denied Nov. 5, 1951.

Hearing Denied Nov. 19, 1951.

Ivan Ellsworth Freeman was convicted in the Superior Court of San Diego County, John A. Hewicker, J., of setting fires on land of another in violation of statute, and he appealed from order denying new trial. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain conviction for statutory offense of wilfully and maliciously burning standing grass, woods, or growing matter, on land of another.

Judgment affirmed.

I. Fires ☞5

Evidence sustained conviction for statutory offense of wilfully and maliciously burning standing timber, grass, brush covered land, or cut over land, not property of defendant. Pen.Code, § 600.5.

2. Criminal Law ☞656(2)

In prosecution for statutory offense of wilfully and maliciously burning growing matter on land of another, wherein witness on cross-examination by defense had stated that he knew of cases where fires had been started by action of sun upon glass, question by court to witness whether witness had heard of four fires being started within period of three hours in same area by glass was not error. Pen.Code, § 600.5.

3. Criminal Law ☞656(2)

In prosecution for statutory offense of wilfully and maliciously burning standing

grass, timber, or woods on land of another, wherein witness testified that he had left home at certain time, but had not looked at his watch, question by court whether witness was accustomed to telling time from sun and whether he could approximate time without watch was not error, but had merely been asked for purpose of bringing out facts. Pen.Code, § 600.5.

4. Criminal Law ⚖656(2)

In prosecution for statutory offense of willfully and maliciously burning standing grass, timber, or woods on land of another, wherein defendant on cross-examination had testified that he remembered everything that had occurred on night before fires, except when he was asleep, reply by court to objection by defense to question inquiring whether defendant remembered particular things, that defendant had testified he remembered everything except when he was asleep, and we intend to find out if he does remember, was not misconduct as ground for mistrial, especially when jury had been instructed to disregard any remarks made by court which might indicate expression of opinion. Pen.Code, § 600.5.

5. Criminal Law ⚖1166½(1)

In prosecution for statutory offense of willfully and maliciously burning standing grass, timber, or woods on land of another, wherein it was contended that defendant had started fires by throwing lighted wooden matches from moving automobile, experiment in which prosecuting attorney threw lighted kitchen matches toward rear of courtroom for purpose of showing that matches so thrown would continue to burn was not prejudicial error on ground that conditions were dissimilar when no claim had been made that conditions were same. Pen.Code, § 600.5.

6. Criminal Law ⚖683(1)

In prosecution for statutory offense of willfully and maliciously burning standing grass, timber, or woods on land of another, wherein defendant had testified that he remembered everything that had transpired on night prior to offense except when he was asleep, and that he had not asked for a woman when renting hotel room, testimony of hotel clerk that defendant had

asked for woman when renting room on night concerned was admissible as rebuttal evidence and also as bearing on defendant's frame of mind and peculiar conduct on following day. Pen.Code, § 600.5.

7. Criminal Law ⚖476

In prosecution for statutory offense of willfully and maliciously burning standing grass, timber, or woods on land of another, in which it appeared that several fires had occurred at different spots within short interval, testimony of expert witnesses as to cause of fires involved was admissible, since cause of fires, under circumstances, was not matter within realm of common knowledge. Pen.Code, § 600.5.

8. Fires ⚖5

In prosecution for statutory offense of willfully and maliciously burning standing grass, timber, or woods on land of another, in which it appeared that several fires had occurred at different spots within short interval, refusal to allow defense witness to testify as to observing spot fires created by other fires at other times than at time of offense involved was not error when witness had not been precluded from testifying as to things seen on occasion involved or under conditions existing at time of offense. Pen.Code, § 600.5.

9. Criminal Law ⚖388

In prosecution for statutory offense of willfully and maliciously burning standing grass, timber, or woods on land of another, wherein it was contended that defendant had started fires by throwing lighted wooden matches from moving automobile, showing of motion picture depicting experiment in which wooden matches were tossed to side of road from jeep traveling at various speeds which resulted in fires, was not error even though wind and temperature conditions might not have been identical, but dissimilarity in conditions was matter for argument to jury. Pen.Code, § 600.5.

10. Criminal Law ⚖651(1)

In prosecution for statutory offense of willfully and maliciously burning standing grass, timber, or woods on land of another, wherein it was contended that defendant had started several fires in given area by throwing lighted wooden matches from

moving automobile, it was proper for court to give jury view of area burned in order to show relation between fires as testified to by witnesses, even though bus carrying jury would necessarily pass through other burned area. Pen.Code, § 600.5.

11. Criminal Law ☞1166½(1)

Where jury was given view in criminal prosecution, that three witnesses sat in same bus in which jurors were carried was not error prejudicial to defendant when witnesses, along with judge, sat apart from jury and rode for only short distance. Pen.Code, § 600.5.

Quintin Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in four counts with violations of section 600.5 of the Penal Code in setting four fires on October 13, 1950, in the vicinity of Julian, in San Diego County. The first two fires were started at the foot of Banner Grade on Highway 78, about six miles east of Julian. The other two were started near Highway 79, about three and four-and-one-half miles, respectively, south of Julian. A jury found the defendant guilty and he has appealed from the judgment and from an order denying his motion for a new trial.

The appellant was employed on a ranch some ten miles southerly from Julian. On October 11, he and his wife were visited by a friend named Kinsman, who had driven out from Kansas. On the evening of October 12, the three drove to Tecate, Mexico, in Kinsman's 1949 Buick sedan for the purpose of showing him a good time. Between nine and ten p. m. they left the car at the international line and walked to a roadhouse in Tecate, a 20-minute walk. Almost immediately the appellant left and Kinsman followed him to an adjoining hotel, where the appellant rented a room. Kinsman returned to the cafe and sat there with the appellant's wife. When the cafe

closed, about one or two o'clock A. M., Kinsman and Mrs. Freeman returned to the car and waited for the appellant. He appeared about four o'clock in the morning and they returned to the ranch, arriving there between six and six-thirty. They all had breakfast and went to bed. Shortly thereafter, the appellant got up and drove Kinsman's car into Julian, the keys having been left in the switch. At 8:25 A. M. he arrived at a service station in Julian and left five or ten minutes later, having had the gas tank filled.

At 8:45 A. M. Mrs. Freeman awakened Kinsman and told him that the appellant had left in his car. The appellant had never driven that car before, and had not asked permission to use it. The appellant owned a jeep but he had taken the keys with him. About 10:30 A. M. Kinsman unsuccessfully attempted to start the jeep by putting a wire around the ignition switch. He finally succeeded in starting it by picking the lock, and around noon he and Mrs. Freeman started for Julian. As they reached Highway 79, shortly after noon, they saw the smoke from the fire on Banner Grade. They proceeded into Julian where they tried, without success, to find the appellant. They started back to the ranch and at Mosler's place, about two miles south of Julian, the fire had reached Highway 79. They stopped and watched the firemen trying to save Mosler's house. They remained there about an hour, and between 1:15 and 2:00 P. M. the appellant drove up in the Buick. He had been drinking and seemed excited about getting away from the fire. They parked the jeep and all three drove in the Buick to Julian and thence to Pine Hills, five miles away. They then returned to Julian and finally back to Mosler's place.

They then proceeded toward the ranch, the appellant driving his jeep and Kinsman and Mrs. Freeman following in the Buick. As they proceeded south on Highway 79 Kinsman and Mrs. Freeman could at times see the appellant in the jeep ahead of them. About three miles south of Julian, when the Buick was from 150 to 200 feet behind the jeep, Kinsman saw the appellant make a throwing motion with his hand, in front of his face. When the Buick reached the

point where this had occurred Kinsman saw a fire just starting on the left side of the highway. He stopped to put it out, but a tanker came around the corner just then and the fire was put out with a hose. It was a small grass fire which had started four feet from the edge of the road and was spreading rapidly.

Kinsman and Mrs. Freeman then proceeded after the appellant, driving at a faster pace than before. About a mile and a half farther on they saw another fire at the side of the road, which Kinsman put out. This fire was about the same size as the other one but was not spreading so rapidly. A highway patrol officer passed the appellant just south of the point of the second fire, and arrived at the fire as Kinsman was putting it out. There was ample evidence that these two fires could not have been spot fires caused by the larger fires on Banner Grade, and that no one else had been there during the time these fires must have started.

Kinsman and Mrs. Freeman went on to the ranch where they found the appellant lying down in the house. Kinsman asked him if he had started any fires and if he had thrown a cigarette out. He denied having done so, saying he had not smoked all the way from Julian because he had no matches. Kinsman told him that their two cars were the first ones through, which left him in a bad spot, and that there would be an investigation. The appellant replied: "I am not guilty". Kinsman asked him what he had been doing that day and he replied that he had gone to Julian to service the car, saying nothing else as to where he had been or what he had done. This was the same story he had told his wife at Mosler's place. Kinsman did not pursue the matter further for fear of starting an argument.

With respect to the two larger fires on Banner Grade two men testified that on that day they were driving from the Salton Sea to Julian along Highway 78. As they neared the foot of Banner Grade they were passed by a late model car going in the opposite direction at a fast speed. Shortly thereafter, they observed a fire burning very rapidly up the hill. They stopped and

reported it and a telephone call to a forest ranger was put in and received at 11:34 A. M. As these men proceeded up the grade they observed a second fire, which was separate and distinct from the first. The nearest edge of the first fire was about five feet from the road. Forest rangers and fire equipment arrived within a few minutes. The two fires had not been in progress long when the first ranger arrived. The fires spread and in a period of 49 minutes reached Highway 79 to the south of Julian. It destroyed a half dozen cabins lying between the point where the fires originated and Mosler's ranch on Highway 79. The fire covered an area of a mile and a half from north to south, and about two and a half miles from east to west.

During an investigation which followed the charred remnants of ordinary kitchen matches were found at the point where all of the fires originated, with the exception of the second fire at the Banner Grade. There was ample evidence showing that these matches had not been dropped after the fires started to burn; that in the two larger fires there was first a small smoldering fire which increased in intensity as it spread and fanned out; and that none of the fires could have caused any of the others. There was testimony by expert witnesses, skilled in the investigation of such fires, who expressed the opinion that these fires were started by ordinary kitchen matches, giving substantial reasons for that opinion. Their testimony was also to the effect that their investigations had eliminated all other possible or reasonable causes for the fires, and the opinion was expressed that these fires disclosed a common mode of operation, having been all started close to the highway within a short radius and comparatively short time, and since they were obviously started by throwing lighted matches from a passing car. Based upon all of the circumstances, the opinion was expressed that one person had set all four of these fires.

The appellant contends that the evidence is insufficient to support the verdict in that it failed to establish that the lands burned over were the property of another, as required by the code section; that these fires

were of incendiary origin; that he wilfully and feloniously burned anything; and that he was in any way connected with the two fires on the Banner Grade.

While there is no direct evidence that the appellant did not own the various lands over which these fires burned, the evidence as a whole, with the reasonable inferences therefrom, is sufficient to support the implied finding to that effect. It would have been a simple matter for him to have brought out the fact that he owned these lands if this had been true. There was evidence that he was a ranch hand employed on a ranch which was some 15 or 20 miles away, by road, from the point where the two fires on the Banner Grade started; that these two fires burned some half dozen cabins between that point and Mosler's place; and that these cabins and several other properties in the burned area were owned by persons other than the appellant. The ranch where the appellant was employed was some six or eight miles from the scene of the two fires which were started on Highway 79, and from the evidence as a whole the jury was entitled to infer that in starting these fires the appellant was also dealing with property which he did not own.

[1] It cannot be held that the evidence was insufficient to show the incendiary origin of the fires, that they were wilfully and maliciously set by the appellant, or to connect him with the two fires on the Banner Grade. The fact that four fires were set within a short time in inhabited territory, and under conditions inevitably making such a fire dangerous to life and property, is sufficient to show the necessary wilfulness and maliciousness, these being questions of fact for the jury. It rather clearly appeared that the four fires were started in the same general manner, by throwing lighted matches from a car passing along the road. They were all started close to the roads and only a few miles apart, two at one place at one time and the other two close together a couple of hours or so later. Other causes of the fire were pretty well excluded by the evidence, and it was shown that the appellant was present at the time the two fires on Highway 79 must have

started, and that no one else was there at the time. While there was no direct evidence that he was seen on the Banner Grade at the time those fires started, a man in a nearly new passenger car was seen rapidly leaving that point immediately after the fires must have been started.

In this connection, the conduct of the appellant and the inconsistent and contradictory statements made by him must also be considered. While there was testimony that he had not quarreled with Kinsman or his wife, the evidence strongly indicated that some unusual situation existed which had an important bearing on his actions. On the night before, he and his wife took his friend Kinsman to Tecate for the purpose of showing him a good time. The appellant left the others almost immediately and went to a hotel room, staying there several hours. Although Kinsman knew where he was he did not attempt to get him when the cafe closed, but went to the car with Mrs. Freeman where they waited until the appellant appeared two or three hours later. Shortly after the others had gone to sleep the next morning he took Kinsman's car, also taking the keys to his own jeep, and disappeared for some six hours. He told the investigators that he could not sleep and had gone for a ride; that he went to Julian and filled the tank of the car with gasoline; that he then drove to Escondido, taking about an hour on the trip; that he called on a friend, Mrs. Stitts, at her home in Escondido staying about half an hour; that he then drove back to Julian, which took about an hour; and that as he passed through Ramona on the way he saw the smoke from these fires at 11:00 o'clock. It was clearly established that the first of these fires did not start until about 11:30 A. M. At another time the appellant told the investigators that he had also taken Mrs. Stitts for a ride. There was an hour or an hour and a half discrepancy in the way the appellant accounted for his time before he rejoined his wife and Kinsman near Julian. It was shown by the amount of gasoline left in the tank of the Buick that he had driven considerably farther than he said he had. The difference in the amount of gasoline was about the amount

that would have been used if the appellant, in addition to his trip to Escondido, also went down the Banner Grade and returned to Julian by another road. When the appellant first returned to Julian about 1:30 P. M. he saw the deputy sheriff Grand, who told him that his wife was looking for him. The appellant told the investigators that Grand also then told him that there were two "set" fires on the Banner Grade. There is no other evidence that Grand had told him such a thing, and no one knew at that time whether or not the fires had been set. Mrs. Stitts, who testified for the appellant, first told the investigators that the appellant came to her home between nine and ten o'clock on that day, that he stayed about half an hour, and that she did not leave the house. She later changed this story and said that she had gone for a ride with the appellant in the nearly new Buick he was driving. Two friends of the appellant, Mr. and Mrs. Campbell, who live near the foot of the Banner Grade, testified in his behalf saying that they saw the smoke from the Banner Grade fire at 10:45 A. M. and that later, after they had lunch, they went to the scene of the fire. While they were very positive as to the time they first saw the fire the evidence conclusively shows that no such fire existed at that time.

It cannot be held that the evidence as a whole is insufficient to support the verdict and the implied findings as to all of the elements questioned by the appellant. The circumstantial evidence against the appellant was strong and any reasonable doubt seems to have been removed by the evidence of his own actions and statements. The record confirms the conclusions reached by the jury.

[2-4] It is next contended that the court was guilty of prejudicial misconduct in asking certain questions of witnesses and in making one remark. On cross-examination of one witness the defense had brought out that the witness knew of cases where fires had been started by the action of sun upon glass. Later, the court asked the witness whether he had heard of four fires being started within a period of three hours in the same area by glass, and he replied

that he had not. The court asked another prosecution witness whether his record showed that there was any lightning in this area on that day. In another instance, the appellant's employer testified that the appellant left the ranch about 7:30 A. M. on the day in question, but said he had not looked at his watch. The court asked him if he was accustomed to telling time from the sun and whether he could approximate the time without a watch. He said that he could. These questions were asked for the purpose of bringing out the facts and no prejudicial misconduct appears. In another instance, the appellant on cross-examination had testified that he remembered everything that had occurred at Tecate, on the night before the fires, except when he was asleep. The prosecution asked a number of questions as to whether he remembered certain things that had then occurred. In reply to an objection to one question the court said, among other things: "He testified he remembers everything except when he was asleep and we intend to find out if he does remember." Later, defense counsel cited this as misconduct and as a ground for a mistrial. In denying the motion the court explained that his purpose had been merely to have all of the facts brought out. No misconduct appears, although the language used is not to be commended. Moreover, the jury was instructed to disregard any remarks made by the court which might seem to indicate any expression of opinion on his part.

[5] It is next contended that the district attorney was guilty of misconduct in asking one question of a defense witness, and in making three comments in his argument to the jury. The question referred to was apparently asked in good faith. While the record of the preliminary hearing did not sustain the district attorney's contention in this regard, it was fully sustained by other evidence which was produced. The remarks made to the jury of which complaint is made constituted legitimate argument and neither misconduct nor prejudice appears. The district attorney is also charged with misconduct in that during his argument to the jury he lighted several kitchen matches and threw them toward the back

of the court room. This was done for the purpose of showing that wooden matches so thrown would continue to burn. The only objection raised is that the conditions in the court room were entirely different from those in the mountains, where these fires were started, and that the experiment was performed before defense counsel could make an objection. The experiment was made for illustrative purposes, no claim was made that the conditions were the same, and no prejudicial error appears.

[6] A number of errors are assigned in connection with the admission of evidence. It is first contended that the testimony of a hotel clerk in Tecate, that when the appellant rented a room on the night of October 12 he asked for a "woman", should not have been admitted; that it was evidence of another offense; and that its only purpose was to prejudice the jury. The appellant had testified that he remembered everything that transpired that night except when he was asleep. While his memory was being tested in this regard, he denied that he had asked for a "woman" on that occasion. The questioned evidence was brought out in rebuttal. It was admissible in this connection, and it also had a bearing on the matter of appellant's frame of mind and his peculiar conduct the next day.

[7] It is contended that the court erred in admitting the testimony of two expert witnesses. It is argued that the cause of fire is a matter of common knowledge and not a question for experts, and that some of the data these experts used was gathered at points other than Julian. This contention is without merit. While the cause of some fires may be a matter within the realm of common knowledge, the situation here involved considerations which called for the evidence of qualified experts.

[8] It is contended that the court erred in refusing to let a defense witness testify as to seeing spot fires in the Julian area. This witness was prevented from testifying as to seeing spot fires created by other fires at other times, but not from testifying as to anything seen on this occasion or under the conditions then existing.

[9] "It is further contended that the court erred in permitting the showing of motion pictures during the trial. These pictures showed an experiment which had been conducted by certain officers and fire experts in the hills near San Diego. In this experiment eleven lighted matches were tossed to the side of the road from a jeep traveling at various speeds, and the pictures showed that only one of these matches did not remain lighted and start a fire. The condition as to dry grass was shown to be quite similar to that existing where the fires in question were started, but it was admitted that the wind and temperature conditions may not have been identical. The dissimilarity in the conditions was a matter for argument to the jury and there is nothing in the record to indicate that the court abused its discretion in permitting the results of the experiment to be shown.

[10, 11] Finally, it is contended that the court erred in connection with taking the jury to view the area where this fire occurred. It is argued that the court permitted the prosecution's chief witnesses to ride in the bus with the jury, that in going to the scene the jury was taken through an area burned over by a much larger fire which had occurred in the summer of 1950, and that the court failed to have the jury inspect some of the things relied upon by the defense. In going to the scene of these fires the bus necessarily passed through the other burned area, but nothing in the record indicates that any prejudice resulted therefrom. The jury was taken out to view the premises because the judge felt, and believed that the jury felt, that it was impossible from the testimony to get a correct idea as to the various distances between these fires, their relation to each other, and what could be seen from various points mentioned by the witnesses. To this end the jury was taken only to certain places, including the spots where the fires originated and a high point from which the distances and relation between the fires could be clearly seen. There was no error in refusing to take the jury to other places to view certain incidental matters concerning which the defense witnesses had testified. The only time when the three wit-

nesses referred to rode in the bus with the jury was while the bus was going from one of the spots to another, during which the judge and the three witnesses sat on the rear seat of the bus and apart from the jury. We are unable to find any prejudicial error in this connection.

In view of the evidence, including the contradictory statements of the appellant and his unsatisfactory explanation of many of his actions, it seems impossible that any of the matters complained of could have affected the verdict. The cause was fairly tried, the appellant was ably defended, and no miscarriage of justice is disclosed by the record.

The judgment and order are affirmed.

GRIFFIN, J., concurs.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



107 Cal.App.2d 5

LONGO et al. v. FREITAS et al.

Civ. 7973.

District Court of Appeal, Third District,
California.

Oct. 22, 1951.

Salvatore J. Longo, doing business under the fictitious firm name and style of Longo Realty Company, brought action against Carl Freitas and others to recover commissions for allegedly obtaining purchasers for realty of defendants. The Superior Court, Stanislaus County, Andrew R. Schottky, J., entered a judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding that plaintiff did not procure prospective purchasers ready, willing and able to complete purchase of realty.

Judgment affirmed.

1. Appeal and Error ⇐1011(1)

Any conflict in evidence on issues covered by findings attacked on appeal, must be resolved in favor of such findings

2. Brokers ⇐86(5)

In action by real estate broker to recover commissions from defendants, on ground that defendants had listed realty with brokers for \$275,000 and that broker procured prospective purchasers who agreed to pay \$265,000, and that defendants assented to sale, but that defendants conveyed their interest back to conditional vendor in consideration for repayment by conditional vendor of \$225,000 paid by defendants under conditional sales contract, evidence sustained finding that broker did not procure prospective purchasers ready, willing, and able to complete purchase of realty.

3. Evidence ⇐588

In action by real estate broker to recover commissions from defendants, on ground that defendants had listed realty with brokers for \$275,000 and that broker procured prospective purchasers who agreed to pay \$265,000 and that defendants assented to sale, but that defendants conveyed their interest back to conditional vendor, evidence of defendants that conditional vendor repaid defendants what they advanced on purchase price was not fantastic and inherently improbable, in view of law relating to rescission and forfeiture and difficulties and expense attendant with repossession of property.

4. Brokers ⇐85(1)

In action by real estate broker to recover commissions for allegedly procuring prospective purchasers for realty, court did not err in excluding evidence of negotiations broker conducted with prospective purchasers prior to execution by defendants of listing agreement, where there was no evidence that prospective purchasers purchased realty.



Mark A. Joseph, Modesto, for appellant

Hawkins & Hawkins, Modesto, for respondent.

PEEK, Justice.

This is an appeal from a judgment in favor of defendants in an action to recover

a commission allegedly due under a contract for the exclusive listing of real estate.

Under the terms of the agreement, which was dated November 9, 1946, respondents listed exclusively and irrevocably with appellant for a period of thirty days, approximately 3000 acres of farm land for the price of \$275,000, the terms being that the purchaser pay \$50,000 cash and assume a balance of \$225,000 due under a conditional sales contract between respondents and Turlock Garden Land Company, from whom they were purchasing the land. The agreement provided for a commission of five per cent of the selling price, and further provided that in the event of a sale made within one year following the termination of the listing to parties with whom appellant had negotiated during the life of the listing, and if appellant had so notified respondents of his negotiations, he would be entitled to the commission above provided. No sale of the property was effected within the month following its execution, and on December 17, 1946, respondents, by quitclaim deed, conveyed their interest in the realty back to the Turlock Garden Land Company. Appellant then brought this action to recover his commission for the sale of the realty, alleging that he had procured as purchasers Glenn and Warren Chase, who were ready, willing and able to complete the purchase of the realty; that respondents agreed to sell to the Chases for the sum of \$265,000; and that the Chases did in fact purchase the land. Respondents answered, denying generally all of the allegations of the complaint.

Upon the issues so raised the trial court found that appellant did not procure purchasers ready, willing and able to complete a purchase of the realty; that appellant did not complete any negotiations with Glenn and Warren Chase for the purchase of the land, nor did he give any notice to respondents that he was negotiating with the Chases other than to introduce one of them to respondent Carl Freitas and show him the land, and that the Chases did not purchase the land. Accordingly judgment was entered in favor of respondents. Appellant has now appealed on the grounds that (1) the findings are not supported by

the evidence, that (2) evidence introduced by respondent is fantastic and inherently improbable, and (3) the court improperly excluded evidence of negotiations which occurred prior to the execution of the listing contract.

[1,2] Appellant, at the outset, is confronted with the rule, which needs no citation of authority, that any conflict in the evidence upon the issues covered by the attacked findings must be resolved in favor of said findings. The record in regard to such contention shows that respondents Carl Freitas, Rose Silva and Andrew Silva were in accord in their testimony that they had not been engaged in any direct negotiations with the Chases relative to the sale of the property, that they had not sold or agreed to sell to the Chases, and that in their dealings with appellant they had never assented to a selling price lower than \$275,000. Contrary testimony was introduced by appellant that the Chases had offered \$265,000 for the land, and that respondents had accepted that offer. Thus the testimony of the parties merely created a conflict on the issues of whether an agreement had been negotiated between respondents and the Chases, and whether appellant had obtained a purchaser ready, willing and able to purchase on the terms fixed by respondents, which conflict the trial court resolved in favor of respondents. Hence, it cannot be said that the findings are not supported by the evidence.

[3] Appellant's second contention is likewise without merit. In view of the law relating to rescission and forfeiture and the difficulties and expense attendant with the repossession of property the acts of the vendor land company in repaying to respondents what they advanced on the purchase price cannot, as appellant contends, be labeled as either fantastic or inherently improbable.

[4] Appellant further charges that the trial court erred in excluding evidence of negotiations he conducted with the Chases prior to the execution of the listing agreement. Since the record is devoid of any evidence of a sale, either by appellant or respondents, such evidence could not have

been material to the issue of performance of the brokerage agreement sued on, and the trial court properly excluded the same.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



FREDRICKSON v. SUPERIOR COURT OF STATE, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

No. 15046.

District Court of Appeal, First District,
Division 1, California.

Oct. 23, 1951.

Hearing Granted Dec. 18, 1951.*

Marie Margaret Maschio Fredrickson filed a petition for writ of certiorari to review an order of the Superior Court of the State of California in and for the City and County of San Francisco, entered by the Honorable T. I. Fitzpatrick, Judge of the Superior Court, granting a motion by Carew & English, Inc., real party in interest, to set aside decrees settling petitioner's final account as administratrix ordering distribution and discharging petitioner as administratrix. The District Court of Appeal, Bray, J., held that the decrees were not void on their face, that notice of motion was not framed under Code Civil Procedure Section 473, authorizing relief from judgment or orders taken through mistake, inadvertence, surprise or excusable neglect and that the record failed to show that court and counsel had treated the motion as being made under such statute or that administratrix had waived the requirement of a proper notice of motion and that therefore court had no power to vacate the decrees.

Order annulled.

1. Executors and Administrators ⇨509(1)

Notice of motion to set aside decrees settling final account of administratrix, ordering distribution and discharging administratrix, stating that motion would be made on ground that final account was not verified and did not show all claims filed or pre-

sented against estate and that movant's claim approved by administratrix and allowed by court was on file and had not been paid or otherwise acted upon and that no notice of rejection had been given claimant, was not framed under statute authorizing relief from judgment or order taken through mistake, inadvertence, surprise or excusable neglect. Code Civ.Proc. § 473.

2. Judgment ⇨388

Where motion to set aside judgment or order is treated by court and counsel at hearing as bringing inadvertence, surprise and excusable neglect before the court and counsel opposing the motion makes no objection to the sufficiency of the motion, requirement that such grounds be stated in the notice of motion is deemed waived. Code Civ.Proc. § 473.

3. Executors and Administrators ⇨509(8)

Where notice of motion to set aside decrees settling final account of administratrix, ordering distribution and discharging administratrix was not framed under statute authorizing relief from judgment or order taken through mistake, inadvertence, surprise or excusable neglect, movant had the burden of showing that motion as made was on different grounds than those set forth in motion. Code Civ.Proc. § 473.

4. Executors and Administrators ⇨502

Lack of verification of final account did not render the decree based thereon void.

5. Executors and Administrators
⇨502, 513(3)

Failure of final account to show all claims filed against estate was not jurisdictional and did not make decree settling account and ordering distribution void.

6. Executors and Administrators ⇨234

A claim against estate which is not barred by limitations need not be rejected by executor or administrator.

7. Executors and Administrators ⇨509(1)

Where decrees settling final account of administratrix, ordering distribution and discharging administratrix were not void on their face, they could be set aside only by appeal within the proper time, proper motion under statute authorizing relief from judgment or order taken through mis-

* Subsequent opinion 241 P.2d 541.

take, inadvertence, surprise or excusable neglect, a motion for new trial within the proper time, or under certain conditions by an independent suit in equity. Code Civ. Proc. § 473.

8. Executors and Administrators ⇨510(7)

Record of proceedings at hearing on motion to set aside decrees settling final account of administratrix, ordering distribution and discharging administratrix, purportedly based on grounds other than those specified by statute, failed to show that court and counsel had treated motion as being made under statute authorizing relief from judgment or order taken through mistake, inadvertence, surprise or excusable neglect or that administratrix had waived the requirement of a proper notice of motion. Code Civ.Proc. § 473.

9. Executors and Administrators ⇨510(8)

An order setting aside decree of discharge of an administratrix not made under provisions of statute authorizing relief from judgment or order taken through mistake, inadvertence, surprise or excusable neglect may not be affirmed as one authorized by such statute. Code Civ.Proc. § 473.

10. Executors and Administrators ⇨509(1)

Where decrees settling final account of administratrix, ordering distribution and discharging administratrix were not void on their face, notice of motion to set aside such decrees were not framed under statute authorizing relief from judgment or order taken through mistake, inadvertence, surprise or excusable neglect and record of proceedings at hearing on motion failed to show that court and counsel had treated the motion as being made under such statute or that administratrix had waived the requirement of a proper notice of motion, court had no power to vacate the decrees. Code Civ.Proc. § 473.

Sefton & Anderson, San Francisco, for petitioner.

Heller, Ehrman, White & McAuliffe, San Francisco, for respondents.

BRAY, Justice.

Petition for writ of certiorari to review an order of the Superior Court of the City and County of San Francisco granting a motion to vacate and set aside a decree of distribution.

Questions Presented.

The sole questions are whether the motion was treated by the parties and court as being one under section 473 of the Code of Civil Procedure, and if so, whether there was any evidence to support such a motion.

Facts.

After publication of notice to creditors by petitioner as administratrix of the estate of Robert E. Maschio, deceased, the real party in interest here, Carew & English, Inc., a corporation,¹ within the time allowed by law and at the place designated in the notice to creditors, the office of petitioner's attorneys, filed its verified claim in the sum of \$1,071 for the funeral expenses of the deceased. A purported approval of the claim by the administratrix appears upon its face. Petitioner claims this is a forgery. The claim was allowed by the court and filed. It has not been paid. Thereafter, petitioner filed her final account as administratrix and petition for distribution, in which she stated that all claims against the estate have been paid. No notice of rejection of the claim, or other action thereon, was sent Carew. On November 29, 1950, a decree settling the final account and ordering distribution was made and filed. In this the court found that all debts, expenses and charges of administration had been fully paid. On the same day a decree discharging petitioner as administratrix was made and filed. No appeal was taken from these decrees. On May 23, 1951, Carew filed a notice that on May 28 (one day less than six months from the granting of the decrees) the court would be moved to set aside the decrees on the grounds therein stated. On the date set the court granted the motion.

Was the Motion Made Under Section 473, Code of Civil Procedure?

1. Herein referred to for brevity as "Carew."

[1,2] Carew concedes that the motion being made after the decrees had become final was too late unless it was made under section 473. The notice of motion gives no indication that the motion was to be made pursuant to that section. It states that the motion will be made upon the following grounds: (1) that the final account was not verified; (2) that it does not show all the claims filed or presented against the estate; (3) that Carew duly presented its claim as provided by law and the notice to creditors; that the claim is on file, approved by the administratrix and allowed by the court; (4) that it was not paid or otherwise acted upon and no notice of rejection given claimant; (5) on all the files, pleadings and papers herein; (6) on oral testimony to be adduced at the hearing; (7) that both decrees are void for the reasons above stated. (Obviously (5) and (6) above are not grounds of motion.) It is clear that the notice of motion is not framed under section 473. Carew contends, however, that the proceedings at the hearing bring the matter within the rule that where the court and counsel treat a motion, on hearing, as bringing inadvertence, surprise and excusable neglect before the court, and where counsel opposing the motion makes no objection to the sufficiency of the motion, it is deemed that counsel has waived the requirement that such grounds be stated in the notice of motion. *Hecq v. Conner*, 203 Cal. 504, 265 P. 180; *Mann v. Pacific Greyhound Lines*, 92 Cal. App.2d 439, 207 P.2d 105.

Unfortunately for Carew, the record of the proceedings in the probate court produced here fails to bring the matter within that rule. The transcript of the hearing of the motion to vacate shows that Carew's counsel opened the hearing by stating that the claim had been presented and no notice of rejection given; that they heard no more about it until they looked up the records and found that the decree of distribution had been entered; that the claim is on file, allowed by the court and apparently bearing the approval of the administratrix. He did not know how that happened. Counsel then stated "at any rate" that the account was not verified and did not contain a list

of the claims. Thereupon petitioner stated, "I want to file a demurrer to this motion or petition, or whatever it may be, on the ground that the Court has no authority at this time to vacate or set aside the decree * * *." He then started to discuss a case on the subject and the court interrupted to state, "Well, if the account was not verified, that would be enough for me." "Argument and discussion" then ensued, not taken by the reporter. Carew called petitioner's attorney to the stand and proved the receipt of the claim by him as attorney for the administratrix; that no notice of rejection had been sent and that the claim had not been paid. The court then stated: "* * * even the six months would not bar you here—this is a fraud on the Court—it can be brought up at any time." The witness explained that Carew was employed by the sisters of the deceased and he assumed they would pay the funeral bill. Petitioner was then called and stated that the signature on the approval of the claim was not hers; that her attorney had sent the claim to the sisters and that she assumed they had paid it. She also testified that she signed and swore to the account before a notary public.

So far as the record before us is concerned, there is nothing in it to bring the matter within the rule of the cases above mentioned. No showing of inadvertence, surprise or excusable neglect was made. No one representing Carew testified at the hearing, nor were any affidavits presented. It is obvious that Carew proceeded and the court acted on the theory that the order was void. Moreover, opposing counsel did not consent to the hearing of the motion; he expressly objected to such hearing.

[3] Carew's attorney filed an affidavit in this court to the effect that prior to the filing of the notice of motion in question here he had filed an identical notice of motion setting the hearing for May 10, 1951; that on that date both sides appeared in court and due to the absence of the probate judge, the hearing was continued to June 4. A few days later it occurred to him that June 4 was more than six months from the entry of the decrees, and therefore beyond the period in which a motion

under 473 could be made. Therefore he filed a new notice of motion setting the hearing for a date within that period, May 28; that on that date he stated to the court in the presence of counsel the reason for the second notice of motion, namely, that the original motion had been continued beyond the time in which a motion could be granted under section 473; that petitioner's counsel made no objection to the hearing nor to the fact that the motion was made on grounds not specified in the motion. Petitioner's attorney filed an affidavit that no testimony as to inadvertence, surprise or excusable neglect was offered at the hearing, and had it been he would have objected to it as not being within the grounds specified in the notice. At oral argument, Carew contended that his statement as to section 473 was during that portion of the proceeding not taken by the reporter, referred to as "Argument and discussion." It seems doubtful that the reporter would have so characterized grounds of a motion or would have omitted them from the transcript. However, the burden is on Carew to show that the motion as made was on different grounds than those set forth in the motion. This he has failed to do.

[4-10] The decree was not void on its face. Lack of verification of the final account would not render the decree based on it void. See *In re Staser*, 84 Cal.App.2d 746, 191 P.2d 791, and cases there cited. Failure of the final account to show all claims filed is not jurisdictional and does not make the decree settling the account and of distribution void. *Benning v. Superior Court*, 34 Cal.App. 296, 167 P. 291. "A claim which is not barred by the statute of limitations is not required to be rejected by the executor or administrator." *Pacific Gas & Electric Co. v. Elks Duck Club*, 39 Cal.App.2d 562, 564, 103 P.2d 1030, 1032. The decrees not being void on their faces, could only be set aside by (1) appeal within the proper time; (2) a proper motion under section 473; (3) a motion for a new trial within the proper time; (4) under certain conditions by an independent suit in equity. *King v. Superior Court*, 12 Cal.App.2d 501, 56 P.2d 268. The record before us fails to show that court and

counsel treated the motion as being under section 473 or that petitioner in any wise waived the requirement of a proper notice of motion. As said in *Nason v. Superior Court*, 39 Cal.App. 448, 452, 179 P. 454, 456. "The motion to set aside the decree of discharge was not made for relief, under the provisions of section 473, Code of Civil Procedure, and the order may not be affirmed as one authorized thereby." See also *Westphal v. Westphal*, 61 Cal.App.2d 544, 550, 143 P.2d 405. The court, therefore, had no power to vacate the decrees.

The order is annulled.

PETERS, P. J., and FRED B. WOOD, J., concur.



107 Cal.App.2d 38

CECIL v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 4345.

District Court of Appeal, Fourth District,
California.

Oct. 23, 1951.

Rehearing Denied Nov. 15, 1951.

Hearing Denied Dec. 18, 1951.

Proceeding by E. J. Cecil against the Bank of America National Trust and Savings Association and others for removal of an arbitrator. The defendant Western Frozen Foods Co., Inc., cross-petitioned for appointment of a third arbitrator. The Superior Court, Fresno County, Arthur C. Shepard, J., refused to disqualify the arbitrator and the plaintiff appealed. The District Court of Appeals, Barnard, P. J., held that the evidence did not show any disqualification requiring the removal of the arbitrator.

Order affirmed.

I. Arbitration and Award ⚡27

Where transferor of farms had entered into agreement with transferee guaranteeing certain return from operation of farms and providing for arbitration of any dispute and had pledged corporate shares to secure guaranty, and thereafter

transferee had assigned agreement and shares to bank as security for loan, attorney, who had acted for bank in previous transactions, was not disqualified, as matter of law, from acting as arbitrator under agreement, in absence of showing of actual or implied bias or prejudice.

2. Arbitration and Award ⇐44

Where transferor of farms had entered into agreement with transferee guaranteeing certain return from operation of farms and providing for arbitration of any dispute and had pledged corporate shares to secure guaranty, and thereafter transferee had assigned agreement and shares to bank as security for loan, transferee rather than bank was real party in interest in proceeding brought by transferor for removal of arbitrator appointed by transferee, notwithstanding fact that prior to proceeding bank had converted shares to cash.

3. Arbitration and Award ⇐44

In proceeding by party to arbitration agreement to disqualify arbitrator appointed by the adverse party, court properly treated question of disqualification as factual one and received and considered all evidence offered, including that having bearing on any actual bias or prejudice.

4. Arbitration and Award ⇐27

In proceeding by party to arbitration agreement to disqualify arbitrator appointed by the adverse party, record sustained implied finding that arbitrator was not biased or prejudiced against the complaining party.

Crossland & Crossland, Fresno, C. E. H. Maloy, San Francisco, for appellant.

Stammer & McKnight, Fresno, Bronson, Bronson & McKinnon, San Francisco, for respondent Western Frozen Foods Co., Inc.

BARNARD, Presiding Justice.

This is an appeal from an order refusing to disqualify an arbitrator.

On January 10, 1947, the appellant transferred certain farms to the Western Frozen Foods Co., Inc. with a written agree-

ment and guaranty that Western would realize a certain amount from the operation of the farms by December 31, 1948. This agreement was secured by a pledge of 49,076 shares of stock in the Kingsburg Cotton Oil Company which were owned by Cecil. The agreement provided that any disputes would be submitted to arbitration, each party to appoint an arbitrator and these two selecting a third. This agreement and the pledged stock were assigned by Western to the Bank of America as security for a loan.

The farms failed to produce the guaranteed profits and a demand was made upon Cecil to make good on his guaranty. Claiming that the farms had not been properly operated Cecil, on March 2, 1949, demanded an arbitration as to his liability, and appointed Milo Erwin as his arbitrator. Cecil was then in control of the Kingsburg Cotton Oil Company, and its chief officer. Erwin was employed by that company, and was Cecil's chief assistant and his personal friend. On March 23, 1949, Western, with the approval of the bank, appointed C. Ray Robinson as its arbitrator. Robinson was recommended to Western because of his experience in farming. On May 5, 1949, Cecil, in writing, protested this appointment on the ground, among other things, that Robinson "is, and has been, an attorney for the bank" and that he "has been appointed for the purpose of, and intends to act as, an advocate and attorney in said arbitration rather than an arbitrator."

On October 7, 1949, Cecil filed a petition in which he prayed that the court should appoint "a third arbitrator to act in said arbitration with the respondents, Milo Erwin and C. Ray Robinson." On April 14, 1950, Cecil and Western signed a written stipulation reciting that Erwin and Robinson had been appointed as arbitrators and providing, among other things, that "the two arbitrators heretofore appointed" should within thirty days appoint a third arbitrator; that in the event "said two arbitrators" could not agree upon a third, such appointment should be made by the court; that "said three arbitrators" should commence hearings within thirty days;

and that certain issues should be submitted to "the two arbitrators already appointed and the third to be selected as hereinbefore provided." To this stipulation was attached an agreement signed by the bank, by Western and by Cecil that the bank should be bound by any award made and finally confirmed by the court. This stipulation was filed in court on August 24, 1950.

On June 2, 1950, Western petitioned the court for the appointment of a third arbitrator. After a hearing the court appointed several arbitrators, all of whom refused to act. On November 3, 1950, Cecil filed a petition seeking to have the court remove Robinson as an arbitrator upon the ground that he "is the attorney for the Merced Branch" of the bank and that he "intends to act as an advocate and champion of" the bank. Among other things, Western filed a cross-petition asking the court to appoint a third arbitrator. After a hearing, at which numerous and lengthy affidavits were presented, the court ruled in favor of the respondent and entered an order denying the petition to remove Robinson, or to enjoin him from acting, and appointing a third arbitrator.

Cecil has appealed from that part of this order which denied his application for the removal of Robinson. The appeal is based upon the contention that it must be held, as a matter of law, that an attorney for one of the parties to an arbitration is disqualified from acting as an arbitrator; that bias and prejudice must be presumed and implied; and that any showing of actual bias or prejudice is immaterial and unnecessary. It is argued that this is the common law rule, which is applicable here since we have no statutory provisions fixing the qualifications of arbitrators. In support of the rule contended for the appellant cites *Gonzalez v. Gonzalez*, 174 Cal. 588, 163 P. 993; *Sumner v. Barnhill*, 12 N.S. 501 (Nova Scotia); *Wheeling Gas Co. v. City of Wheeling*, 5 W.Va. 448; *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N.Y. 398, 148 N.E. 562; and *Schwartzman v. London & Lancashire Fire Ins. Co.*, 318 Mo. 1089, 2 S.W.2d 593. It is argued that an attor-

ney is the agent of his client and bound to act for him, and that these cases establish the rule that it is against public policy to permit any one to so act who might be under a temptation or any tendency to favor the party appointing him. The respondent contends that a showing of bias and prejudice was here essential, and that no such showing was made. It relies on such cases as *First National Bank in Cedar Falls v. Clay*, 231 Iowa 703, 2 N.W.2d 85; *Goodrich v. Hulbert*, 123 Mass. 190; *McQuaid Market House Co. v. Home Ins. Co.*, 147 Minn. 254, 180 N.W. 97; *Riccomini v. Pierucci*, 54 Cal. App. 606, 202 P. 344, 345. In the *Goodrich* case, it is said: "To hold, as a matter of law, that a member of the bar is disqualified to act as an arbitrator, merely because he has formerly been of counsel for one of the parties, would be an imputation upon the uprightness and good faith of the profession." In the *Riccomini* case, the court said: "It is a well-settled rule that, to justify setting aside a general award of arbitrators, there must be partiality or corruption upon their part. The relation of attorney and client is not such that it is conclusive evidence of partiality when the client acts as arbitrator in a matter in which his attorney happens to appear as counsel for one of the parties." In the *Clay* case it is said: "Choosing arbitrators wholly disinterested is an admirable standard to aspire to, but the parties seldom do that, and if all awards were set aside in which it was not done, few awards would stand." [231 Iowa 703, 2 N.W.2d 92.]

[1] We are unable to hold that a disqualification here appeared which, as a matter of law, required the court to remove Robinson as an arbitrator. No such fixed rule as that contended for has been established in this state. In the absence of abuse, the matter has long been left to the agreement of the parties. In any event, the question as to whether some such rule should be strictly applied necessarily depends upon the factual situation in a particular case. Several questions of fact were here presented which the court decided in favor of the respondent.

[2] The appellant contends that the bank, rather than Western, was the real party in interest since Western had assigned the pledged stock to the bank, and the bank had later sold the stock. It appears from the evidence that the bank sold this stock because conditions had developed making this advisable, but that it was still holding the proceeds as security for Western's debt. The bank admitted that it was so holding this money, and agreed to be bound by the result of the arbitration when the award becomes final. While the bank has a certain security interest, Western is the real party in interest. The appointment of Robinson, while approved by the bank, was made by Western in accordance with a right given it by the arbitration agreement.

The appellant contends that Robinson has been and now is the attorney for the bank, and that it was, and is, the bank's intention that he shall act as its advocate. Mr. Maloy, one of the attorneys for the appellant, stated in his affidavit that on September 7, 1950, he talked with George D. Schilling, an attorney for the bank, at his office in San Francisco; that Schilling told him that Robinson "has been our attorney for years"; that he expressed the opinion to Schilling that if this was true Robinson was disqualified; that Schilling replied that he did not believe this made any difference; that Schilling further said that Robinson had been appointed and was to act for the bank as its advocate and attorney in this arbitration proceeding; that he suggested to Schilling that he himself might be appointed arbitrator for Cecil in the place of Erwin; and that Schilling stated that he would have no objection to that being done. While Schilling did not directly deny some of the statements thus attributed to him, his affidavit gives a somewhat different version of that conversation. He stated that he told Mr. Maloy that Robinson was not a regularly employed or retained attorney for the bank; that he did occasional legal work for the bank; that the bank did not have much litigation in Merced County and had had only occasional legal matters

during the last ten or fifteen years; and that the bank had employed other attorneys in Merced during that period. The affidavit of Robinson states, among other things, that he has from time to time represented the bank in certain estate and guardianship matters referred by him to the bank; that another lawyer in his office was then, in November, 1950, handling a small claim and delivery action for the bank; that other than this there has not been a single piece of business referred to him since 1944, which originated with or was initiated by the bank; that there has been no employment or payment of any fees on strictly bank business; and that on two occasions during that time he has represented Cecil or a copartnership in which Cecil was a partner. He further denied that he intends to act as an advocate or champion for the bank in the arbitration proceeding, or that the bank intends to use him as such. If it be assumed that Schilling told Maloy that Robinson was to act for the bank "as its advocate and attorney," there is no evidence in the record that Robinson had any such intention.

A further consideration is the fact that the appellant acquiesced in the appointment of Robinson, and expressly assented thereto, over a considerable period of time after he had raised these same objections. On May 5, 1949, he protested the appointment of Robinson in writing, stating that he believed that Robinson was the bank's attorney and intended to act as its advocate rather than as an arbitrator. Eleven months later he entered into a stipulation, later filed in court, agreeing to Robinson as an arbitrator. On two other occasions, in October, 1949, and in June, 1950, when the appointment of a third arbitrator was raised in court he made no objection to Robinson. In view of all of the evidence, his present contention that he had no actual knowledge of the facts until he was told of Maloy's conversation with Schilling in September of 1950, is not very convincing. Long after he was informed of the facts he relies on, and believed them, he stipulated in court that Robinson should

continue with the arbitration. On the ground of waiver alone the record discloses strong support for the order made.

[3, 4] This arbitration was one provided for by a written agreement, each party being given the right to appoint an arbitrator, with no limitation as to his qualifications. Cecil selected Erwin, a personal friend and close business associate. Western selected Robinson, who had had some professional association with the bank, which was only indirectly interested in the matter. Under the existing circumstances it cannot be said, as a matter of law, that a disqualification existed. The court properly treated the question as a factual one and received and considered all of the evidence offered, including that having a bearing on any actual bias or prejudice. The record sustains the implied finding in that connection, and the order which was made.

The order appealed from is affirmed.

GRIFFIN, J., concurs.



107 Cal.App.2d 1

PRITCHARD v. GILBERT et al.

Civ. 7965.

District Court of Appeal, Third District,
California.

Oct. 22, 1951.

Hearing Denied Dec. 18, 1951.

Action by Robert A. Pritchard against O. E. Gilbert, George S. Samuels, individually, and George S. Samuels, operating and doing business under the fictitious name and style of Stordor to recover damages for assault and battery alleged to have been committed by defendant Gilbert at time when Gilbert was an employee of defendant Samuels. The Superior Court, Butte County, Harry Deirup, J., rendered judgment for plaintiff against both Gilbert and Samuels and George S. Samuels, individually and doing business under the fictitious name and style

of Stordor appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that at time defendant Gilbert succeeded in having plaintiff stop his automobile and there upon punished plaintiff for what defendant Gilbert deemed unlawful driving, Gilbert, a salesman operating an automobile furnished by defendant Samuels for use in his employment and returning home from a sales meeting was acting within the scope of his employment.

Judgment affirmed.

1. Appeal and Error ⇨1011(1)

Findings on trial court, based from conflicting evidence, are binding on District Court of Appeal.

2. Master and Servant ⇨306

An employer is liable for wilful and malicious torts of his employee committed in the scope of the employment.

3. Master and Servant ⇨302(2)

The fact that tortious acts of employee do not further his employer's interest and that employee did not thereby intend to further such interest does not absolve employer from liability if injury resulted from a dispute arising out of the employment. Civ.Code, § 2338.

4. Master and Servant ⇨300

Employer's responsibility for tortious conduct of employee extends beyond his actual or possible control or conduct of servant and rests on broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on part of such others while acting in scope of their employment.

5. Master and Servant ⇨330(3)

In action for damages for assault and battery alleged to have been committed by employee of defendant, evidence sustained finding that employee, a salesman operating an automobile furnished by defendant and returning from a sales meeting, who succeeded in having plaintiff stop his automobile and thereupon punished plaintiff for what employee deemed unlawful driving performed acts resulting from a dispute arising out of his employment and was acting within scope of his employment in

making the assault which was unprovoked and without cause.

Johnson & Davies, Sacramento, for appellant.

Goldstein, Barceloux & Goldstein, Chico, for respondent.

VAN DYKE, Justice.

Plaintiff and respondent brought this action to recover damages for assault and battery alleged by him to have been committed by defendant Gilbert, who at the time was an employee of defendant and appellant Samuels. The cause was heard by the court and judgment was rendered in plaintiff's favor against both Gilbert and Samuels. Gilbert has not appealed.

The sole issue presented is whether Gilbert was acting within the scope of his employment at the time of the assault and battery committed by him upon respondent.

Upon the day of the assault, Gilbert, who was a salesman for appellant Samuels in the latter's business, came to Sacramento from his home in Red Bluff to attend a sales meeting. He drove to Sacramento in an automobile owned by appellant and furnished to Gilbert for use in his employment. On the same day respondent, also a salesman, attended a sales meeting in Red Bluff, to which he journeyed from his home in Chico. Each man at the time of the assault was returning to his home. They met and passed each other a few miles north of Chico. Although respondent testified he did not remember passing Gilbert, yet Gilbert testified that respondent so operated his car as to compel Gilbert to drive off the road pavement to avoid a collision. Gilbert turned around and pursued respondent, blowing his horn and blinking his headlights. Hearing the horn and observing the blinking lights, respondent stopped and Gilbert stopped his car back of that of respondent. What occurred then, as testified to by respondent was as follows: Gilbert came up to respondent, "hollered" at him and struck him through the open window of the car. Respondent started to get out and when he opened the car door

Gilbert seized him, pulled him from the car and proceeded to beat him about the sides of the face. Respondent was knocked down and was then kicked in the face and ribs. His jaw was broken and he was battered and bruised until rendered unconscious. While this was going on he was calling for help to some people living just across the road whom he knew. These people came over and respondent asked them to call the officers who later came and took him to Chico. The foregoing version is in sharp conflict with the testimony of Gilbert, who stated in substance that upon being forced from the highway to avoid a collision and believing that whoever was driving the car was in no fit condition to drive and was a menace to the users of the highway, he turned in pursuit for the purpose of stopping the driver and calling officers to take him in charge. He testified that he found respondent to be highly intoxicated, that he endeavored to persuade him to stop driving, whereupon respondent cursed him, knocked him down and continued hitting him after he got up. He said he then proceeded to defend himself by striking back. He asserted his only purpose was to detain respondent until officers could be called.

It is the contention of appellant that his employee, Gilbert, while admittedly in the course of his employment in returning from the sales meeting to his home in Red Bluff, left that employment when he turned and pursued respondent for the reason and with the purpose as testified to by Gilbert and that his turning in pursuit and the following assault and battery were without the scope of his employment. These contentions were interposed as a defense by specially pleading them in the answer of appellant, and responsive to these allegations the court found that the acts of defendant Gilbert were not in any way caused, induced or excused by any act of respondent and specifically that it was "not true that that the plaintiff at or prior to the assault upon him by the defendant O. E. Gilbert, or at any time, made a violent or unlawful assault upon the person of the defendant O. E. Gilbert," and that it was "not true that the said acts of the defendant O. E. Gilbert were done and performed in whole

or in any part in pursuance of any plan, scheme or intent on the part of the defendant O. E. Gilbert to effect an arrest of the plaintiff for any public offense." The court found that the assault occurred in the immediate course of an altercation between respondent and Gilbert which arose directly and proximately out of and was connected with the employment of Gilbert and in the course and scope thereof; that the assault was unprovoked and without cause and committed by a man of great strength against a man who was weak and unable to defend himself.

[1-4] It is clear that the court rejected in the main the testimony of Gilbert and believed that of respondent. Under the familiar rule we are bound to accept the trial court's conclusions in this regard. We have, therefore, a situation where Gilbert, while driving his car on his master's business, believing his rights on the highway to have been violated, turns his car, pursues respondent, and, having caused him to stop, gives him a severe beating. The case is governed by the rules laid down by the Supreme Court in *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5, 6. The following holdings were there made: "It is settled that an employer is liable for wilful and malicious torts of his employee committed in the scope of the employment. [Citing numerous authorities.]" The fact, if it be a fact, that the tortious acts of the employee do not further his employer's interest and that the employee did not thereby intend to further such interest does not absolve the employer from liability "if the injury resulted from a dispute arising out of the employment." "Under the provisions of section 2338 of the Civil Code a principal is liable for 'wrongful acts' of his agent committed 'in and as a part of' the principal's business. 'It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he (the employee) was employed to do.'" [Citing numerous authorities.]" The court continued:

"The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual or possible control

over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment. * * * Such injuries are one of the risks of the enterprise. * * * In the present case, defendant's enterprise required an association of employees with third parties, attended by the risk that someone might be injured. 'The risks of such associations and conditions were risks of the employment.' * * * Such associations 'include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional makeup. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. Work could not go on if men became automatons repressed in every natural expression. * * * These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.' * * The evidence here presented indicates without conflict that the injury to plaintiff was an outgrowth of Enloe's employment."

[5] The foregoing was said in a case where the employee, engaged in laying a floor, objected to the act of the employee of another contractor in placing a timber in the structure prematurely. The employee dislodged the timber. After an interval the other replaced it, whereupon the employee threw his carpenter's hammer, striking the other and injuring him. We see no essential difference between the case before us and the *Carr* case.

The trial court was justified in concluding that Gilbert, angered by what he deemed to be the unlawful driving of respondent, lost his temper and proceeded by a series of con-

nected and uninterrupted acts to administer dire punishment. This conduct on his part was so intimately connected with his service to his employer and so clearly resulted from a dispute arising out of his employment that his acts in turning, pursuing respondent and assaulting him must be held to have been within the scope of his employment.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.



107 Cal.App.2d 135

KARAS v. KARAS et al.

Civ. 4180.

District Court of Appeal, Fourth District,
California.

Oct. 25, 1951.

Alice C. Karas brought action for divorce against Henry M. Karas on ground of extreme cruelty. The husband filed a cross-complaint for divorce on ground of adultery naming Richard L. Boorman as co-respondent. The Superior Court of San Bernardino County, Carl B. Hilliard, J., awarded the wife a divorce, custody of minor child, division of property and support money for child, and the husband appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to support award of divorce to wife.

Judgment affirmed.

1. Divorce ⇨124

Where most of the evidence produced by parties to action for divorce was in conflict, trial court had right to believe or disbelieve testimony of any witness.

2. Appeal and Error ⇨994(3), 1010(1), 1012(1)

Appellate court will not weigh the evidence, pass upon the credibility of the witnesses, nor substitute its judgment thereon for that of the trial court, but will only determine whether there is some substantial evidence to support the findings.

3. Divorce ⇨130

In wife's action for divorce, evidence was sufficient to support decree awarding wife a divorce for cruelty.

4. Divorce ⇨124

Where a cause of action for divorce is established, broad discretion resides in the trial court in determining, even upon conflicting evidence, to whom the interlocutory decree should be awarded.

5. Divorce ⇨135

In wife's action for divorce on ground of extreme cruelty, trial court properly rejected husband's contention that evidence conclusively showed, by certain letters, a condonation of his previous offenses. Civ. Code, §§ 115-118.

6. Divorce ⇨184(6)

In wife's action for divorce wherein husband filed cross-complaint, question of date of separation of the parties was for trier of fact.

7. Divorce ⇨301

In wife's action for divorce on ground of extreme cruelty, wherein husband filed cross-complaint for divorce on ground of adultery, evidence justified finding that welfare of minor child of the parties would be better served by placing him in the wife's custody instead of in the custody of some outside agency or some third person.

8. Divorce ⇨298(4)

Wife who was granted divorce was properly given custody of minor child where child's interest and best welfare would best be served thereby, notwithstanding evidence of some indiscretions on part of the wife.

9. Divorce ⇨296, 298(1)

In a divorce action, trial court has wide discretion in awarding custody of a minor child, and in exercise of its discretion the trial court must look to the welfare of the child.

Taylor F. Peterson, San Bernardino, for appellant.

Henry F. Rager, Fontana, for respondents.

GRIFFIN, Justice.

Plaintiff and respondent brought this action for divorce against defendant and appellant, based on the charge of extreme cruelty. She sought the custody of the minor child, Roldan Scott Karas, aged two years, distribution of the community property to her, and general relief. Defendant answered and by way of cross-complaint sought a divorce from plaintiff on the ground of adultery with the named co-respondent, and upon the ground of extreme cruelty, and sought the same relief for which plaintiff prayed. The trial before the court resulted in a finding and judgment in favor of plaintiff. Defendant challenges the sufficiency of the evidence to support the finding and judgment.

Plaintiff and defendant were married in 1945. According to plaintiff's testimony, they separated on December 13, 1949. This fact is disputed by defendant. Plaintiff testified that defendant drank to excess; that he drank "wine by the glassful", "over a quart a day", and that "you would never see him without a whiskey glass" with liquor in it, even though the bills were not paid; that he was very mean and at night when she came home from work he continually used swear words toward her; that he would threaten to kill her and that she would cry; that he would break dishes and throw dishes through the window panes; that most of their trouble was over sex problems; that defendant suggested plaintiff sleep with other men; and that defendant told her on one occasion he was worried about their minor son because he, defendant, had epilepsy and that it was hereditary. Defendant was being treated at the Veteran's Hospital after he quit work in April, 1948.

Apparently plaintiff and defendant were living with plaintiff's parents who cared for the child. They were living upon a small chicken ranch owned by the parties to this action. Plaintiff's mother and sister corroborated plaintiff's story in many respects.

Defendant produced testimony that indicated that the parties did not separate on the date alleged; and that defendant did not drink to excess. He produced two

private investigators who testified that they were employed by defendant to watch plaintiff over a period of time from February 11th to the latter part of March, 1950; that they observed plaintiff going to the apartment of the named co-respondent on several evenings; that the lights were turned off for several hours and that plaintiff would thereafter leave the apartment and return to her home. Plaintiff admitted that she did visit the co-respondent on several occasions but claimed she was listening to phonograph records and that she enjoyed them so much more in the dark; and that her husband knew this latter fact. She denied having any sexual relations with the co-respondent and stated that her attorney told her she could go with anyone she wanted to after she had seen her attorney about the divorce. The complaint in this action was filed on February 28, 1950.

Defendant denied drinking to excess, admitted breaking windows but denied generally the other accusations of plaintiff and testified he was possessed of semi-conscious spells, periods of amnesia and would get lost; that he went to the Veteran's Hospital in June, 1948, received treatment, and was in the hospital for about two months; that he went back periodically and was still receiving treatments. The evidence further shows that shortly before this action for divorce was filed defendant went to New York to be with his relatives and that when this action was filed he returned to California. Defendant's physician diagnosed his condition as "psychomotor epilepsy" or "psychoneurotic condition", and as to the latter diagnosis he arrived at this conclusion after seeing defendant in one of these "attacks". This is a resume of the evidence upon which the case was submitted to the trial court for decision, at which time the parties agreed that the court might consult with the plaintiff and defendant in chambers respecting the future welfare and well-being of the minor child. Thereafter the court found generally in favor of plaintiff and against the defendant on his cross-complaint, and accordingly awarded an interlocutory decree of divorce to plaintiff. It specifically

found that plaintiff was a fit and proper person to have the care and custody of the child, and gave the right of reasonable visitation to defendant, ordered the community property sold, and, after payment of debts, the balance of the property was to be divided equally between the parties. Defendant was required to pay \$30 per month toward the support of the child. He appealed from the whole of the judgment.

[1-4] Most of the evidence produced by the parties was in conflict and the trial court had a right to believe or disbelieve the testimony of any witness. While the question of the sufficiency of the evidence, as a matter of law, to support a finding may be presented to the appellate court for review, that court's duty stops when it has determined that there is some substantial evidence to support it. It will not weigh the evidence, pass upon the credibility of the witnesses, nor substitute its judgment thereon for that of the trial court. 2 Cal. Jur. p. 912, sec. 539. Under this rule the finding that plaintiff should be awarded a decree of divorce under the evidence, having sufficient evidentiary support, cannot be disturbed on appeal. Where a cause of action for divorce is established, broad discretion resides in the trial court in determining, even upon conflicting evidence, to whom the interlocutory decree should be awarded. *Harding v. Harding*, 140 Cal. 690, 74 P. 284; 9 Cal. Jur. p. 780, sec. 128, and cases cited. See also, *Andrews v. Andrews*, 120 Cal. 184, 52 P. 298; *Goldsmith v. Goldsmith*, 26 Cal. App. 458, 147 P. 214.

The next argument is that there is no evidence nor finding that defendant's conduct had any effect upon plaintiff's health or that she experienced any grievous mental suffering by reason thereof, citing such cases as *Farrand v. Farrand*, 77 Cal. App. 2d 840, 176 P.2d 773.

There is evidence that defendant made indecent sexual proposals to plaintiff, threatened her and at the same time raised a small stepladder as if to strike her. Plaintiff's mother testified that she often saw and heard her daughter crying on these occasions, and other witnesses testified concerning defendant's actions, and

that it caused plaintiff to cry and be very unhappy. We conclude that the evidence supports an inference that plaintiff endured grievous mental suffering. In view of this evidence and since the court found that plaintiff's allegation that she endured "grievous mental suffering" was true, this finding cannot be disturbed on appeal. *Bush v. Bush*, 72 Cal. App. 2d 487, 164 P.2d 774; *Maloof v. Maloof*, 175 Cal. 571, 166 P. 330.

[5] The trial court properly rejected the contention of defendant that the evidence conclusively showed, by certain letters, a condonation of previous offenses of defendant. Secs. 115, 116, 117, and 118, Civ. Code.

[6] While the evidence on the question of the date of separation of the parties is conflicting, the trial court was the judge of that question. *Harding v. Harding*, supra.

[7-9] The last question involves the propriety of that portion of the decree awarding custody of the minor child to plaintiff, as indicated. Counsel for defendant concedes that the statutory rule provides that other things being equal, the custody of a child of tender years should be given to the mother, but argues that "things here are far from equal" and the actions of the mother were "so reprehensible that it must shock the judicial conscience to observe that the trial judge granted her a divorce and custody of the child." In this respect the trial judge was confronted with the showing, which he found to be true, that defendant was a person who drank to excess, used abusive language, who was physically afflicted, and not a person who was well able to care for a child two years of age. While the evidence, on the other hand, might show some indiscretions on the part of the plaintiff, which are not to be condoned, the trial court was justified in finding that the welfare of the child would be better served by placing him in plaintiff's custody instead of in the custody of some outside agency or some third person. The question of awarding the custody of minor children oftentimes presents perplexing

problems. The law has placed a wide discretion in the trial courts in this respect, particularly in reference to children of this age. It is to their welfare the court looks while exercising its discretion. From the record it appears that the judge was most interested in this phase of the case. He conferred with the parties in chambers on the subject and ultimately concluded, after careful study, that the award of the custody to plaintiff, with the right of reasonable visitation by the defendant, was the proper order. Where the child's best interests and welfare are involved, many cases may be cited in which even the guilty or offending parent has been given the custody of the minor children. 9 Cal.Jur. p. 792, sec. 135. No abuse of discretion appears warranting a reversal of the order in this respect.

Judgment affirmed.

BARNARD, P. J., concurs.



In re ADAMS' ESTATE.

KUCHEL v. ADAMS.

Civ. 18395.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1951.

Hearing Granted Dec. 13, 1951.*

Proceeding in the matter of the estate of Lillian T. Adams, deceased, by Thomas C. Kuchel, petitioner, against Morgan Adams, contestant, involving imposition of inheritance tax on inter vivos transfer of property by decedent on ground that such transfer was made in contemplation of death. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered an order holding the transfer subject to inheritance tax and contestant appealed. The District Court of Appeal, Hanson, J., pro tem, held that the evidence did not sustain conclusion that transfer of property in trust for benefit of transferor's

only son and two grandsons almost 11 years before death was made in contemplation of death.

Order reversed.

1. Taxation ☞893

Trustee's legal conclusion as to what perhaps was in the mind of trustor when she transferred property in trust for benefit of her son and grandsons was too unsubstantial to be regarded as substantive evidence that transfer was made in contemplation of death and hence subject to inheritance tax. Revenue and Taxation Code, § 13301 et seq.

2. Evidence ☞11

Appellate court would take judicial notice that 1935 was a troublesome time for mortgage corporations.

3. Taxation ☞893

Evidence did not sustain conclusion that transfer of property in trust for benefit of transferor's son and grandsons, made almost 11 years before death by a woman who was experienced in handling her business affairs and was physically sound and mentally alert, though almost 80 years of age, was made in contemplation of death so as to be subject to inheritance tax. Revenue and Taxation Code, § 13301 et seq.

4. Appeal and Error ☞994(3)

The rule that the credibility of witnesses is for trial court did not apply with respect to witnesses whose letters and affidavits were received in evidence by way of stipulation in lieu of calling them to the stand, since trial court did not see or hear such witnesses.

5. Evidence ☞317(15), 471(9)

Statement made by trustee to inheritance tax appraiser as to what trustee thought perhaps was in transferor's mind as the motive for inter vivos transfer of property in trust for benefit of trustee and his sons, not based on any fact statement made by transferor to trustee, was inadmissible and should not have been considered in determining whether transfer was made in contemplation of death, since such statement was a mere conclusion of trustee and was hearsay with respect to his sons as

* Subsequent opinion 246 P.2d 625.

beneficiaries of trust. Revenue and Taxation Code, § 13301 et seq.

6. Taxation ☞878(1)

An inheritance tax may be levied on a transfer of property which results from a future gift contained in a testamentary disposition, but such tax may not be constitutionally imposed upon a present irrevocable gift inter vivos, unless the gift may be classed as testamentary in character or intended as a substitute for a testamentary disposition. Revenue and Taxation Code, § 13301 et seq.

7. Taxation ☞878(1)

Under federal Constitution, a tax may not be imposed on a transfer of property under the guise that it is testamentary when it is not, or that it is a present inter vivos gift when in fact it is not. Revenue and Taxation Code, §§ 13301 et seq., 15101 et seq.

8. Taxation ☞878(1), 893

The primary test in determining whether an inter vivos gift is testamentary in character or intended as a substitute for a testamentary disposition so as to be subject to inheritance tax is the motive of the donor, and the best evidence of such motive is the statements and expressions of donor himself, when not contradicted by the surrounding circumstances. Revenue and Taxation Code, § 13301 et seq.

Fleming, Robbins & Tinsman, Los Angeles, for appellant.

James W. Hickey, Sacramento, Morton L. Barker, Walter H. Miller, Los Angeles, for respondent.

HANSON, Justice pro tem.

[1] The sole question which here presses for solution is whether, on the evidence adduced, it can be said that the trust here involved was created by the trustor in "contemplation of death." On the evidence we are unable to discern any substantiation whatever, as did the trial judge, for the claim of the State that the trustor created the trust because she "contemplated death" as the phrase is used in our inheritance tax law. Revenue and Taxation

Code, § 13301 et seq. To our minds there is not an iota of evidence which even circumstantially supports such a conclusion other than the legal conclusion of the trustee as to what perhaps was in the mind of the trustor which, even if accepted, is too unsubstantial to be regarded as substantive evidence of the fact.

The California statute subjects a transfer such as the one here made, to an inheritance tax *if it be made* (1) "in contemplation of death" or (2) "with the intention that it take effect in possession or enjoyment at or after the death of the transferor."

The state concedes that the transfer was not made with the intention that it should take effect in possession or enjoyment at or after the death of the transferor, the decedent Lillian T. Adams. Accordingly, we are here concerned only with the narrow question whether the transfer was made by her in contemplation of her own death, and not someone else's death.

The meaning of the phrase "in contemplation of death" is defined in part by the statute as including within the meaning thereof "that expectancy of death which actuates the mind of a person on the execution of his will. The term is not restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis."

The transfer, which the controller here seeks to tax, was made in 1935 almost eleven years prior to the death of the transferor who at the time of the transfer and until shortly prior to her death was in perfect health and in complete possession of her mental faculties. The transfer was accomplished by a conveyance in trust to her only son, as trustee, wherein he as one of the beneficiaries was given all the income of the trust during his life and thereafter it was to be divided between his two sons until such time as each, respectively, attained the age of 35 years whereupon the share of such son in the principal was to be paid over to him. However, the trust provided that the trustee, if he elected to do so, could at any time in advance of the termination date of the trust, transfer in whole or in part the corpus to either or

both of his sons in accordance with their then existing proportionate shares. Not only was the trust in every aspect irrevocable, so far as the transferor was concerned, but she retained no right, title or interest with respect to it and was not a beneficiary thereof. Several months prior to the death of the transferor the trustee exercised his right to terminate the trust completely and paid over to his sons their respective shares.

Plainly, the transfer itself was of a type which could have been taxed under our present gift tax act had that act been in effect—as it was not, being enacted in 1939, Revenue and Taxation Code, § 15101 et seq.—unless it can be said that the transfer was made in contemplation of death and hence taxable under the inheritance tax act.

An inheritance tax collector, whose compensation is by law measured by a percentage of the property he includes as taxable, made a return wherein he included as subject to the inheritance tax the trust estate and all its accumulations as of the date of the death of the transferor and not as of the date the trust had actually terminated or as of the date of its creation. The value of the total trust estate on the date of its creation was \$302,364.01 and as of the death of decedent \$457,521.75. The appraiser by the report he returned found that the transfer was made “in contemplation of death, *with life estate retained and as an advancement.*” (Italics supplied.) There was not a scintilla of evidence to sustain the italicized portion of the quotation above. This much the controller concedes. But instead he now rests his claim merely on the contention that the transfer was made in contemplation of death.

With this brief background of the case we turn at once to set forth a statement of the salient and controlling facts as they are disclosed by the record before proceeding further to discuss the law that is here applicable.

In July, 1922, James H. Adams, a direct descendant of President John Adams, died leaving a substantial estate which he ap-

parently left to his widow Lillian T. Adams, who at the time was 67 years of age and to his only child Morgan Adams. At the time of his father's death Morgan Adams had two sons, James H. Adams II, aged 7, and Morgan Adams, Jr., aged 5. Morgan Adams at the time had made his mark in the financial circles of Los Angeles, being president of the Mortgage Guarantee Co. and individually possessed of a very substantial fortune. The record before us makes it plain that the widow Lillian was not only exceedingly proud of her husband's lineage but also the financial ability of her son Morgan.

Mrs. Lillian T. Adams was not the type of woman who could not carry on her financial affairs without the help of a husband or son. She had distinct ideas of her own and the record is that she exercised good business judgment. She valued highly the financial and business ability of her own son, but was not by reason thereof in the least inclined to yield her judgment to his, even though she entrusted the management of her financial estate to him so far as investments and re-investment were concerned, but otherwise personally handled all her own business affairs. Not only did she succeed her husband as a director in the corporation of which her son was president, but she was active in attending the board meetings. The board was an outstanding board of businessmen. When in the meetings of the board she demanded that some particular thing should be done, then, as a director expressed it, “What she wanted done, * * * was done.”

It appears that Mrs. Adams always took a great interest in her grandsons as they were growing up and, when they entered college, she began discussing with her son her desire to vest in them adequate and substantial means to aid them in initially launching their proposed business careers. In these discussions she stated it was her desire to create a trust estate with her son as trustee, but that notwithstanding she wished the grandsons to receive the corpus as soon as they were able properly to manage the same. The son expressed to her his approval. She also discussed with her

grandsons, during their college years, what she proposed to do.

[2] In 1935, while her grandsons were still in college Mrs. Adams on her own initiative went to the office of her personal attorney and told him her exact desires. At that very time—1935—she was aware of the law then in existence that imposed on stockholders of corporations—such as that headed by her son—a double stock liability. The time—of which we take judicial notice—was a troublesome one for mortgage corporations. She knew not only that her son owned a great deal of stock in his corporation but she told her attorney that she thought there might be a possibility owing to existing conditions that he would need financial assistance; that his sons—her grandsons—were still in college supported by their father, and in the vernacular, might be subjected to “designing women.” Hence, she had concluded that her son should have the first call on her assets and that barring any such necessity on his part that her grandsons should be launched in business with adequate means as soon as they were able to properly manage the gift she proposed to make. She realized, as the record shows, that the father of the boys rather than she as their grandmother, was in closer touch with them and so could exercise the better judgment. Accordingly, she concluded that her son should be safeguarded by having the income of the assets she wished to convey to her grandsons so long as he felt he needed it but that thereafter he should be enabled to vest the assets in his boys as soon as he felt there was not any danger that they would squander them. To that end she created the trust.

[3,4] When her attorney told her the proposed trust would involve the payment of a gift tax to the federal government, she, nevertheless, directed that the trust should be accomplished and the tax paid. There was no discussion between her and her attorney as to inheritance taxes or any suggestion by either that such taxes were or might be involved. The trial court itself refused to find that she created the trust with the thought of minimizing taxes, state or federal. At the time the trust was

created she was just short of 80 years of age and thereafter lived until she was 90. Until a few months before her death—10 years after she created the trust—she was physically and mentally completely alert. Until that time she had never been under the necessity of medical care, except to have herself checked periodically. She died from no malady, without pain and simply of old age. When she created the trust her fortune exceeded \$400,000. Before that date and within a few months thereof she had traveled extensively to various parts of the world without the slightest assistance or attention from anyone. At the time she created the trust which left, after its creation, in her own hands and possession a fortune in excess of \$100,000 she continued making gifts to various organizations and took an active part in them until a few months before her death ten years later. She had a zest for life and was continually “on the go.” There is not a scintilla of evidence to indicate that at the time she created the trust she did so in contemplation of death and we find in the record no evidence upon which such an inference may properly be drawn. The evidence on the subject in favor of the objector came before the trial court almost exclusively from persons of high repute, by way of letters or affidavits, which were received in evidence by way of stipulation in lieu of calling them to the stand. Hence, the rule that the credibility of witnesses is for the trial court does not come into play in this case with respect to the affidavits or letters, as the trial court did not see or hear the witnesses. We have read and re-read the entire record and find it so overwhelmingly in the favor of the objector that we see no need of further detailing it. Of the three witnesses who testified from the stand there is not one iota of fact in their testimony or any possible proper inferences therefrom which lends any support for the contention of the controller. The very reverse is true. The one lone exception to this statement, upon which the controller so heavily relies and which evidently was accepted as a controlling fact by the trial court—though wholly inadmissible—should here be stated.

[5] At the hearing before the inheritance tax appraiser the trustee testified in response to a question as to what his mother's motives were in creating the trust as follows: "Well, even at that time she was well along; she was in good health, but I had taken care of her affairs pretty much ever since my father's death and *she thought it was a good scheme to make a bequest. I guess that is what it was*, at that time on the basis that I would continue to look out for that amount of money, which, of course, I did." (Italics supplied.) Not only was this statement as italicized vulnerable to the hearsay rule with respect to the grandsons as beneficiaries of the donor's gift, but it was, moreover, a mere conclusion by the trustee of the motive of the donor not based on any fact statement made by the donor to him, but of a fact he thought perhaps rested in the donor's mind. The statement was wholly inadmissible, *Estate of Boole*, 98 Cal.App. 714, 277 P. 759, and should not have been considered by the trial court. That it was so considered we must assume as the controller rests his case, largely, if not wholly, on the fact and justifies the trial court's decision on the theory it was based upon it in large part.

The trial court in its memorandum ruling stated he was "impelled to the conclusion that one of the operative and actuating purposes which caused the decedent to make the transfer in question was to distribute the greater part of her property to the natural objects of her bounty by an *inter vivos* gift in lieu of transmitting it to them by will. The extent of the property transferred in relation to the entire estate of the donor, the circumstances of the donees and their relationships to the donor, the terms of the trust instrument and the age and circumstances of the donor, point to and support the conclusion we have reached. *Estate of Newman*, 52 Cal.App.2d 126, 125 P.2d 908."

Not only was there in another part of the ruling an express approval of the report of the inheritance tax appraiser which stated that the trust constituted "a transfer made in contemplation of death, with life estate retained and as an advancement,"

but contrariwise the findings as submitted by the controller and signed by the court expressly stated that the transfer was not an "advancement" and that no "life estate" or "any other type of interest" was retained by her at the time of her death. Accordingly, the findings in these aspects are directly contradictory. We pass the contradictions, as does the controller, by stating that the only finding upon which the inheritance tax appraiser was actually sustained was his finding that the transfer in trust was made in contemplation of death. However, we should here note that the trial court did strike out a finding proposed by the controller reading as follows: "(3) To minimize the impact of the higher rates of taxation under the federal estate tax law and the California inheritance tax law which would have been applicable if her assets had all been distributed as a part of her probate estate."

[6-8] When one executes a will he necessarily does so in contemplation of his ultimate death, and with no other motive than to create a testamentary future gift of his estate in accord with his desires at the moment. On the other hand when one makes an irrevocable gift *inter vivos* his motive is not to make a future but a present gift to accord with his desires at the moment. In either case he is fully cognizant of the fact that ultimately he must die, but in the one case the contemplation of death is the paramount motive which induces him to act, and in the other it may be, but is not necessarily the paramount or sole motive. The State may levy an inheritance tax on a transfer of property that results from a future gift contained in a testamentary disposition, but it may not constitutionally impose such a tax upon a present irrevocable gift *inter vivos*, unless the gift may be classed as testamentary in character or intended as a substitute for a testamentary disposition. It is one thing to levy a tax on a present irrevocable *inter vivos* gift and quite another to levy one on a future gift made by the way of a testamentary disposition. But in neither case may the tax be imposed under the guise that the gift is testamentary when it is not, or that it is a present *inter vivos* gift when it

is not, without running afoul of the provisions of the federal constitution. Cf. *Nichols v. Coolidge*, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184. While no all embracing test has been laid down, and seemingly none can be stated, which will determine on which side of the line each individual case falls, yet motive of the donor is the *primary test*. And as to that, the best evidence of the state of mind of the donor at the time a gift is made "and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself * * *" when not contradicted by the surrounding circumstances. *U. S. v. Wells*, 283 U.S. 102, 51 S.Ct. 446, 75 L.Ed. 867. If his motive was not impelled by fear of impending death or by a mere desire to substitute a present gift for a testamentary gift, but to fulfill a desire during his lifetime to provide others with immediate income the cases generally hold the gift may not be regarded as made in contemplation of death or as testamentary in character. In the case before us the desire was to supply the trustor's son with an immediate income, as long as he needed it, and thereafter to the grandsons.

If the present State Gift Tax Act, enacted in 1939, had been in effect in 1935 when the trust was created, unquestionably the donor would have made a gift tax return to the State as she did to the federal government and paid such a tax. Under such circumstances we anticipate that the controller would gladly have accepted the tax and would not have rejected it on the theory that the gift was made in contemplation of death and hence that he desired to await her death so that a larger tax could be collected by him in behalf of the state. If the donor anticipated that the state would shortly pass a Gift Tax Act and hence for that reason alone concluded to anticipate its incidence upon her gift the controller may not complain, as the federal constitution bars any such complaint. Moreover, he may not stretch his complaint by invoking the inheritance tax act to reach a situation taxable only by a proper Gift Tax Act.

In the case before us the trial court found that (1) the entire right, title, interest and possession of the transferor to the property transferred to the trustee vested in the trustee in behalf of the beneficiaries instantly upon the transfer; (2) that the transferor retained no rights thereto of any kind or character; (3) that the transfer was not restricted to take effect upon or after the death of the transferor. In view of the conclusion we have arrived at as to the disposition that must be made of the case it is unnecessary for us to determine whether an *inter vivos* trust, as here, which had fully terminated prior to transferor's death is assessable as of such date or some other date. Cf. *Estate of Madison*, 26 Cal.2d 453, 159 P.2d 630. We pass then to the crux of the case.

It is evident from what we have so far said that the operative fact in determining whether the transfer was made in contemplation of death is the motive or the state of mind of the transferor at the time of the transfer.

The motive of the transferor, as she herself stated it, as testified to by the witnesses, stands uncontradicted. She wished, as she stated it, to supply her grandsons with ample funds as soon as they began their business careers, or as soon as their father felt they were capable of properly handling and safeguarding the funds and subject only to the need the father might have to retain the income from the funds for his own use. She plainly desired to make her grandsons independent out of her own funds, without regard to any funds the father might provide in the future.

Moreover, it must not be overlooked that the transferor at the time of the transfer had in her possession a will she had executed in 1922. In that will, except for a cash bequest of \$5,000 to her attorney, she left her entire estate to her son Morgan even though her husband was then living. She named her husband as executor of the will, but made no reference to or provisions for her grandsons. By her transfer in trust in 1935 she carved out of her estate which her son Morgan would have taken under the will the sum of some

\$300,000. She left the will intact as a testamentary disposition to operate on the estate she retained. Accordingly, we do not here have in any sense the factual situation that existed in the case in *Estate of Newman*, 52 Cal.App.2d 126, 125 P.2d 908, upon which the controller relies so heavily. In the *Newman* case the decedent had made a will leaving all his property, except for some minor bequests to his wife. Thereafter he made three transfers to her between July, 1934, and May, 1936, the total of which disposed of 73% of his entire estate. In June, 1936, he made a will eliminating the minor bequests in his first will and named his wife as the sole beneficiary. The facts just related are at such variance with the facts of the instant case as to make it self-evident that the decision is not controlling.

As none of the indicia usually associated with a transfer in contemplation of death are in this case shown by the evidence, the order is reversed.

WHITE, P. J., and DRAPEAU, J., concur.



107 Cal.App.2d 25

PEOPLE v. FARRELL et al.

Cr. 4654.

District Court of Appeal, Second District,
Division 2, California.

Oct. 23, 1951.

Raymond Edward Farrell and Thomas Philip Farrell were accused by information of robbery. Thomas Philip Farrell was convicted after trial without a jury, by the Superior Court, County of Los Angeles, William B. Neeley, J., and he appealed. The District Court of Appeal, Moore, P. J., held that evidence supported the conviction.

Affirmed.

1. Robbery ⚡24(1)

Evidence was sufficient to support conviction of robbery.

2. Criminal Law ⚡374

Evidence that defendant was in such want of funds that he was impelled to forge a check was some proof and justified inference that he had a motive to participate in robbery which was committed in his presence while he made no protest but took flight with the actual robber.

3. Robbery ⚡24(1)

Evidence that defendant borrowed a pistol and purchased a revolver just prior to robbery at which he was present authorized deduction that defendant was a conscious participant therein, especially in view of his subsequent denial to sheriff of knowledge of the guns.

4. Criminal Law ⚡351(10)

Deception and falsehood as to facts under investigation are evidence of a consciousness of guilt.

5. Criminal Law ⚡407(1)

Where defendant's brother confessed robbery to sheriff in defendant's presence and implicated defendant therein, defendant's silence and failure to denounce brother's statement were admissible in prosecution for robbery as tending to show an implied admission of truth of brother's statements.

6. Criminal Law ⚡260(11)

In prosecution for robbery, credibility of witness who was allegedly intoxicated when defendant and his brother discussed the robbery before him, was for determination of the trier of fact.

7. Criminal Law ⚡260(7)

In prosecution for robbery, trial court's declaration that he would regard statements of defendant made in response to accusations by defendant's brother before sheriff as out of the record and that he would regard the accusations as denied by defendant, did not remove from record proof of defendant's complacency, conduct and failure to denounce the accusations, and if it was a striking of evidence of defendant's conduct, it would be restored, especially in absence of motion to strike or objections to its introduction.

8. Criminal Law ⚡407(1)

Where a party is accused of a crime and makes evasive or equivocal reply, both

the statement and the fact of the failure to deny or his equivocal reply are admissible as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt.

James M. Fizzolio, North Hollywood, C. Thomas Fizzolio, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant and his brother Raymond were accused by information of robbery. Raymond pleaded guilty and after trial appellant was convicted by the court without a jury and sentenced to prison for the term prescribed by law. This is an appeal from such judgment.

About noon on September 26, 1950, John Hirsch, an armed guard messenger for an armored transport company, called at a suburban market on west Slauson avenue, received a sealed canvas bag and made his exit through the rear door. As he emerged from the building he was "poked in the back" by a strange man who held a trench coat over his right arm. The stranger took Hirsch's gun and the canvas bag, and after conducting the messenger a short distance, the robber disappeared "into the bushes."

About midnight November 1, 1950, police officers of the city of Los Angeles, acting upon information recently received, knocked at the door of defendants and ordered them to come out. Raymond emerged from the residence and after gaining entrance the officers found appellant in a back bedroom. In searching the premises they found the pistol which had been taken from John Hirsch, also a Japanese automatic which appellant had borrowed from one Huff.

Raymond confessed to the robbery of the transport messenger on September 26 and gave details of the crime. Thereafter deputy sheriff Irving brought the brothers into a conference and requested Raymond to repeat his narrative in order to straighten out the discrepancies. Thereupon Raymond

stated that he and appellant left home about 10 o'clock in appellant's station wagon and after procuring additional gasoline they parked at the "Wich Stand." About 20 minutes prior to the robbery they drove into the parking lot of the Mayfair market. There Raymond alighted from the station wagon and stood by until the armored car approached the market; appellant immediately drove from the parking lot to the adjoining street and Raymond entered the rear of the market where he waited until Hirsch came out with the money bag. He held the Japanese automatic in Hirsch's back, walked him across the parking lot, took the money bag, reentered the station wagon and appellant drove it away. On arriving at home they divided \$2,200 in money evenly and burned the checks in the incinerator. During the statement of Raymond appellant was silent. He was then asked by Irving what he had to say. He replied, "What do you want me to say?" He was then asked if there were any changes he would like to make in Raymond's statement. His reply was, "the only thing I have got to say is that I didn't put a gun in anybody's back and I didn't hold up any armed truck. I don't know anything about any robbery." He denied that he had made such a trip as described by Raymond and did not remember what he did on that day. He said Raymond had never discussed the matter since the day of the robbery and declared that he knew "nothing about any robbery."

Raymond did not testify at the trial.

The next item of proof was the testimony of the witness John Faulkner who met the defendants on October 31, 1950, at a cafe where Raymond requested Faulkner to meet the brothers for a conference at a West Boulevard bar on the following day. On November 1 Faulkner visited the Hilltop Bar, imbibed some drinks and from there went to the bar on West Boulevard as requested by Raymond. Defendants were present when Faulkner arrived. The three sat at the bar drinking when Raymond said, "I want to pull a job; I want to take the gas company out there where I used to work. We have got to have a third man." Faulkner said, "Why all this Ray?" The

reply was, "Well I worked there, I can't go in; I'd be recognized; I want you and Tommy to go in; I'll sit in the automobile * * *. We took the Mayfair up there within about three minutes and never been nothing said about that; we got \$2,200 out of the deal; \$1,100 apiece." Faulkner asked Ray whether he was crazy and one of the brothers said, "John is too loaded to talk sense." The defendants conveyed Faulkner back to the Hilltop cafe. At no time did appellant deny any portion of the statement made by Raymond to Faulkner concerning the robbery of the messenger at the Mayfair market. He claimed that he did not hear it.

Evidence was received to the effect that eight days before the robbery appellant forged the name of a Mrs. Fiorito to a check for the sum of \$600; that five days later he learned she was returning to the state; that Mrs. Raymond Farrell made a deposit of \$600 to Mrs. Fiorito's account prior to her arrival from the east about October 1.

[1] The contention is made that appellant was not concerned with the crime; that there was no proof that he aided or abetted Raymond or that he conceived or directed the robbery. But in view of appellant's silence while Raymond told of the banditry, of his failure promptly to deny any of Raymond's statements made to the deputy sheriff, his acquisition of the Japanese pistol in August and his purchase of the .32 automatic three days before the robbery, his denial to officer Irving of knowledge that there were any guns in Raymond's house, his impecunious condition at the same time—there is ample proof to support the conviction.

[2, 3] In addition to such evidence the trial judge was justified in drawing many reasonable inferences from the facts established. *People v. Hennessey*, 201 Cal. 568, 571, 258 P. 49; *People v. Latham*, 43 Cal.App.2d 35, 38, 110 P.2d 101. Appellant's want of funds on September 18 impelled him to forge Mrs. Fiorito's name to a check. That he was in such dire penury as to be driven to commit a felony is some proof of a motive for robbery and it is a

fair inference that appellant had a burning motive to participate in the robbery on September 26 which was committed in his presence where he made no protest, but with the actual robber took flight from the scene. *People v. Gonzales*, 87 Cal.App. 2d 867, 877, 198 P.2d 81. Also, from the proof that appellant borrowed the Japanese pistol in August and purchased an automatic revolver about the middle of September, it was a logical inference that appellant was preparing to commit a crime. The acquisition of such an armory just prior to a robbery at which appellant was present impels the deduction that appellant was there as a conscious participant. *People v. Bolton*, 215 Cal. 12, 19, 8 P.2d 116. Especially is such inference warranted in view of appellant's declaration to the deputy sheriff that he knew nothing of the guns and did not know that there were any guns in Raymond's house, notwithstanding the fact that one of them had been borrowed by appellant.

[4, 5] Deception and falsehood as to the facts under investigation are evidence of a consciousness of guilt. *People v. Cole*, 141 Cal. 88, 89, 74 P. 547; *People v. Miller*, 19 Cal.App.2d 708, 709, 66 P.2d 448. At no time when the details of the Mayfair robbery were stated did appellant act as an innocent person would have acted under the circumstances. He did not denounce his brother's statement as a pack of lies or as a fantasy or as a dream—as a normal, innocent person would have done. Therefore, his statements and his conduct were admissible as tending to show an implied admission of the truth of the statements made. *People v. Cooper*, 81 Cal.App.2d 110, 117, 183 P.2d 67; *People v. Bridges*, 73 Cal.App.2d 913, 914, 167 P.2d 793.

[6] In testifying in his own behalf appellant's explanation of his driving his station wagon to meet Faulkner on November 1 was that he had nothing else to do. He testified that when they met Faulkner the latter was so intoxicated the bartender refused to serve him liquor. It is not to be forgotten, however, that Faulkner was not so drunk as to fail to notify the police of the robbery reported to him by Raymond

in the hearing of appellant. Faulkner's credibility in telling the story of the conference while the three men drank together was for the court's determination. *People v. Robinson*, 49 Cal.App.2d 576, 579, 122 P.2d 77. Under all the circumstances it was not an unreasonable inference that appellant's failure to deny or to attempt to refute the statements of his brother was an admission that the two had previously committed the robbery of the messenger at the Mayfair market. Also, his bland dismissal of Faulkner with the statement that he was drunk while the three men conversed at the West Boulevard bar does not adequately overcome the bold testimony of a truthful man who would not fall for the seductive arguments of Raymond Farrell.

[7, 8] At the conclusion of the trial the court stated that he would regard the statements of appellant in response to the accusatory statement made by Raymond to the officer as out of the record and that he would regard the accusatory statement as denied by appellant. Such declaration by the court does not remove from the record the proof of the complacency of appellant as Raymond repeated the story of the robbery or of appellant's childish denial in court of all knowledge of the crime. However the trial court may have considered it, evidence of appellant's conduct is still in the record. There was no motion to strike it and no objection made on its introduction. If it was stricken, it is hereby restored. Where a party is accused of a crime and makes evasive or equivocal reply, both the statement and the fact of the failure to deny or his equivocal reply are admissible as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt. *People v. Simmons*, 28 Cal.2d 699, 712, 172 P.2d 18. There was no showing that on either occasion when in his presence appellant was accused of having participated in the robbery that he was menaced, or given promises of his exculpation, or that he was persuaded by any arguments to make a response. Neither did he declare that he was maintaining a policy of silence.

In *People v. Newman*, 24 Cal.2d 168, 148 P.2d 4, 152 A.L.R. 365, notwithstanding the

trial court struck out the testimony of an expert witness concerning betting markers, on appeal it was held that the evidence was erroneously stricken and it was given the same effect as though the order striking it had not been made by the trial court. 24 Cal.2d at page 177, 148 P.2d at page 9. "As this evidence against the appellant was admitted during the trial, the appellant was confronted with it after its admission up to the final submission of the case, and as we have seen he made no attempt to controvert it. Had the trial court not made its erroneous order, the appellant would have been in the same situation as he is now in, if we give consideration to the stricken evidence in determining the question as to whether there is evidentiary support of the judgment."

Despite industrious effort of his counsel to exculpate him, the conclusion of the trial judge to send appellant to prison along with his brother is a just judgment.

Affirmed.

McCOMB, J., concurs.



107 Cal.App.2d 31

**FISKE v. DIRECTOR, DEPARTMENT OF
PUBLIC WELFARE, SAN DIEGO
COUNTY, et al.**

Civ. 4246.

District Court of Appeal, Fourth District,
California.

Oct. 23, 1951.

Petition by Rose M. Fiske against the Director, Department of Public Welfare, County of San Diego, and others, to have a consent and relinquishment for adoption signed by the petitioner declared void and have the child delivered to the petitioner. The Superior Court of San Diego County, Arthur L. Mundo, J., entered an order in favor of the petitioner and the defendants appealed. The District Court of Appeal, Griffin, J., held that the evidence justified the trial court in

finding that the petitioner was mistakenly led to believe at the time she signed consent that she had one year within which to act and that consent was not final until a year had elapsed.

Affirmed.

1. Adoption ☞7

In proceeding by a mother to have a consent for adoption canceled and declared void and the child delivered to mother, evidence justified trial court in finding that mother was mistakenly led to believe that she had one year after the signing of consent within which to act and that consent and relinquishment was not final until year had expired. Civ.Code, § 224m.

2. Appeal and Error ☞1012(1)

The question of weight of evidence is for trial court, and District Court of Appeal may not interfere with its findings and judgment unless a clear abuse of discretion appears.

Hillyer & Hillyer, San Diego, for petitioner and respondent.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., James Don Keller, Dist. Atty., Duane Carnes, Deputy Dist. Atty., San Diego, for respondents and appellants.

GRIFFIN, Justice.

Petitioner and respondent Rose M. Fiske (hereinafter referred to as petitioner) alleged that she was the natural mother of one Ronald Fiske, a minor male, born March 13, 1948, and that on May 3, 1949, she signed a "Consent and Relinquishment for his Adoption" to respondent and appellant Director, Department of Public Welfare, County of San Diego (hereinafter referred to as respondent). She alleged that at that time it was the understanding of petitioner that the child would be returned to her if she so requested within one year from the giving and signing of the relinquishment; that during that period she made several written demands upon respondent, withdrawing her consent, and requesting its revocation, and asked for the return of the child to her; that respondent

refused; that she is well able to care for the child and that it would be for his best interests that the consent be withdrawn and canceled. The respondent Director, Department of Public Welfare, County of San Diego, as well as the Director, State Department of Social Welfare answered, and alleged that a certified copy of the consent had been filed by the County welfare with the State Department, in accordance with the provisions of sec. 224m of the Civil Code; that no notice of rescission was received and that they were not willing to join the parents in rescinding it; that petitioner was fully apprised of the binding nature of the relinquishment and that the best interests of the child would be served by permitting the relinquishment to remain in effect. A copy of the signed relinquishment, duly witnessed, is set up in the answer. It recites generally that the mother does—"hereby relinquish and surrender said minor child for adoption * * *. It is fully understood by me that when this relinquishment is filed with the State Department of Social Welfare by said agency, all my rights to the custody * * * of said minor child * * * will be terminated and that said child cannot be reclaimed by me."

This agreement was signed by two witnesses and acknowledged by Miss Edmunds, authorized official of the County welfare agency. A similar relinquishment was signed by the father of the child on June 9, 1949.

After hearing, the court found that petitioner signed the relinquishment, but at the time she "was emotionally upset and physically and mentally incapable of understanding the meaning and consequences of the signing of the said document and was under the impression that the said minor child * * * would be returned to her if she so requested within one year from the giving and signing of said Relinquishment for Adoption * * *. That the petitioner did not give real consent at the time of signing said Relinquishment * * *. That shortly before the time of signing the said document, to wit, May 3, 1949, the Petitioner had been divorced by her husband * * * and she was unable to support herself or

her three minor children and was greatly distraught by her financial difficulties * * *. That before said Relinquishment * * * had been filed with the State Department of Social Welfare, Petitioner made a written request and demand on June 6, 1949, that her child * * * be returned to her"; that petitioner was able to care for and educate the minor child; that respondents unreasonably refused and still refuse to revoke, cancel and annul the Relinquishment for Adoption; that the child has been in the custody of the Department for 17 months and has not been adopted; that there is no reason given by the Department why said agencies are unwilling to join in the cancellation of the Relinquishment; that it is not shown that the best interests of the minor child would be served by the permitting of the Relinquishment for Adoption to remain in effect; that petitioner is a fit and proper person for the care, custody and control of her child; and that it is for the best interests and welfare of the child that the Relinquishment be canceled.

The judgment was that the relinquishment was not a valid one and that it should be and was ordered canceled and declared void and the child ordered delivered to petitioner. Respondents appeal and contend that the evidence is insufficient to support the finding, and that the findings are not responsive to any issue raised by the pleadings.

Petitioner lived in San Diego, had three small children. Ronald was the youngest. She divorced her husband. She was destitute, and went to the Welfare Department for aid and advice. According to her testimony, she contacted a Mr. Bartley. He advised her not to adopt the baby out but to keep the three boys together. On May 2, she talked to a Miss Edmunds in that department, about relinquishing the child for adoption and she advised petitioner that it would be the best thing to do. The child was then with the "Weber" family by arrangements with petitioner. On May 3, she stated she went to the Department and Miss Edmunds, who had some papers with her concerning relinquishment, read them to her and she asked petitioner if she was

ready to sign the final papers and that petitioner said "Yes" and that she signed the relinquishment and that the witnesses, as indicated, also signed it; that before she signed it she discussed with Miss Edmunds the effect of the relinquishment and that Miss Edmunds told her "my signing the paper didn't mean it was final" and said "within a year after the date I signed it that I would get my baby"; that "within one year, it would be final". She testified that she was born in New York and that she knew under the laws of New York she could "get her baby back during one year". No motion was made to strike this last statement, but after it had been stated, an objection was made and sustained. She then testified that just prior to signing the relinquishment she told Miss Edmunds she was going back to her mother in New York and that the welfare worker told her "Well, after I got home to the other children, if I was, you know, if I got a good job and got settled in my home, and I knew if I had a better plan for Ronnie, that I could take care of him, I could get my baby * * *" provided she did it within a year; that she left on May 10, with the other two boys, with money she obtained from her mother; that on June 6th she wrote to Miss Edmunds and inquired (letter in evidence) about Ronald, asked if she had found suitable parents for him, if there was a possibility of her ex-husband getting him, and wanted to know: "Is it too late for me to ever get him?" On June 15, 1949, Miss Edmunds replied, stated that Mr. Fiske had signed the final relinquishment and could not get the baby. She told her that the Department had several good homes in mind for placement and wanted to know: "Are you in any real doubt as to whether this will be the best plan for him? The final papers have gone through, of course, but you will recall that we do not like to complete plans for adoption unless you are very sure that it is the best plan available for the baby. If you felt that after all you had some suitable plan for Ronnie yourself—and were in San Diego—we would be happy to talk it over with you. Since I cannot discuss it with you—and if you do have some plan in mind which you think would be better than adop-

tion for Ronnie—we would want you to talk it over with a social worker in your vicinity. Will you let me know how you feel about this. Then, if you have some other arrangement in mind for Ronnie, I can have a social worker in your area get in touch with you about it; or, if you think adoption will be best, I can go ahead with that plan * * *.”

On June 25, petitioner wrote and stated that she saw a social worker in New York and “She thought it was best to do the right thing for Ronnie’s sake. I’m sure he will have a better future than I can give him * * *. I want him to be loved by a good loving mother and father * * *. Yes, you can go ahead with the adoption, because it’s the only way out * * *. I am so depressed and disgusted about my unhappy life that I don’t know what I’m going to do now.”

On July 3d Miss Edmunds wrote petitioner a most comforting letter and assured her that when Ronnie was adopted he would have a good home and loving parents. On July 11, petitioner then wrote to Miss Edmunds and stated that she had gone through so much trouble, had a nervous breakdown, and had finally come to her senses and decided she could not give Ronnie up; that she had been crazy and could not go on without him; that she realized she signed those papers but she was under great strain; that she then only thought of the present and not the future; that the fact that her husband left her alone, as he did, and finally deserted her, left her without her right mind, that she was going to the social worker in New York and explain and that she hoped she would get Ronnie back home soon; that she would come to California and get him in July. She implored Miss Edmunds to help her obtain the baby. On July 15th, respondent Director wired petitioner that the agency would have to get in touch with the social worker in New York before it would consider any change in plans for Ronnie. On September 12th, Miss Edmunds advised petitioner she had been in touch with the New York social worker and advised petitioner that “once the final relinquishment papers are signed

by the parents, they can no longer have the child returned to them”, and gave the reasons for the actions of the welfare department and suggested that petitioner see the New York social worker for further explanation.

Petitioner then testified that the reason she signed the relinquishment was because her husband had deserted her and the three children, without sufficient money to pay the bills and she did not have enough money to feed them; that she placed Ronnie with the Webers before she went to the welfare department and discussed with them about adopting him, but they decided not to continue with such a plan.

Petitioner’s mother testified that when petitioner arrived in New York with her two boys she was “upset” and “confused”. At the hearing petitioner called the welfare workers and witnesses to the instrument as her witnesses, who testified generally that they told petitioner, when she signed the relinquishment, that it would not be complete until her husband had also signed it and it was filed with the State Department of Social Welfare, after which it was final and binding and the child could not be returned to petitioner except by rescission of the relinquishment by mutual consent. They further testified that petitioner read the relinquishment and that it was fully explained to her. Respondents called a welfare worker who testified that petitioner saw her on April 6, 1949, and on several occasions thereafter talked to her regarding the independent adoption of the boy by the Webers; that she would not encourage petitioner to sign the relinquishment until she had investigated it; that the Webers did not care to proceed with the adoption; that petitioner was pretty upset over this fact and wanted the Department to work out a plan for her child; that she told petitioner if she would sign a “consent”, the Department would take the child from the Webers and accept him “for study”; that this “consent” provided it was not a final consent or relinquishment but a preliminary step toward an agency adoption; that the agency or the mother “may go back on it” and it was so explained to petitioner.

After securing this "consent" petitioner and the child were referred to Miss Edmunds.

The signed relinquishment here involved was sent to the Department of Social Welfare in Sacramento on June 9, and filed there on June 13, 1949. This proceeding was commenced on May 24, 1950, and it was agreed that the child, up to the time of trial, had not been placed in an adoptive home.

The complaint is (1) that the finding that petitioner was, at the time she signed the relinquishment, emotionally upset and physically and mentally incapable of understanding the meaning and consequences of her act, is not supported by the evidence, nor within the issues presented by the pleadings; (2) that the finding that petitioner did not "give real consent" is not supported by the evidence; (3) that the finding that petitioner made a written demand for the child by letter on June 6th before the relinquishment was filed with the State Department of Social Welfare is not supported by and is contrary to the evidence. It is further contended, in this connection, that since sec. 224m Civil Code provides that when such a relinquishment authorized by that section is filed with the State Department of Social Welfare it may be rescinded only by the mutual consent of the parties, that, as a matter of law, petitioner had no right to rescind the relinquishment by the method pursued. As we construe it, respondents argue that before the court would be justified in canceling the relinquishment, the petitioner must show that it was obtained by duress, menace, fraud, undue influence, misrepresentation or mistake and that since there was no evidence nor finding of any such ground other than the possible ground of mistake, the mistake relied upon for a rescission was only as to a collateral matter and not suf-

ficient to support the finding that "petitioner did not give real consent at the time of signing". The same argument is made as to the finding that the petitioner was "emotionally upset and physically and mentally incapable of understanding the meaning and consequences of the signing".

[1, 2] There is some evidence in the record bearing upon these subjects. Petitioner testified that one social worker told her before she signed the relinquishment that it was not final and that within one year after she signed it she could get her baby back. This testimony is refuted by the welfare worker. There is further testimony that in a previous interview with another social worker in reference to an independent adoption proceeding, the welfare worker told petitioner that if she signed a "custody consent" it would not be binding upon her and could be revoked by her at any time. The trial court had the right to believe the testimony of petitioner on this subject. There is some indication in the letters that petitioner did suggest the return of the child within one year. The trial court was justified in finding that a misrepresentation of fact was made to petitioner in this respect and that petitioner was mistakenly led to believe that she had one year within which to act. There is substantial evidence opposed to this conclusion that might well have supported a contrary finding. The question of the weight of the evidence was for the trial court and this court may not interfere with its finding and judgment unless a clear abuse of discretion appears. *Chichester v. Seymour*, 28 Cal.App.2d 696, 83 P.2d 301. In view of this determination no further discussion of the additional points raised is necessary.

Order affirmed.

BARNARD, P. J., concurs.

37 Cal.2d 856

ALEXANDER et al. v. ANGEL et al.
S. F. 18210.Supreme Court of California, in Bank.
Oct. 26, 1951.

Action by Charles N. Alexander and Katherine J. Alexander to foreclose mortgage given by defendant John B. Angel as security for two promissory notes. The defendant filed a cross-complaint against the Alexanders and Robert J. Haws and Zada M. Haws in which novation was pleaded. The Superior Court, Alameda County, A. T. Shine, J., entered judgment for defendant Angel on his cross-complaint and plaintiffs Alexander appealed. The Supreme Court, Spence, J., held that evidence was sufficient to sustain trial court's finding that novation had in fact been intended and effected.

Judgment affirmed.

Prior opinion 230 P.2d 646.

1. Appeal and Error ⇨931(1)

On appeal all substantial conflicts must be resolved in favor of successful party, and all legitimate and reasonable inferences indulged in to uphold the findings if possible.

2. Appeal and Error ⇨1011(1)

Where evidence on issue of novation was conflicting, and trial court had made findings in favor of existence of novation, appellate court, giving evidence all legitimate and reasonable inferences in favor of findings, would resolve conflict in favor of existence of novation.

3. Novation ⇨11, 12

Novation must be pleaded either expressly or by unequivocal implication, and burden of proof is upon party asserting its existence. Civ.Code, §§ 1530, 1531.

4. Novation ⇨1, 3

The question whether novation has taken place is always one of intention with the controlling factor being intent of obligee to effect a release of original obligor on his obligation under original agreement.

5. Novation ⇨12, 13

The evidence in support of a novation must be clear and convincing, the entire question being one of fact dependent upon

circumstances of particular case, and the weight and sufficiency of proof are consequently matters for determination of trier of facts under general rules applicable to civil actions. Civ.Code, §§ 1530, 1531.

6. Mortgages ⇨283(3)

Where mortgage debt is assumed by purchasers from mortgagor with consent of mortgagee, and entirely different mode of payment is agreed upon between purchasers and mortgagee, mortgagor is exonerated from liability as surety on obligation in absence of his consent to such different mode of payment. Civ.Code, § 2819.

7. Novation ⇨10

When it appears that parties intended that new agreement executed between them was to take place of an existing agreement, the old agreement is thereby entirely abrogated or extinguished.

8. Novation ⇨10

Where new agreement superseding old agreement is novation, rights and duties of parties are governed by new agreement and failure to perform thereunder does not, under any theory of rescission or revivor, operate to revive obligations under extinguished agreement.

9. Novation ⇨5

Where creditor and new debtor enter into agreement whereby new debtor agrees to assume obligations of old debtor and creditor assents to such assumption in lieu of obligation of old debtor, consent of original debtor is not essential to create liability of new debtor and discharge original debtor, since presumably beneficial result to original debtor permits assumption that he consented to discharge.

10. Novation ⇨11

Where party attempting to plead novation as defense to creditor's suit failed to allege his consent to agreement between creditor and new debtor, plea was nevertheless valid, since benefit to original debtor permitted assumption of consent in absence of affirmative disclaimer of such benefit.

11. Novation ⇨12

In action by mortgagee against original mortgagor to foreclose mortgage se-

curing promissory note wherein mortgagor alleged by way of defense, a subsequent agreement between mortgagee and third party who assumed mortgage debt with consent of mortgagee and agreement by mortgagee to discharge original mortgagor, evidence was sufficient to establish that novation had in fact been intended and effected.

Nathan Goldwater and John L. McVey, Oakland, for appellants.

Donahue, Richards, Rowell & Gallagher and George W. Hauer, all of Oakland, for respondent.

SPENCE, Justice.

Plaintiffs Alexander brought this action to foreclose a chattel mortgage given as security for \$4,300, the amount of two promissory notes. Defendant Angel admitted execution of the notes in his answer but as an affirmative defense and also by cross-complaint, he alleged his conveyance of the property to Robert J. Haws and Zada M. Haws and their (the Haws') entry into a separate agreement with plaintiffs whereby they, as his vendees, assumed his obligation and he was released from all liability therefor—in effect, a pleading of novation. Both plaintiffs and the Haws were named as cross-defendants, and in his cross-complaint, defendant and cross-complainant Angel sought a declaration of the rights and duties of all the parties concerned in the respective transactions. Cross-defendants Haws failed to file an answer and their default was entered; but Mr. Haws did participate in the trial as a witness. The trial court made findings sustaining defendant and cross-complainant Angel's claim of a novation and from the judgment accordingly entered in his favor, plaintiffs Alexander appeal.

[1,2] As ground for reversal, appellants contend that the evidence was insufficient to support the findings on the contested issue of a novation. But the record appears to present the usual case of opposing evidentiary considerations, and so applicable is "the time honored rule that all substantial conflicts must be resolved in

favor of the respondent, and *all legitimate and reasonable inferences indulged in to uphold the findings if possible.*" Richter v. Walker, 36 Cal.2d 634, 636, 640, 226 P.2d 593, 596; emphasis added. Accordingly, appellants cannot prevail.

On January 2, 1947, appellants Alexander sold a fountain lunch and restaurant to respondent Angel. The latter on that date executed in favor of appellants two promissory notes secured by a chattel mortgage on the business fixtures. The notes were for \$2,150 each, due one year and two years, respectively, after the date of execution—January 2, 1948, and January 2, 1949; and neither bore interest. In September, 1947, and prior to the maturity date of either of the notes, respondent entered into negotiations for the sale of his business to cross-defendants Haws. Shortly before consummation of the sale and on October 28, 1947, the Alexanders and the Haws executed a written agreement, which read as follows:

"In consideration of the forbearance of Charles N. Alexander and Katherine J. Alexander in asserting their right to payment of the sum of \$2150, due and payable January 2, 1948, pursuant to that certain promissory note, made and executed by John B. Angel on January 2, 1947, and payment of the sum of \$2150, due and payable on January 1, 1949 * * * both of which notes are secured by a chattel mortgage on fixtures and equipment now located in that certain storeroom commonly known and designated as 3421 Fruitvale Avenue, Oakland, we, the undersigned, purchasers and assignees of Angel's Fountain Lunch, formerly known as the Dimond Pastime, located at 3421 Fruitvale Avenue, Oakland, California, hereby agree to make monthly payments in the sum of \$150 to include interest at the rate of six (6) percent per annum. We hereby agree to make said payments on the 28 day of each month commencing on the 28 day of October, 1947, until the full amount of the principal of \$4300 is paid.

"In event, however, said payments as aforesaid are not made in the manner as hereinbefore provided, then Charles N. Alexander and/or Katherine J. Alexander

* * * may, at their option, declare the full amount to be due and payable. In such event said payments are not made, we, the undersigned, hereby agree to pay all court costs made necessary in the collection of these notes and such attorney fees as the court may determine."

The Haws made eight payments to appellants, amounting to \$636.06, the first (\$127.50) on October 28, 1947, and the last on November 24, 1948. No demand was made on respondent for payment until January, 1949, at the time the second note became due, when a formal demand was made on both notes before appellants instituted this action.

The trial court specifically found that "at the time of the execution of the written agreement of October 28, 1947, it was the intent of all the parties thereto, said parties being the plaintiffs and cross-defendants Charles N. Alexander and Katherine J. Alexander, and Robert J. Haws and Zada M. Haws, cross-defendants, to entirely extinguish and abrogate the agreements of January 2, 1947, between the Alexanders and John B. Angel, and to substitute in the place of such agreements of January 2, 1947, the said agreement of October 28, 1947; that * * * further * * * at the time of said agreement of October 28, 1947, it was the intent of the parties to said agreement to substitute a new debtor, namely, Robert J. Haws, in the place and stead of the old debtor, John B. Angel, defendant and cross-complainant herein; that * * * further * * * at [said] time * * * it was the intent of the parties * * * to release defendant and cross-complainant John B. Angel of any and all liability to the plaintiffs and cross-defendants herein, under the agreements of January 2, 1947; that * * * the said intention of the parties to the said agreement of October 28, 1947, is evidenced by the language of and by the actions of the said parties subsequent to the execution of the said agreement." Consistent with such determination of the rights and duties of the parties here in dispute, the trial court concluded that the effect of the agreement of October 28, 1947, between the Alexanders and the Haws was "a novation,

so as to substitute the obligations of [the Haws], thereby assumed by them, for the obligation of John B. Angel which arose by virtue of the agreements of January 2, 1947," between Angel and the Alexanders; that "the effect of such novation was the substitution of a new debtor, namely, [the Haws], in the place and stead of the old debtor, namely, John B. Angel," that "as a result of the said novation * * * Angel [was] not indebted to the * * * Alexanders * * * in any sum at all." Accordingly, judgment was entered denying the Alexanders recovery from Angel.

[3-5] A "novation is the substitution of a new obligation for an existing one." Civ.Code, sec. 1530. One of the ways a novation may be consummated is "by the substitution of a new debtor in place of the old one, with intent to release the latter." Civ.Code, sec. 1531. Novation must be pleaded either expressly or "by unequivocal implication," and the burden of proof is "upon the party asserting its existence." *Colley v. Chowchilla Nat. Bank*, 200 Cal. 760, 770, 255 P. 188, 192, 52 A.L.R. 569; also 66 C.J.S., Novation, § 25a, page 712; § 26b, page 714. The "question whether a novation has taken place is always one of intention", *Producers' Fruit Co. v. Goddard*, 75 Cal.App. 737, 755, 243 P. 686, 693, with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement. *Ayoob v. Ayoob*, 74 Cal.App.2d 236, 251, 168 P.2d 462. While the evidence in support of a novation must be "clear and convincing", *Columbia Casualty Co. v. Lewis*, 14 Cal.App.2d 64, 72, 57 P.2d 1010, 1013, the "whole question is one of fact and depends upon all the facts and circumstances of the particular case", *Manfre v. Sharp*, 210 Cal. 479, 481, 292 P. 465, 466, with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions. 66 C.J.S., Novation, § 26d, page 716; § 27a, page 718; *Producers' Fruit Co. v. Goddard*, supra, 75 Cal.App. 737, 755, 243 P. 686. In line with these observations and the further principle above noted that "all legitimate and reasonable inferences [must be] in-

dulged in to uphold the findings if possible", *Richter v. Walker*, supra, 36 Cal.2d 634, 640, 226 P.2d 593, 596, it must be concluded that the record contains ample evidence in support of the trial court's finding of a novation here.

First, there is the matter of the purport of the agreement between the Alexanders and the Haws in extinguishment of the original obligation of respondent Angel to the Alexanders. Except for similarity in the stated amount of the indebtedness, \$4,300, the respective obligations reflect differentiating features: (1) the Haws' agreement provided for monthly payments of \$150 commencing on the date of its execution, October 28, 1947, until the principal was paid—an entirely different method of payment from that provided in the original notes respectively due on January 2, 1948, and January 2, 1949, each in the sum of \$2,150; (2) the Haws' agreement provided for interest payments, while the notes had no such provision; and (3) the Haws' agreement contained an acceleration clause in the event of nonpayment of any of the monthly amounts, again a provision not contained in the notes. These distinguishing factors indicate not merely the assumption of a pre-existing obligation but the consummation of an entirely new agreement in relation to a mortgage debt, new as to parties and new as to obligation.

[6] Such drastic changes in a mortgage debt assumed by purchasers from the mortgagor would require the latter's consent in order to prevent his exoneration from liability as surety on the obligation. Civ.Code, sec. 2819; *Braun v. Crew*, 183 Cal. 728, 731, 192 P. 531. So significant here is the fact that upon the execution of the Haws' agreement, prepared by appellants' counsel, appellants admittedly made no attempt to contact respondent Angel or secure his consent to the material changes made in the terms of the obligation—a course of procedure which would indicate that they no longer considered respondent Angel liable on the new undertaking with the Haws, but rather that he thereupon stepped "out of the picture." Corroborating that intent on the part of appellants are the circumstances of the payments made by the Haws

under their agreement. While that agreement called for monthly payments of \$150, they made only eight payments (the first \$127.50, the other individual amounts not appearing) for the total sum of \$636.06, the first as of the date of execution of the agreement, October 28, 1947, and the last on November 24, 1948. Thus over a thirteen-month period there was paid approximately only one-third of the amount owing. Yet with the arrearage so accumulating, appellants made no demand upon respondent Angel until January, 1949, when *both* of the original notes were presented to him before commencement of this action—though the first note, if still in effect, was due January 2, 1948.

Likewise pertinent to the purport of the new agreement are the views of the parties as expressed at the trial. Mr. Haws testified that he was to pay off the amount of the notes executed by respondent Angel as part of the purchase price of the business. Appellant Alexander admitted receiving the payments under the agreement from the Haws; that the agreement was executed a few days before the property was sold by respondent Angel to the Haws; that he did not at any time discuss the agreement with respondent Angel but dealt solely with a Mr. Fox, respondent's real estate agent; and that the agreement was executed because Mr. Haws "didn't want to risk his money with the possibility of foreclosure against Mr. Angel three or four months after the deal was made," pursuant to the date of the first note held against respondent Angel, January 2, 1948. Respondent Angel testified that he first learned of the agreement between the Haws and Alexanders about the time the sale was made but that he did not remember actually seeing it until about the time of the commencement of this action; and that he paid nothing on the note, assuming that Haws "was making the payments as he had agreed with Mr. Alexander."

[7,8] Where it "satisfactorily appears that a new agreement was intended by the parties to take the place of an existing one," as is the case here since the parties proceeded to act for some fifteen months in reliance solely on the substituted agree-

ment, "it necessarily follows that the old agreement has been entirely abrogated or extinguished." *Producers' Fruit Co. v. Goddard*, supra, 75 Cal.App. 737, 755, 243 P. 686, 693. In consequence of such novation, the rights and duties of the parties must be governed by the new agreement alone, and "a failure to perform [thereunder] does not, under any theory of rescission or revivor, operate to breathe new life into the dead and extinguished obligation." *Beckwith v. Sheldon*, 165 Cal. 319, 324, 131 P. 1049, 1051; *Producers' Fruit Co. v. Goddard*, supra, 75 Cal.App. 737, 756, 243 P. 686; also 66 C.J.S., *Novation*, § 22, page 710; 4 Cal.Jur. sec. 4, p. 250; *Murphy v. White*, 101 Cal.App. 719, 722, 282 P. 427; *Richardson v. Hislop*, 109 Cal.App. 440, 451, 293 P. 168.

It is true that there is some conflict in the record on the novation issue. Thus there is the testimony of appellant Alexander that when he received the payments from the Haws, he understood that they were to "be applied on Angel's [first] note"; and that while no demand was ever made upon him for the notes executed by respondent Angel, he did tell "Mr. Fox [respondent's agent] that those notes would be held and [he] could not release [them] under any circumstances." Mr. Fox was not called as a witness. Likewise appellants cite the provision in the Haws' agreement for the payment of court costs and attorney fees as "necessary in the collection of [the] notes," and argue that if a novation had been intended there would be no notes to collect, as any action would necessarily be upon the later agreement. In answer to this point, respondent Angel refers to the express allowance for the payment of such items in the original chattel mortgage, and he maintains that if the new agreement had not been intended as a substitute therefor, the provision for costs and attorney fees incident to the collection process would have been mere surplusage. These were all opposing considerations for the trial court in resolving the disputed issue at hand. Suffice it to say in this regard that from the language of the Haws' agreement itself, as well as from consideration of the subsequent acts of all the parties

here involved, the trial court could reasonably infer that there was intended the substitution of a new obligation for the existing one.

[9] As a final point of argument, appellants stress the fact that respondent Angel was not a party to the Haws' agreement. In this regard they refer to the general statement found in the discussion of a novation that the assent of all parties is necessary. 20 Cal.Jur. sec. 3, p. 248. However, such a broad generalization must be examined in the light of the various situations that may arise. Certainly no new debtor can be bound without his assent, *Colley v. Chowchilla Nat. Bank*, supra, 200 Cal. 760, 771, 255 P. 188, and no old debtor can be discharged without the creditor's consent. *Carp v. Dowdell*, 131 Cal. 495, 498, 63 P. 778; *Manfre v. Sharp*, supra, 210 Cal. 479, 482, 292 P. 465; *University of Redlands v. Ford*, 56 Cal.App. 2d 151, 152, 132 P.2d 238; see, also, 66 C.J.S., *Novation*, § 18b, pages 700-701. But wholly different considerations are presented where there is an agreement between the creditor and the new debtor, and the assent of the original debtor is not universally necessary to produce in effect the liability of a new debtor and the discharge of the original debtor. *Williston on Contracts*, Rev.Ed., Vol. VI, sec. 1870, pp. 5254-5255. In fact, in such type of novation, since it is presumably beneficial to the original debtor, no mention need even be made of the matter of his consent, *Baxter v. Chico Construction Co.*, 31 Cal. App. 492, 493-494, 160 P. 1084; *First National Bank of Santa Ana v. Kinslow*, 2 Cal.App.2d 456, 457-458, 38 P.2d 163, inasmuch as it may properly be assumed that he consents to the discharge although he still has a right of disclaimer. *Restatement of Contracts*, Vol. II, sec. 427, p. 803. Such is the case here upon the record's showing of facts and circumstances from which it could reasonably be inferred that a novation was intended at the time of the execution of the agreement between appellants and the Haws, *Murphy v. White*, supra, 101 Cal.App. 719, 722, 282 P. 427; see *Silva v. Providence Hospital of Oakland*, 14 Cal.2d 762, 773, 97 P.2d 798; *F. I.*

Somers & Sons v. LeClerc, 110 Vt. 408, 8 A.2d 663, 665; anno. 124 A.L.R. 1498, 1503, and the factor of respondent Angel's consent thereto is not a matter of doubt in view of his reliance upon such agreement to effect his discharge from his prior obligation to appellants.

[10, 11] Likewise without merit is appellants' objection to the sufficiency of respondent's pleading of a novation because there is no allegation of the consent of all the parties involved. In this connection they cite the case of *Garthofner v. Edmonds*, 74 Cal.App.2d 15, 167 P.2d 789, where a widow's agreement to pay a former obligation of herself and her deceased husband was held to be unenforceable, inasmuch as she was already obligated to pay the debt, and so there was a lack of consideration to support the later agreement. 74 Cal.App.2d at page 19, 167 P.2d 789. But in so holding, the court also discussed the purport of the successive dealings of the parties and declared that since at the time of the alleged later agreement, the husband, "one of the obligors of the original debt was then dead" he "did not and could not consent to" the new arrangement and accordingly, a valid novation was not effected. 74 Cal.App.2d at page 20, 167 P.2d at page 791. Such conclusion rests on unrealistic considerations with respect to the particular facts involved on the question of mutuality of consent, and it must be disapproved as applied to that type of novation where, as here, there is the substitution of a new debtor for the old, pursuant to the former's agreement with the creditor; and the assent of the original debtor to an arrangement for his discharge from his prior obligation, so obviously to his advantage, should be presumed or dispensed with unless he affirmatively disclaims such benefit. Accordingly, the failure of respondent Angel to allege his consent to the Haws' agreement does not invalidate the pleading of his claim that he was thereby released "from any and all liability" under his notes and effectively discharged from his previous obligation. Rather the issue of novation was squarely presented by the pleadings, the case was tried on that single proposition, and the record as above re-

viewed contains substantial evidence in support of the trial court's finding that a novation was in fact intended and effected.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



37 Cal.2d 843

In re LOEWENSTEIN'S ESTATE.

LOWELL v. KUCHEL, Controller.

L. A. 21740.

Supreme Court of California, in Bank.

Oct. 26, 1951.

As Modified on Denial of Rehearing

Nov. 19, 1951.

Proceedings in the matter of the estate of Melanie L. Loewenstein, deceased, wherein Herbert D. Lowell, as executor, etc., filed objections to report of appraiser as to the liability of the decedent's estate for inheritance tax. Thomas H. Kuchel, as controller, etc., sought to uphold the tax. The Superior Court, Los Angeles County, Otto J. Emme, J., entered an order fixing the inheritance tax and Herbert D. Lowell, executor, etc., appealed. The Supreme Court, Shenk, J., held that the son succeeded to the property pursuant to the will of his mother and that the succession was taxable.

Affirmed.

Prior opinion 230 P.2d 882.

I. Insurance ⇨585(1)

Where niece was given life interest in principal fund, and her son was to succeed her, but proviso allowed niece with written consent of uncle's legal representatives to require insurance company to pay any part or all of fund to her and legal representatives and her son signed written request and consent permitting niece to withdraw all of fund, and niece notified company of such request and consent but withdrew no funds, excluded evidence that consent agreement was not to be exercised

without son's consent and that money was to be used solely for his benefit, even if considered as part of record, did not overcome effect of contract with insurance company and the executed request and consent to withdraw fund, upon ownership of fund.

2. Insurance Ⓒ585(1)

Taxation Ⓒ866

Where niece was given life interest in principal fund, and her son was to succeed her, then to son's surviving widow or children, but proviso allowed niece with written consent of uncle's legal representatives to require insurance company to pay any part or all of fund to her and legal representatives and son signed written request and consent permitting niece to withdraw all of funds, and niece notified company of such request and consent but withdrew no funds, upon execution of request and consent all control by donor or his representatives and of contingent remaindermen terminated and niece became unqualified owner of principal fund which on her death was to be treated as part of her estate in computing inheritance tax. Revenue and Taxation Code, § 13601.

3. Taxation Ⓒ881

Statutory policy to tax every transfer made in lieu of or to avoid passing of property by will or laws of succession required rejection of construction of instrument giving niece full ownership of principal fund of a gift, executed after qualified inter vivos transfer by uncle, which would have permitted evasion of tax otherwise due on a subsequent succession. Revenue and Taxation Code, §§ 13601, 13648.

4. Gifts Ⓒ43

Completion of gift of sum of money to person is equivalent of consumption by that person of entire fund.

5. Insurance Ⓒ585(1)

Where niece was given life interest in principal fund, and her son was to succeed her, but proviso allowed niece with written consent of uncle's legal representatives to require insurance company to pay any part or all of fund to her and legal representatives, and son signed written request and consent permitting niece to with-

draw all of fund, and niece notified company of such request and consent but withdrew no funds, completed right to withdraw funds, as money on deposit to her order, was equivalent to actual withdrawal thereof.

6. Taxation Ⓒ866

By qualified gift of life interest in sum of money to person plus exercise of power to make gift to her of entire fund absolute in her lifetime, the person received a completed gift of fund which for all intents and purposes became portion of her estate, subject to inheritance tax. Revenue and Taxation Code, § 13601.

7. Taxation Ⓒ866

Where person received gift of life interest in sum of money plus power to make gift to her of entire fund absolute in her lifetime and exercised that power to obtain a completed gift, statutes, federal and state, governing taxation of gift or exercise of such power, had no pertinency on question of taxation of succession to such fund. Revenue and Taxation Code, § 13601.

8. Taxation Ⓒ881

When an absolute gift has been accomplished and a subsequent independent succession is disclosed, that succession is subject to taxing statute. Revenue and Taxation Code, § 13601.

9. Remainders Ⓒ10

Where niece was given life interest in principal fund, and her son was to succeed her, and interest was then to pass to son's surviving widow or children, but proviso, which was exercised, allowed niece to make gift absolute to herself, possible future interests were contingent upon nonexercise of power to complete gift of entire fund, and were cut off by exercise of power.

10. Taxation Ⓒ878(1)

Where niece was given life interest in principal fund and her son was to succeed her, but proviso allowed niece with written consent to make gift absolute to herself, and niece exercised this power but withdrew no funds, and niece died testate, her son succeeded to property pursu-

ant to his mother's will and succession was taxable. Revenue and Taxation Code, §§ 13601, 13648.

Frank M. Gunter, Beverly Hills, for appellant.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Morton L. Barker, Deputy Inheritance Tax Atty., Walter H. Miller and Betty Jo. Sheldon, Asst. Inheritance Tax Attys., Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from an order approving the report of the inheritance tax appraiser and fixing the amount of inheritance tax due in accordance therewith.

The appeal is presented on an agreed statement. The appellant, Herbert D. Lowell, is the executor of the last will of the decedent, Melanie L. Loewenstein. He is also her son and the sole distributee under her will.

In October 1939 Henry Meis, an uncle of Melanie, in lieu of the payment of \$68,828.54 under an insurance policy, contracted with Connecticut Mutual Life Insurance Company that the latter would retain the principal fund and pay interest earnings thereon monthly to Melanie and her husband Daniel during their lives; upon the death of the survivor to Melanie's son Herbert; then to Herbert's surviving widow or children; or if none survive to certain charitable organizations. A proviso in the contract reads that after October 14, 1940, Melanie "with the written consent of said Henry Meis, or, if he be deceased, with the written consent" of his legal representatives "may require the company to pay to her order, any portion of the amount retained, interest payments on the amount so paid thereupon to cease." If Herbert should become entitled to receive interest, at the age of 21 he could require the company to pay one-half of the amount retained, and at age 25 the whole thereof.

Henry Meis died on January 11, 1943, a resident of the state of Ohio and his estate was administered there, final distrib-

ution occurring on March 20, 1950. On October 24, 1947, pending imminency of distribution, Melanie and the Meis executors signed a "Request for and Consent to Withdrawals of Proceeds of Insurance Policy" and filed it with the company. The request and consent reads that since Melanie "desires to have the right and power to require" the company "to pay to her order from time to time such portion or all of the amount retained by said company", and the son Herbert and the executors of Meis "are agreeable to such payments" and "join in this agreement for the purpose of giving their written consent to such payments", Melanie, with the written consent of the executors and Herbert, "does hereby request and require" the company "to pay to her all or any portion of the amount retained", payments to be made at any time she may desire; and Herbert and the executors authorize the payment without any further consent on their part.

No further request was made by Melanie and no portion of the contract principal was actually paid to her. She died a resident of this state on February 17, 1949, her husband having predeceased her. The value of the distributable estate, including the contract principal of \$68,828.24, amounts to \$166,101.64. The court's order fixed an inheritance tax of \$7,777.11 on the transfer to Herbert of the whole thereof after deduction of the statutory exemption. Herbert objected to the inclusion of the value of the income contract in the taxable estate transferable to him on the ground that the contract was purchased with funds of Henry Meis, and that the transfer of those funds was effected during the lifetime of Henry Meis pursuant to the income contract and was taxable solely in the course of administration of his estate. The respondent state controller has sought to uphold the questioned portion of the tax on the ground that a transfer from Melanie resulted from her completed ownership of the fund pursuant to the request for and consent to withdrawal. The court overruled Herbert's objections and found that pursuant to the contract and to the request and consent the parties accomplished a

transfer to Melanie of the absolute ownership of the contract fund. It was thereupon concluded in effect that an interest passed to Herbert under the will of Melanie which was a succession subject to the tax. Sec. 13601 Rev. and Tax.Code.

[1] The agreed statement recites that evidence was offered by Herbert as to the parties' intention in executing the request and consent and as to representations by Melanie that no withdrawals would be made by her except on his further express request and consent and that in each instance the moneys would be received by her solely for his account and use. The court excluded this evidence. It is contended that the evidence should have been received to show that no actual change in ownership was intended by the request and consent in the absence of subsequent actual withdrawal of funds. If the evidence be considered as if in the record, insofar as the subject-matter here involved is concerned, it could not overcome the clear effect of the contract and the executed request and consent to withdrawal of the fund.

We are not here construing the language of a statute. We are concerned with executed instruments dealing with transfers of ownership of property in order to determine the legal effect for tax purposes. If the effect of the instruments is as found and concluded by the probate court the order properly fixed the tax.

[2] There was nothing in the contract to prevent Melanie's withdrawal of the entire fund with the consent of the Meis executors. She so requested and they consented. The consent of Herbert or of any other appointee under the contract was not made a prerequisite to Melanie's exercise of the power to withdraw the fund. Prior to the exercise of that power the gift to her was qualified and limited. The execution of the request and consent completed the gift to her. She thereby obtained unqualified ownership of the principal fund, or the equivalent attributes of ownership which here must be deemed controlling. See *In re Estate of Newton*, 35 Cal.2d 830, 835, 221 P.2d 952. Upon the execution of the request and consent all control by Meis or

his representatives and of contingent remaindermen was terminated. Thereby in legal effect Melanie became the owner of the fund as fully as though it were on deposit to her account in a bank. It became a fund on deposit to her order with the insurance company and as such a part of her estate. Cf. *Fisher v. Ludwig*, 6 Cal. App. 144, 91 P. 658.

[3-5] Section 13648 of the Revenue and Taxation Code declares the intent and purpose to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession. The policy inherent in that expressed intent and purpose also requires the rejection of a dubious construction of the instrument, executed after the inter vivos transfer by Meis, which would permit the evasion of a tax otherwise due on a subsequent succession. Other property concepts relied upon by the appellant do not prevent the determined effect of that instrument. It is urged that the contract be viewed as bestowing on Melanie a life estate with power to consume the corpus, cf. *In re Estate of Rath*, 10 Cal. 2d 399, 75 P.2d 509, 115 A.L.R. 836; *Lord v. Atchison*, 12 Cal.2d 681, 686, 87 P.2d 346, the unconsumed portion remaining subject to the contract. This theory overlooks the fact that in legal contemplation the completion of the gift to Melanie is the equivalent of the consumption by her of the entire fund. It may not be contended that sums actually withdrawn and unexpended on her death would not be subject to the taxing statute. It follows that the completed right to withdraw the fund, as money on deposit to her order, is equivalent to the actual withdrawal thereof.

[6-8] The same answer disposes of the contention that the exercise of the right to withdraw the fund was the exercise of a power of appointment, and that on the facts under the statute only the gift of that power was taxable. The contention might apply if Melanie received the gift of a life estate with the power to appoint Herbert as the person to take on its termination. Cf. *In re Estate of Newton*, supra, 35 Cal.2d 830, 221 P.2d 952. But that is not the legal effect here. By the gift of a life estate to

Melanie plus the exercise of the power to make the gift to her of the entire fund absolute in her lifetime, Melanie received a completed gift of the fund which for all intents and purposes became a portion of her estate. The state is not here taxing either the exercise or the non-exercise of that donated power; and whatever taxability was involved in the gift of the power, or the exercise or non-exercise thereof, is outside the domain of consideration. Therefore statutes, either federal or state, governing the taxation of the gift or the exercise of such powers, have no pertinency. When as here an absolute gift has been accomplished and a subsequent independent succession is disclosed, that succession is subject to the taxing statute.

[9] The further assertion that the trust could not be terminated without the consent of the remaindermen, some perhaps not yet in being, assumes only one possible method of termination. The contract provided otherwise, so that possible future interests were contingent upon the non-exercise of the power to complete the gift of the entire fund. Cf. *In re Estate of Madison*, 26 Cal.2d 453, 465, 159 P.2d 630; *Bixby v. California Trust Co.*, 33 Cal.2d 495, 497, 202 P.2d 1018; *Childs v. Gross*, 41 Cal.App.2d 680, 693, 107 P.2d 424. As noted, that power was exercised.

[10] The tax imposed is one on the privilege of succession. In *re Estate of Barter*, 30 Cal.2d 549, 556, 184 P.2d 305 and cases cited. The probate court correctly concluded that Herbert succeeded to the property on the death of and therefore pursuant to the will of Melanie, and that the succession is taxable as determined by the order. The foregoing is not intended, however, to dispose of contentions that certain items of deductions in the inheritance tax report are miscomputed as relating to a transfer inter vivos. If there are such miscomputations the affirmance herein is not to be deemed to preclude a recomputation to accord with the views expressed herein.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

PEOPLE v. COEFIELD.

Cr. 5198.

Supreme Court of California, in Bank.

Oct. 26, 1951.

Rehearing Denied Nov. 19, 1951.

William Thomas Coefield was convicted in the Superior Court, Alameda County, Charles Wade Snook, J., of murder of the first degree and from the judgment of conviction and death sentence and order denying a new trial, an appeal was automatically taken under statute. The Supreme Court, Gibson, C. J., held that the evidence sustained conviction of murder of the first degree committed in connection with conduct intended to facilitate escape after robbery of a liquor store and that evidence that defendant had participated in three other similar liquor store robberies within a month of the homicide was admissible as part of state's case in chief to show a common scheme and intent to rob.

Judgment and order affirmed.

1. Homicide $\S$ 253(6)

Evidence sustained conviction of murder of the first degree under statute making all murder committed in the perpetration or attempt to perpetrate robbery or other specified crimes murder of the first degree. Pen. Code, $\S$ 189.

2. Homicide $\S$ 18(5)

Where one enters a place with a deadly weapon for the purpose of committing robbery, malice is shown by the nature of the attempted crime and the law fixes upon offender the intent which makes any killing in the perpetration or attempt to perpetrate the robbery a murder of the first degree. Pen. Code, $\S\S$ 187, 189.

3. Homicide $\S$ 18(5)

A killing committed in connection with conduct intended to facilitate escape after robbery and as part of one continuous transaction constituted "murder of the first degree" under statute, regardless of whether the killing was done intentionally or accidentally. Pen. Code, $\S$ 189.

See publication Words and Phrases, for other judicial constructions and definitions of "Murder of the First Degree".

4. Homicide ⚡289

In prosecution for murder committed in connection with conduct intended to facilitate escape after robbery of liquor store, instructing jury that the only criminal intent which prosecution had to show was a specific intent to rob the clerk who was killed and that proof of a deliberate or premeditated killing or any intent to kill was unnecessary was not error. Pen.Code, § 189.

5. Criminal Law ⚡369(2)

Evidence which tends logically, naturally and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense is admissible, even though it embraces the commission of another crime, regardless of whether it is part of a single design.

6. Criminal Law

⚡365(1), 369(1, 2), 370, 371(1, 12), 372(1)

Defendant can be tried for no other offense than that with which he is charged in the indictment or information and evidence of collateral independent crimes is inadmissible, except that evidence of other crimes may be admitted where it tends directly to establish the crime charged by proving a material fact, where it is part of the *res gestæ*, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme.

7. Criminal Law ⚡372(4)

Homicide ⚡235

Where defendant pleaded not guilty to charge of murder of the first degree committed in connection with conduct intended to facilitate escape after robbery of a liquor store, it was incumbent on the prosecution to establish the element of intent to rob beyond a reasonable doubt and as part of such proof it was proper to show that the robbery in connection with which the murder was committed was part of a common scheme, design, or plan to commit robberies and then make escape easier by rendering victims unconscious. Pen.Code, § 189.

8. Criminal Law ⚡371(4), 372(4)

Where defendant pleaded not guilty to charge of murder of the first degree committed in connection with conduct intended

to facilitate escape after robbery of a liquor store, evidence that defendant had participated in three other liquor store robberies within a month of the homicide, in view of the striking similarity in the methods of operation, was admissible to show a common scheme and intent to rob regardless of whether the other offenses were committed before or after the murder for which defendant was on trial, and even though there was other evidence to prove the same matter, including defendant's previous admission to district attorney that he had participated in the robbery resulting in the killing. Pen.Code, § 189.

9. Criminal Law ⚡682

Where defendant pleaded not guilty to charge of murder of the first degree committed in perpetration of a liquor store robbery, proof of intent to rob was a proper part of the state's case in chief, and hence admitting as part of the prosecution's case in chief evidence that defendant had participated in three similar liquor store robberies within a month of the homicide instead of reserving such evidence for possible use on rebuttal was not error, even if the state had reason to anticipate that defendant testifying on his own behalf would admit his participation in the robbery. Pen.Code, § 189.

10. Criminal Law ⚡823(1)

Instructing jurors that sympathy for defendant should not influence their verdict in prosecution for murder of the first degree without also telling them that sympathy for victim of homicide should likewise not affect their verdict was not prejudicial error in view of other instructions. Pen.Code, § 189.

Robert H. Kroninger, Oakland, and Harold C. Faulkner, San Francisco, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., Folger Emerson, Asst. Dist. Atty., Vernon L. Goodin, Deputy Dist. Atty., all of Oakland, for respondent.

GIBSON, Chief Justice.

Defendant was charged by information with the murder of Melvin Tokus. A jury

found him guilty of murder of the first degree and made no recommendation as to punishment. See Pen.Code, § 190. Defendant's plea of not guilty by reason of insanity was withdrawn, his motion for a new trial was denied, and the death penalty was imposed. This appeal is automatic under section 1239(b) of the Penal Code.

On the evening of October 7, 1949, defendant and two other men, Jolby and Anderson, met and agreed to rob the Three Point Liquor Store in Oakland and planned the part each of them was to play. Defendant and Jolby, who were both armed, entered the store shortly after midnight when no customers were on the premises. Anderson remained outside temporarily, apparently acting as lookout, and then followed his companions into the store. In the meantime, defendant asked for two bottles of wine and when they were brought by Tokus, the clerk, defendant announced that it was a "stickup" and directed Tokus to place the store's money in a paper bag and give it to Anderson. Jolby disarmed the store's watchman and Tokus and the watchman were then ordered into a back room and robbed of their wallets. To aid in making an escape, defendant struck Tokus on the head with his gun and knocked him to the floor, and Jolby struck the watchman several blows on the head with his gun. Tokus started to rise, and defendant struck him again on the head. At that moment the gun discharged, and the bullet entered Tokus' brain, causing his death. After the shot, defendant removed a wristwatch from Tokus' arm, and the robbers left the store and drove to San Francisco, where they divided the proceeds of the robbery.

Defendant took the stand in his own behalf and admitted that he entered the store with a gun for the purpose of robbery and told the clerk it was a "stickup," that he and Jolby forced Tokus and the watchman into the back room where he took Tokus' wallet, that he struck Tokus on the head with his gun, knocking him down, and struck him again when he started to rise, and that he hit Tokus on the head for the purpose of "knocking him out" to permit escape after the robbery, and took

the wristwatch after the shooting. Defendant stated that he heard a shot when he struck Tokus the second time but did not know he had shot Tokus, that he was holding the gun by the handle but his finger was not on the trigger and he did not pull it, and that he did not intend to discharge the gun or kill anybody.

[1-4] The evidence is clearly sufficient to support the verdict of murder in the first degree in view of the provisions of section 189 of the Penal Code that "All murder * * * which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree." Defendant argues that it must first be shown that there was a *murder*, not merely a killing, and that to have a murder there must be a malicious killing and an intent to kill. See Pen.Code, § 187. It has been held, however, that when one enters a place with a deadly weapon for the purpose of committing robbery, malice is shown by the nature of the attempted crime, and the law fixes upon the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder of the first degree. *People v. Bostic*, 167 Cal. 754, 760-761, 141 P. 380; see *People v. Milton*, 145 Cal. 169, 171-172, 78 P. 549; *People v. Olsen*, 80 Cal. 122, 126-127, 22 P. 125. Other cases have pointed out that such a killing is murder of the first degree by force of section 189 of the Penal Code, regardless of whether it was intentional or accidental. *People v. Valentine*, 28 Cal. 2d 121, 135, 169 P.2d 1; *People v. Lindley*, 26 Cal.2d 780, 791, 161 P.2d 627; *People v. Boss*, 210 Cal. 245, 249, 290 P. 881; *People v. Denman*, 179 Cal. 497, 498, 177 P. 461. Here, as we have seen, the evidence, including defendant's own testimony, shows that the killing was committed in connection with conduct intended to facilitate escape after the robbery and as part of one continuous transaction; accordingly, it constituted murder of the first degree by the terms of the statute. See *People v. Chavez*, 37 Cal.2d 656, 234 P.2d 632; *People v. Rye*, 33 Cal.2d 688, 692-693, 203 P.2d 748; *People v. Boss*, *supra*, 210 Cal. at pages 250-252, 290 P. 881. In such a case the

jury has no option but to return a verdict of murder of the first degree, whether the killing was done intentionally or accidentally. *People v. Perry*, 195 Cal. 623, 638, 234 P. 890; *People v. Witt*, 170 Cal. 104, 108, 148 P. 928. It follows that it was not error to instruct the jury that the only criminal intent which the prosecution had to show was a specific intent to rob Tokus and that it was not required to prove a deliberate or premeditated killing or to prove any intent to kill. *People v. Milton*, 145 Cal. 169, 169-172, 78 P. 549; See *People v. Denman*, 179 Cal. 497, 498-499, 177 P. 461; *People v. Boss*, 210 Cal. 245, 249-250, 290 P. 881.

The prosecution was permitted to present evidence that defendant had participated in three other liquor store robberies within a month of the homicide. There was testimony that on two prior occasions defendant and an accomplice robbed a certain liquor store in Emeryville at about two o'clock in the morning. In both instances the clerk was ordered into a back room where defendant hit him on the head with a gun. The third robbery took place in Sacramento on the night after the homicide. The owner testified that defendant, Jolby and Anderson entered his store, took his money and told him to go to the basement, that Jolby struck him two or three times on the head with a gun, and that the gun then discharged and the bullet went through Jolby's hand and the witness' knee. Defendant complains that the evidence was not admissible because it related to crimes for which he was not on trial.

[5,6] It is well settled that if evidence in a criminal case tends logically, naturally and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense, it is admissible whether it embraces the commission of another crime or not and whether it be part of a single design or not. *People v. McMonigle*, 29 Cal.2d 730, 742, 177 P.2d 745; *People v. Peete*, 28 Cal.2d 306, 315, 169 P.2d 924; *People v. Sanders*, 114 Cal. 216, 230, 46 P. 153. As stated in *People v. Albertson*, 23 Cal.2d 550, 576, 145 P.2d 7, 20: "The general rule, universally recognized, is that in

a criminal prosecution the defendant can be tried for no other offense than that which he is charged in the indictment or information; evidence of collateral independent crimes is not admissible. [Citations.] The equally well-recognized exceptions to this rule are clearly defined. Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the *res gestae*, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme."

[7,8] Under the theory of the prosecution, the fact that defendant was engaged in a robbery was a material element of the crime of murder of the first degree. Since defendant had pleaded not guilty, it was incumbent on the prosecution to establish the element of intent to rob beyond a reasonable doubt, and as part of the proof it was proper to show that the Three Point robbery was part of a common scheme, design or plan to commit robberies and then make escape easier by rendering the victims unconscious. See *People v. Arnold*, 199 Cal. 471, 486-487, 250 P. 168; *People v. McMonigle*, 29 Cal.2d 730, 743-744, 177 P.2d 745; *People v. King*, 13 Cal. 2d 521, 527-528, 90 P.2d 291; *People v. Thorne*, 10 Cal.2d 705, 707-708, 76 P.2d 491; cf. *People v. David*, 12 Cal.2d 639, 647, 86 P.2d 811. In view of the striking similarities in the method of operation, the evidence was clearly admissible. In each instance the place robbed was a liquor store, the robbery was committed in the late evening or early morning, a gun was used to intimidate the victim, who was forced into a back room or basement away from public view, and the victim was struck on the head with the gun to render him unconscious and permit the robbers to escape. Since the evidence was relevant on the question of common scheme and intent to rob, it was admissible whether the other offenses were prior or subsequent. *People v. Weir*, 30 Cal.App. 766, 767, 159 P. 442; *People v. Zimmerman*, 11 Cal.App. 115, 118, 104 P. 590; cf. *People v. Dabb*, 32 Cal.2d 491, 500, 197 P.2d 1.

[9] Defendant claims that the evidence should not have been admitted because there was other proof of defendant's participation in the robbery. He also complains that the evidence should not have been presented as part of the prosecution's case in chief, but should have been reserved for use as possible rebuttal, because defendant had made a previous statement to the district attorney in which he admitted that he participated in the Three Point robbery and that a killing resulted. The evidence was relevant, and under all the circumstances the court did not err in admitting it even though there was other evidence to prove the same matter. See *People v. McMonigle*, 29 Cal.2d 730, 742, 177 P.2d 745; *People v. Jackson*, 36 Cal.2d 281, 285, 223 P.2d 236. Nor was there any duty on the part of the prosecution to withhold the evidence for possible use on rebuttal, since proof of intent to rob was a proper part of the state's case in chief and was admissible even if the state had some reason to anticipate that the defendant would take the stand and admit his participation in the Three Point robbery.

[10] Defendant's final contention is that it was prejudicial error for the court to instruct the jurors that the people had a right to have the law properly executed and that sympathy for defendant should not influence their verdict without also telling them that sympathy for the decedent should likewise not affect their verdict. The instruction complained of, however, does not unduly stress the duty to disregard sentiment for the accused, and the jury was elsewhere instructed to consider the case without regard to sympathy, prejudice or bias for or against anyone involved in the case.

The judgment and order denying a new trial are affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance but I do not agree with the holding in the majority opinion that evidence of the other robberies alleged to have been committed

by the defendant was admissible under any sound legal theory, and such holding is clearly contrary to the holding of this court in the recent case of *People v. Newsom*, 37 Cal.2d 34, 230 P.2d 618.

I have heretofore expressed my view with respect to the admission of evidence of crimes other than that which is charged against the defendant and for which he is being tried, and the majority holding in the case at bar on this issue is clearly contrary to the settled rule in all common-law jurisdictions. See dissent *People v. Dabb*, 32 Cal.2d 491, 501, 197 P.2d 1; *People v. Westek*, 31 Cal.2d 469, 483, 190 P.2d 9; *People v. Peete*, 28 Cal.2d 306, 322, 169 P.2d 924.

In the case at bar, however, I think there is little doubt but that the jury would have returned the same verdict had the erroneously admitted evidence of other crimes been excluded, and therefore the admission of such evidence in this case cannot be said to have been prejudicial to the defendant. For this reason, I concur in the judgment of affirmance.

Rehearing denied; CARTER, J., dissenting.



37 Cal.2d 876

Ex parte McINTURFF.

McINTURFF v. PEOPLE.

Cr. 5233.

Supreme Court of California, in Bank.

Oct. 26, 1951.

Rehearing Denied Nov. 19, 1951.

Robert C. McInturff brought habeas corpus proceedings to secure his release from prison. The Superior Court of Sacramento County, Raymond T. Coughlin, J., entered a judgment in favor of the petitioner, and the People of the State of California appealed. The Supreme Court, Schauer, J., held that writ of habeas corpus was not available, after final judgment of conviction and sentence, to review trial court's erroneous refusal to certify the defendant to the Youth Authority as

required by Welfare and Institutions Code as in effect in 1943.

Judgment reversed.

Carter, J., dissented.

Prior opinion 230 P.2d 443.

1. Infants ☞69

The provisions of section of Welfare and Institutions Code that until January 1, 1946, specified persons convicted of a public offense should be committed to the Youth Authority, were mandatory. Welfare and Institutions Code, § 1731.5.

2. Infants ☞69

Where one, who was convicted of first degree robbery, was 18 years of age at time of his apprehension for such offense, when he came before trial court for sentence in May, 1943, court was required to grant his request when he asked to be referred to the Youth Authority. Welfare and Institutions Code, § 1731.5.

3. Habeas Corpus ☞4

If question sought to be presented in habeas corpus proceeding could have been but was not presented by appeal from conviction, ordinarily habeas corpus should not lie.

4. Habeas Corpus ☞9

Relief can be granted in habeas corpus proceeding to a person held under sentence to an institution or custodian other than the one authorized by law.

5. Habeas Corpus ☞30(3)

Relief can be given in habeas corpus proceeding to one on whom wrong type of sentence has been imposed.

6. Habeas Corpus ☞29

Relief can be given in habeas corpus proceedings to one whose commitment for punishment as a habitual criminal has been founded on facts which, as a matter of law, do not admit of such punishment.

7. Habeas Corpus ☞30(3), 50

Writ of habeas corpus may be used to discharge one whose sentence for a term of years is longer than that authorized by law, if the valid portion of the sentence has expired.

8. Habeas Corpus ☞30(3)

Writ of habeas corpus was not available after final judgment of conviction and sentence to review erroneous refusal of trial court in first degree robbery prosecution of 18 year old defendant, to certify defendant to the Youth Authority as required by statute then in force. Welfare and Institutions Code, § 1731.5.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Clarence A. Linn and Gail A. Strader, Deputy Attys. Gen., for appellant.

Oscar A. Kistle, Public Defender of Sacramento, and Thomas W. Olson, Jr., Asst. Public Defender of Sacramento, for respondent.

SCHAUER, Justice.

The superior court, in this habeas corpus proceeding, determined that petitioner was unlawfully confined in the state prison at Folsom and ordered that he be discharged. The People appeal. The question is whether the writ of habeas corpus is available, after final judgment of conviction and sentence, to review the trial court's erroneous refusal to certify petitioner to the Youth Authority. We have concluded that the writ cannot be used for this purpose.

Petitioner is confined under a judgment of conviction of first degree robbery. At the time of his apprehension for the offense petitioner was 18 years of age. When he came before the trial court for sentence in May, 1943, that court denied petitioner's request to be referred to the Youth Authority and sentenced him to state prison for the term prescribed by law.

[1] The Youth Authority Act as it read at the time petitioner committed the crime and at the time he was sentenced provided, "a court shall commit to the Authority any person convicted of a public offense whom the Authority believes can be materially benefited by the procedure herein provided for, and for whose care and maintenance there exists, in the opinion of the Authority, proper and adequate facilities, and who (a) Is found to be less than 23 years of age

at the time of apprehension (b) Is not sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine." (Welf. & Inst. Code, § 1731.5; Stats.1941, p. 2526.) It was mandatory that the trial court certify youthful offenders who came within the terms of subdivisions (a) and (b) of section 1731.5 to the Authority for its determination whether it would accept commitment of such offenders. Refusal to certify such offenders could be corrected by appeal. (People v. Ralph (1944), 24 Cal.2d 575, 583, 150 P.2d 401.)¹

Pursuant to the decision in People v. Ralph, the trial court certified Ralph to the Youth Authority. That body refused to accept him, and the trial court then ordered that he "remain in the custody of the warden of San Quentin State Prison." Ralph was not present when the quoted order was made. Apparently misapprehending the effect of our decision and the trial court's orders, Ralph sought habeas corpus; he complained that the trial court was without authority to make the quoted order in his absence. We pointed out (In re Ralph (1946), 27 Cal.2d 866, 867, 168 P.2d 1) that Ralph's "whole contention on the appeal related not to the legality of the judgment of conviction or to the sentence of imprisonment as such but only to the identity of the penal authority into whose custody he should be committed," and we held: [27 Cal.2d at page 870, 168 P.2d at page 3] "[I]t is the judgment of conviction and sentence which constitute the basis for commitment either to prison (formerly in the custody of the warden, now in the custody of the Director of Corrections (Pen.Code, § 1202a; Stats. 1945, ch. 91, § 1)) or to the Youth Authority (Welf. & Inst. Code, § 1731.5) * * * [C]ommitment to the Youth Authority can be only tentative, discretion to accept or

reject^a a defendant being vested in the Authority. The effect of our decision upon the appeal was merely to tentatively suspend commitment of the defendant to the state prison dependent upon action by the Youth Authority. Following rejection of defendant by such Authority, the original sentences could properly be carried out, and the trial court's orders * * * [re-sentencing defendant] are to be regarded as merely commitments to prison made pursuant to the previously pronounced sentences. Such commitments do not constitute new or different judgments or sentences against defendant and consequently his presence was not required at the time they were made."

Petitioner relies upon In re Rugland (1947), 80 Cal.App.2d 316, 317, 181 P.2d 923. There, as here, a trial court had erroneously refused to certify a youth to the Authority at a time when section 1731.5 of the Welfare and Institutions Code required it to do so. Without mentioning the problem of whether the remedy of habeas corpus was available, the District Court of Appeal ordered that "The causes are * * remanded to the [trial court] * * * with directions to commit petitioner to the Youth Authority."² As petitioner points out, Rugland was less than 25 years of age at the time of the decision on habeas corpus, and was, therefore, a person who was still a possible subject for restraint by the Youth Authority. But when a youth whose custody the Authority has accepted becomes 25, the Authority must either discharge him or, if it believes him dangerous and the maximum term prescribed by law for his offense has not expired, it may ask the committing court to put him on probation or send him to state prison. (Welf. & Inst. Code, §§ 1771, 1780-1782.) Petitioner here is more than 25 years of age. Therefore,

1. Certification to the Authority is not mandatory at the present time. Since 1945, St.1945, p. 1466, section 1731.5 has provided that the court "may refer" certain youthful offenders to the Authority; the Authority, if it decides to accept them, "shall so certify" to the court; and the court "shall thereupon commit said person to the Authority." Abuse of the trial court's discretion, as shown by its

use of the wrong criteria in determining whether a defendant should be referred to the Authority, can be reviewed on appeal. (People v. Walker (1947), 82 Cal.App.2d 193, 202, 185 P.2d 842.)

2. This "commitment" would be tentative, in the sense that the Authority did not have to accept Rugland. (People v. Ralph (1944), supra; In re Ralph (1946), supra.)

he says, he can no longer be subject to any action of the Youth Authority and he must be discharged. The question as to possible merit or lack of merit of this argument, in its latter aspect, we do not reach because, for reasons hereinafter stated, we cannot agree with the Rugland assumption that habeas corpus is available to review the erroneous failure to certify to the Youth Authority.

[2] Petitioner characterizes the failure to certify him to the Youth Authority as "jurisdictional." It is true that the trial court was authorized by law to do only one thing when petitioner asked to be referred to the Youth Authority and that thing was to grant his request. In such a situation unauthorized action may be "jurisdictional" in the sense that, if the circumstances are otherwise appropriate, the writ of prohibition may issue to prevent it, or the writ of certiorari to annul it. (*Abelleira v. District Court of Appeal* (1941), 17 Cal.2d 280, 291, 109 P.2d 942, 132 A.L.R. 715.) But not every failure to proceed in the manner required by law is "jurisdictional" even in the broad sense in which the word is used when the availability of prohibition or certiorari is under consideration. (See *Redlands, etc., School Dist. v. Superior Court* (1942), 20 Cal.2d 348, 360, 125 P.2d 490.) And the development of habeas corpus has been independent of that of certiorari and prohibition. The broadened uses of habeas corpus have been rationalized by expressly expanding the situations in which it is available to review matters over which the trial court had "jurisdiction," rather than by expanding the concept of "jurisdiction." (See *In re Bell* (1942), 19 Cal.2d 488, 493-494, 122 P.2d 22; *In re McVickers* (1946), 29 Cal.2d 264, 273, 176 P.2d 40; *In re Seeley* (1946), 29 Cal.2d 294, 296, 176 P.2d 24.) Therefore, no useful purpose would be served by discussion of whether the error here was "jurisdictional" or "mere."

[3-7] Where, as here, the petitioner is held under a judgment which has become final, and there is no lack of jurisdiction in the strict sense and no constitutional question, the following considerations are pertinent to the determination whether relief

by habeas corpus is available: If the question sought to be presented could have been and was not presented by appeal, ordinarily habeas corpus should not lie. (See *In re Connor* (1940), 16 Cal.2d 701, 706, 108 P.2d 10.) Without this usual limitation of the use of the writ, judgments of conviction of crime would have only a semblance of finality. But there are some situations where habeas corpus can be used to give the relief sought without going behind the judgment of conviction and without opening up questions of fact which are difficult of solution. For example, relief can be given to a person held under sentence to an institution or custodian other than the one authorized by law (*In re Wilson* (1925), 196 Cal. 515, 525, 238 P. 359; *Pen.Code*, §§ 1485, 1487, subd. (5), 1493, 1501), to one upon whom the wrong type of sentence has been imposed (*In re Lee* (1918), 177 Cal. 690, 696, 171 P. 958 [indeterminate sentence imposed when petitioner should have been sentenced to a fixed term; petitioner remanded for sentence]), and to one whose commitment for punishment as an habitual criminal has been founded upon facts which as a matter of law do not admit of such punishment (*In re McVickers* (1946), *supra*, 29 Cal.2d 264, 274, 176 P.2d 40; *In re Seeley* (1946), *supra*, 29 Cal.2d 294, 303, 176 P.2d 24). Also, and similarly, the writ may be used to discharge one whose sentence for a term of years is longer than that authorized by law, where the valid portion of the sentence has expired (see *In re Morck* (1919), 180 Cal. 384, 181 P. 657).

In each of these instances determinations which were unauthorized by law and which affected punishment were corrected by habeas corpus, but each instance was one where the determination could be corrected by this court (or the trial court at its direction) to accord with the only other possible determination in the circumstances. In the present case the unauthorized determination (that petitioner should not be referred to the Youth Authority) was one which might or might not have affected punishment. At this late date we cannot presume (as discharging petitioner would, in effect, require us to presume) that had

petitioner been referred to the Youth Authority that body would have found that he was a proper subject for its control and that it had facilities to accept him, and that the Authority would have discharged him when or before he reached the age of 25 years. Nor do we think it proper to require that petitioner be retroactively certified to the Authority for that body's speculative determination as to what it would have done had petitioner been referred to it at the proper time. To reopen to speculative review the cases of prisoners who were not referred to the Authority during the period when such referral was both mandatory and possible, whether or not those prisoners are now of such age that they could be subject to control of the Authority, would not accord with the general principle of finality of judgments. For the reasons above stated, *In re Rugland* (1947), supra, 80 Cal.App.2d 316, 317, 181 P.2d 923, is disapproved.

In accord with our position here is the position taken in the following cases which considered the effect of the trial court's failure to comply with the requirement of the juvenile court law that defendants under a certain age be certified to the juvenile court for its determination whether they should be proceeded against as juveniles or tried as adults: *In re Tom* (1911), 17 Cal.App. 678, 680, 121 P. 294; *People v. Oxnam* (1915), 170 Cal. 211, 217-218, 149 P. 165; *In re Northon* (1917), 35 Cal.App. 369, 371, 169 P. 1051; *In re Wolff* (1920), 183 Cal. 602, 192 P. 33; *People v. Barbera* (1926), 78 Cal.App. 277, 279, 248 P. 304; *In re Downs* (1928), 95 Cal.App. 571, 573, 273 P. 143; *People v. Luzovich* (1932), 127 Cal.App. 465, 468, 16 P.2d 144; *People v. Sanchez* (1942), 21 Cal.2d 466, 471, 132 P.2d 810. The cases of *In re Tassey* (1927), 81 Cal.App. 287, 293, 253 P. 948; *In re Bastiani* (1927), 81 Cal.App. 294, 253 P. 951; and *In re Gutierrez* (1934), 1 Cal.App.2d 281, 287, 36 P.2d 712, indicate that habeas corpus may be used, after final judgment of conviction, to correct an erroneous refusal to certify to the juvenile court. To the extent that they so indicate, such cases are inconsistent with

the group of cases last hereinabove cited and, in view of the conclusion we have reached, they are disapproved.

[8] For the reasons above stated, the order that the writ be granted and petitioner discharged is reversed, and the cause is remanded with directions to the superior court to enter its order discharging the writ and remanding petitioner to custody.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

SPENCE, J., concurs in the judgment.

CARTER, Justice.

I dissent.

The majority opinion holds that habeas corpus is not the proper remedy where a person is in the custody of the wrong person or institution. It mentions various possible reasons for that holding, such as an adequate remedy by appeal, and that every failure of a court to proceed in the manner required by law is not an act in excess of its jurisdiction, that habeas corpus has been expanded to give relief where the question is not jurisdictional, but not to the point of enlarging the concept of jurisdiction. It does not base its holding on any of those grounds, however, for it concedes that the writ is available where a person is held under a sentence to a custodian other than the one authorized by law, *In re Wilson*, 196 Cal. 515, 238 P. 359, where the wrong kind of sentence is imposed, *In re Lee*, 177 Cal. 690, 171 P. 958, and where a person is improperly confined as an habitual criminal, *In re McVickers*, 29 Cal.2d 264, 176 P.2d 40; *In re Seeley*, 29 Cal.2d 294, 176 P.2d 24, and then concludes that no effective relief can now be given to petitioner because he is over 25 years and we cannot know what the Youth Authority would have done if he had been placed under their jurisdiction by the court.

It is conceded that it was the mandatory duty of the trial court to commit petitioner to the authority. It had no power to do otherwise. In essence, its order of com-

mitment was a mere ministerial act, for it had no choice in the matter. There is nothing, however, in the law that prevents an effective correction of the court's action in habeas corpus proceedings as was done in the cases above cited. The law provided: "A court shall commit to the Authority any person convicted of a public offense whom the Authority believes can be materially benefited by the procedure herein provided for, and for whose care and maintenance there exists, in the opinion of the Authority, proper and adequate facilities, and who

"(a) Is found to be less than 23 years of age at the time of apprehension.

"(b) Is not sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine." (Welf. & Inst. Code, § 1731.5. Petitioner was less than 23 years when he was apprehended. Therefore, he still qualifies even though he is now over 25. This court need not speculate what the authority would have done with petitioner because he can now be committed to the authority for its action, but as he is over 25 the authority may either discharge him (Welf. & Inst. Code, § 1771) or "If the date of discharge occurs before the expiration of a period of control equal to the maximum term prescribed by law for the offense of which he was convicted, and if the Authority believes that unrestrained freedom for said person would be dangerous to the public, the Authority shall petition the court by which the commitment was made." (Welf. & Inst. Code, § 1780.) The court which hears the petition may discharge the prisoner, admit him to probation, or commit him to prison as prescribed by the statute. (Welf. & Inst. Code, §§ 1781-82.) The authority is still in a position to ascertain from the previous and present custodians of petitioner matters to guide its disposition of his case and he should be afforded the right to have his case considered by it.

I would therefore grant relief to the extent of requiring that petitioner be committed to the Youth Authority for whatever determination it may see fit to make, under the law, as to his future custody.

Ex parte DAVIS.

Cr. 5222.

Supreme Court of California, in Bank.

Oct. 26, 1951.

As Amended Nov. 1, 1951.

Bruce Davis brought habeas corpus proceedings to secure his release from confinement. The Supreme Court, Schauer, J., held that petitioner was not entitled to writ of habeas corpus on ground that he had been arbitrarily arrested while on probation and his probation revoked without notice, in absence of allegation or showing that order of revocation was arbitrary.

Application for habeas corpus denied.

Carter, J., dissented in part.

1. Habeas Corpus ⇨30(3)

Writ of habeas corpus was not available to review erroneous refusal of trial court in forgery prosecution of 18 year old defendant, to certify defendant to Youth Authority as required by the Welfare and Institutions Code. Welfare and Institutions Code, § 1731.5.

2. Criminal Law ⇨982

There is neither a constitutional nor statutory right to notice and hearing preceding revocation of probation.

3. Criminal Law ⇨1134(10)

If order of revocation of probation is made in a case where imposition of sentence has been suspended, validity of order can be reviewed on appeal from ensuing judgment of conviction.

4. Criminal Law ⇨987

A judgment of conviction after order of revocation of probation is made in a case where imposition of sentence had been suspended, can be pronounced only after defendant is present and arraigned. Pen. Code, § 1200.

5. Habeas Corpus ⇨30(3)

If order of revocation of probation is made in a case in which judgment of conviction had been entered, its validity can be reviewed by habeas corpus, which should first be sought from revoking court.

6. Habeas Corpus ⇨30(3)

Where one who claimed that while on probation after conviction of forgery, he

was arrested arbitrarily, did not allege or show that order of revocation was arbitrary, but only that it was made without giving of notice to him, was not entitled to discharge in habeas corpus proceedings.

Bruce Davis, in pro. per., and C. K. Curtright, Sacramento, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Petitioner, by application for the writ of habeas corpus, asks that we declare that his confinement under a 1944 judgment of conviction of forgery is illegal and that he can be held only under certain 1948 judgments not here attacked. He urges that the 1944 judgment is invalid because he was only 18 years of age at the time of his arrest on the charge which resulted in that judgment and he was not referred to the Youth Authority pursuant to the requirements of section 1731.5 of the Welfare and Institutions Code as it then read. The problems raised by this contention are disposed of in our opinion in *In re McInturff*, Cal.Sup., 236 P.2d 574. Petitioner further urges that imprisonment under the 1944 judgment became illegal because his probation was revoked without prior notice and hearing. For the reasons hereinafter expressed we have concluded that his imprisonment is not illegal because of the lack of such notice and hearing.

Petitioner pleaded guilty to the 1944 charge of forgery. He was arraigned for judgment and sentenced to state prison for the term prescribed by law. Execution of sentence was suspended for five years and probation granted. In August, 1945, the superior court made its order revoking probation; the declared ground is that "it appears to the satisfaction of this court,

by competent evidence offered this day that the above-named defendant has breached and violated * * * [the] terms and conditions of the order of probation above referred to."¹ At the same time the trial court issued its warrant for petitioner's arrest. Petitioner was arrested by police officers and without notice or hearing concerning revocation of probation he was taken to San Quentin. There he learned that his probation had been revoked and that he was being held under the 1944 judgment.

[2] We are satisfied that there is neither a constitutional nor a statutory right to notice and hearing preceding revocation of probation. The federal Constitution does not give such a right. (*Escove v. Zerbst* (1935), 295 U.S. 490, 492, 55 S.Ct. 818, 79 L.Ed. 1566.) And we do not believe that section 13 of article I of our state Constitution² should be held to give petitioner a greater right in this respect than he is accorded under the federal Constitution, for under our law, as under the federal law, probation is not a right but a privilege (see *People v. Williams* (1944), 24 Cal.2d 848, 855, 151 P.2d 244; *Escove v. Zerbst*, supra). Unlike the federal statute, which contains the mandatory provision that a re-arrested probationer "shall" be taken before the court (18 U.S.C.A. § 3653; *Escove v. Zerbst*, supra, page 493 of 295 U.S., pages 819, 820 of 55 S.Ct.), our statute provides that he "may" be taken before the court (Pen.Code, § 1203.2).

The following cases support our conclusion: *People v. O'Donnell* (1918), 37 Cal.App. 192, 196, 174 P. 102; *People v. Sanders* (1923), 64 Cal.App. 1, 4, 220 P. 24; *In re Young* (1932), 121 Cal.App. 711, 713, 10 P.2d 154; *People v. Blankenship* (1936), 16 Cal.App.2d 606, 609, 61 P.2d 352; *People v. Hunter* (1940), 42 Cal.App. 2d 87, 91, 108 P.2d 472; *People v. Tibbits* (1943), 60 Cal.App.2d 335, 337, 140 P.2d 726; *People v. Scott* (1946), 74 Cal.App.

1. Petitioner has not shown that this recital is incorrect.
2. That section provides, in material part, that "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public

trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be * * * deprived of life, liberty, or property without due process of law * * *."

2d 782, 784, 169 P.2d 970; *In re Dears* (1950), 96 Cal.App.2d 141, 143, 214 P.2d 585; cf. *People v. Fields* (1933), 131 Cal. App. 56, 20 P.2d 988. See also *People v. Silverman* (1939), 33 Cal.App.2d 1, 5, 92 P.2d 507; *People v. Fields* (1948), 88 Cal.App. 2d 30, 33, 198 P.2d 104. *In re Cook* (1944), 67 Cal.App.2d 20, 26, 153 P.2d 578, insofar as it is inconsistent with our conclusion, is disapproved.

We recognize that the courts of other states are not in accord as to whether notice and hearing must precede revocation of probation. (See 54 A.L.R. 1471; 132 A.L.R. 1248.) Since the question largely depends upon the construction of the statutes relative to probation, many of the cases from other states are not in point. And the decisions of state courts which purport to find a right to notice and hearing granted by the requirement of due process are contrary to the decision of the United States Supreme Court in *Escob v. Zerbst* (1935), supra, 295 U.S. 490, 55 S.Ct. 818. For a more detailed discussion of opposing views in the matter reference is made to both the majority and dissenting opinions in the case of *In re Dears* (1950), supra, 96 Cal.App.2d 141, 214 P.2d 585. We are satisfied that neither the Constitution of the United States nor that of California precludes *ex parte* revocation of probation.

We have also concluded that, in the absence of express statutory procedural regulations, the administration of justice is better served by permitting *ex parte* revocation of probation than by absolutely requiring notice and hearing. Factual situations presented in *People v. Williams* (1944), supra, 24 Cal.2d 848, 151 P.2d 244, and *People v. O'Donnell* (1918), supra, 37 Cal.App. 192, 174 P. 102, illustrate the evils which could accrue from that requirement. In such cases, if notice and opportunity to be heard were required, a probationer who was imprisoned in another state or who evaded arrest or service of notice until the period of his probation had expired would pass beyond the jurisdiction of the court to impose sentence or to require execution of a previously suspended sentence, even though he had shown

that he was not a fit subject for probation.

[2-5] This is not to say that one whose probation was revoked for no reason, or for an arbitrary reason despite his fulfillment of its terms, is without remedy. If the order of revocation is made in a case where imposition of sentence had been suspended, the validity of the order can be reviewed on appeal from the ensuing judgment of conviction; such judgment can be pronounced only after defendant is present and arraigned (Pen.Code, § 1200). (See *People v. Perkins* (1951), 37 Cal.2d 62, 230 P.2d 353; *People v. Hayden* (1950), 99 Cal. App.2d 97, 221 P.2d 221; *People v. Merrill* (1951), 104 Cal.App.2d 257, 266, 267, 231 P.2d 573; *People v. Young* (1951), 105 Cal. App.2d 612, 233 P.2d 155. If the order of revocation is made in a case such as the present, its validity can be reviewed (on timely application) by habeas corpus, which should be first sought from the revoking court. "It is generally recognized by the authorities that while revocation is largely a discretionary matter, the rights of the individual are adequately protected by the availability of habeas corpus to redress wholly arbitrary conduct on the part of the revoking official. (See *In re Cook*, supra [page 26 of 67 Cal.App.2d, page 581 of 153 P.2d].)" (*In re Dears* (1950), supra, page 144 of 96 Cal.App.2d, page 588 of 214 P.2d; see also *In re Walden* (1949), 92 Cal.App.2d 861, 208 P.2d 441, where the contention that revocation of probation was void for want of compliance with a statutory requirement was rejected on the merits, in a habeas corpus proceeding, without discussion of the availability of the remedy.) Although petitioner has alleged that while on probation he was arrested arbitrarily, he has not alleged or shown that the order of revocation was arbitrary.

For the reasons above stated the order to show cause heretofore issued is discharged and the application for habeas corpus is denied.

GIBSON, C. J., and SHENK, ED-
MONDS and TRAYNOR, JJ., concur.

SPENCE, J., concurs in the judgment.

CARTER, Justice.

I dissent insofar as the opinion turns upon *In re McInturff*, Cal.Sup., 236 P.2d 579.



37 Cal.2d 849

BRIETIGAM et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

No. L. A. 22039.

Supreme Court of California, in Bank.
Oct. 26, 1951.

Proceeding under the Workmen's Compensation Act by Alfred Robbins, claimant, opposed by H. S. Brietigam and another, doing business as Lemoore Grain & Feed Company, alleged employer, and Pacific Employers Insurance Company, their insurance carrier, and others. The Industrial Accident Commission made an award in favor of claimant and named employers and their insurance carrier applied for a writ of review to annul such award. The Supreme Court, Spence, J., held that the evidence sustained finding that buyers of barley, having taken delivery at roadside pile, were the sole employer of swamper hired by truckers to load barley on trucks for transportation to storage warehouse.

Award affirmed.

1. Workmen's Compensation Ⓒ350

Helpers employed by truckers to load trucks are also "employees" of truckers' employer for purpose of determining liability for workmen's compensation awarded injured helper, unless truckers are independent contractors, in which case helpers as their employees would have no rights against truckers' employer under Workmen's Compensation Act.

2. Workmen's Compensation Ⓒ1461

Evidence that following railroad embargo buyer took delivery of barley pursuant to alternative provisions of contract of purchase at roadside pile instead of in

railroad cars, employed truckers, previously employed by seller to deliver barley to cars, to transport it to storage warehouse, and paid truckers agreed rate out of which truckers paid swampers employed by truckers to load trucks, sustained finding of Industrial Accident Commission that buyer was sole employer of swampers liable for compensation awarded injured swamper. Labor Code, § 5952.

3. Administrative Law and Procedure

Ⓒ789, 791

Workmen's Compensation Ⓒ1939

Findings of Industrial Accident Commission supported by substantial evidence or by inferences which may fairly be drawn from the evidence will not be disturbed by appellate tribunal, even though the evidence is susceptible of opposing inferences. Labor Code, § 5952.

4. Workmen's Compensation Ⓒ237

While mere payment of wages or salary of itself is insufficient to establish that the recipient thereof is the servant of the person making such payment, such payment is a factor to be considered in determining existence of an employer-employee relationship for purpose of awarding workmen's compensation.

5. Workmen's Compensation Ⓒ235

It is the right to control and direct the activities of alleged employee, regardless of whether such right is exercised, that gives rise to employment relationship for purpose of awarding workmen's compensation.

6. Workmen's Compensation Ⓒ235

Authority to discharge at will constitutes strong evidence that person having such authority is an employer for purpose of awarding workmen's compensation.

Kearney, McCartney, Scott & Clopton
and Mort L. Clopton, Los Angeles, for
petitioners.

Edmund J. Thomas, Jr., San Francisco,
and Thomas L. Higbee, San Diego, for
respondents.

SPENCE, Justice.

Petitioners Brietigam and their insurance carrier, Pacific Employers Insurance Company, seek the annulment of an award of the Industrial Accident Commission in favor of respondent Alfred Robbins. No question is raised concerning Robbins' right to compensation, the only point in dispute being the identity of the persons liable therefor. The award was based on the finding that petitioners Brietigam were the sole employers of Robbins at the time of his injury. Petitioners contend that the evidence fails to support the existence of such employer-employee relationship, and that in so resolving the employment issue, respondent commission acted in excess of its jurisdiction. Lab. Code, § 5952. But the record does not sustain their position.

In June, 1948, petitioners Brietigam, doing business as the Lemoore Grain and Feed Company, contracted to purchase a quantity of barley from the B. V. Farming Company of Bakersfield at "3.12 1/2 f. o. b. in pile Buena Vista or at 3.15 per cwt. f. o. b. cars Buena Vista." The barley was part of a grain crop grown by the F. & H. Farming Company, consisting of Francis Houchin and a Mr. Freeborn, on farm land at Buena Vista leased by the B. V. Farming Company, which company was owned by C. E. Houchin, an uncle of Francis Houchin. The latter was in charge at the field where the crop was grown, and he had his own crew to harvest the grain. Both farming companies, by reason of contractual arrangements covering the raising and handling of the grain crop, had an interest in the barley purchased by petitioners Brietigam. The B. V. Farming Company owned a grain-storage warehouse, which was in charge of its employee Buford L. Fox.

The grain was harvested and deposited at a spot known as the Levee Spur, situated on the Buena Vista farm land itself. Initially the grain was there loaded on freight cars for rail shipment, with the loading being done by five truckers hired by Francis Houchin at the rate of \$1 per ton. Later, in July, 1948, a railroad embargo prevented

further shipment as originally contemplated, and other arrangements for handling the barley purchase had to be made between the parties. C. E. Houchin telephoned petitioner H. S. Brietigam and insisted that he take delivery or be considered in default. Brietigam thereupon arranged with C. E. Houchin for storage of the grain in the latter's warehouse. Subsequently Brietigam had a telephone conversation with Fox, the employee of C. E. Houchin in charge of the warehouse, wherein Fox suggested that Brietigam use the truckers who were already on the job for hauling the grain from the pile to the warehouse. Brietigam agreed to that arrangement and to the hauling rate of \$1.60 per ton (as distinguished from the previous rate of \$1 per ton). Each of the truckers was licensed as a public carrier, and they arranged for three "swampers" to perform the loading operations at the rate of 30¢ per ton, such amount to be paid from the \$1.60 per ton rate received by the truckers. A loading machine was furnished by C. E. Houchin. On July 23, 1948, while operating this machine in transferring the grain from the pile to the truck for the haul to the warehouse, Robbins, one of the swampers, sustained the injury which is the subject of the challenged award.

The actual deal with the truckers in regard to the grain loading for delivery to the warehouse was made by Francis Houchin according to the price agreement reached between Brietigam and Fox for that work. Francis Houchin continued to direct the loading operations at the farm, and Fox directed the unloading operations at the warehouse. From the truckers' testimony, it appears that there was a variety of opinion among them as to the employment arrangements: some thought they were working for Francis Houchin since he "bossed" the loading, while others thought they were working for Brietigam in line with their understanding that the price rate for the hauling represented what he was willing to pay therefor. To cover the first few days' hauling expense under the \$1.60 per ton rate, Brietigam (Lemoore Grain and Feed Company) sent a "lump-

sum check" to the B. V. Farming Company, but this procedure did not meet with the latter company's approval as indicated by the bookkeeper's letter to the Lemoore Grain and Feed Company under date of July 21, 1948. As here pertinent, the letter read: "We requested that you forward your checks made payable to each trucker for the amount due him, and as a matter of assistance to you we would see that the checks were delivered to them. We now have a check from you in the amount of \$706.36 which covers the amount due the truckers for July 15, 16 & 17. This check was made out to B. V. Farming Company and inasmuch as these truckers were in need of money and were threatening to discontinue their hauling operations unless they received some money, we issued checks to the truckers for an amount equal to your check. * * * *In the future, will you kindly see that your checks are payable directly to the truckers, as these men are not employed by us, and you can readily see where it would cause us unnecessary bookkeeping, etc., to have to issue checks for your men.* We handled it for you this time as a matter of convenience to you, but would appreciate it very much if you would issue all future checks directly to the men *handling your hauling.*" (Emphasis added.) Thereafter the Lemoore Grain and Feed Company made out individual checks for transmittal to the truckers according to their respective charges.

Following delivery to the warehouse, negotiable warehouse receipts were issued showing the number of sacks of barley "received on storage from B. V. Farming Company for account of Lemoore Grain & Feed Company." With respect to "taking delivery of the grain," Brietigam testified: "It's not my property until its aboard the truck, and if it calls for f. o. b. pile, *I take delivery at the pile. It becomes my property when I take it out of the pile.*" (Emphasis added.) In further explanation, he added: "*I meant that when we buy it f. o. b. at the pile, it doesn't become our property until we take delivery out of the pile.* * * * *Once*

it's removed from the pile it's our property." (Emphasis added.)

[1-3] The decisive question in the case is the relationship between petitioners and the truckers. If the truckers were employees of petitioners Brietigam, then Robbins, the injured "swamper," who was hired by the truckers for the loading work, was also an employee of petitioners Brietigam. *S. A. Gerrard Co. v. Industrial Accident Commission*, 17 Cal.2d 411, 413-414, 110 P.2d 377; also *Keeling v. Industrial Accident Commission*, 16 Cal.App.2d 733, 735, 61 P.2d 373. However, if the truckers were independent contractors, then Robbins, as their employee, would have no rights against petitioners. *State Compensation Insurance Fund v. Industrial Accident Commission*, 46 Cal.App.2d 526, 529, 116 P.2d 173. Likewise the "essential employer-employee relationship" would be lacking if, as argued by petitioners, Robbins was hired by the truckers, who were in turn employees of either of the Houchins or of both, to the exclusion of any employment status with petitioners. While there is some evidence tending to indicate each of the suggested employment relationships, there appears to be ample evidence which supports the finding of respondent commission that Robbins was an employee solely of petitioners Brietigam. So pertinent is the settled rule that "[w]here findings made by the commission are supported by substantial evidence, or by inferences which may fairly be drawn from the evidence, even though the evidence be susceptible of opposing inferences, those findings will not be disturbed by an appellate tribunal." *Schaller v. Industrial Accident Commission*, 11 Cal.2d 46, 50, 77 P.2d 836, 838; see, also, *Coborn v. Industrial Accident Commission*, 31 Cal.2d 713, 716-717, 192 P.2d 959.

From the record it may reasonably be inferred that the hauling arrangement made with the truckers following the railroad embargo contemplated an entirely new contract of employment pursuant to petitioners Brietigam carrying through their storage arrangement with C. E. Houchin, rather than simply, as petitioners maintain,

a continuation of the former agreement with a mere change in the destination of the barley and an appropriate modification of the tonnage rate for hauling. As heretofore stated, there were two alternate methods of delivery provided in the original contract of purchase of the barley: (1) the seller would deliver it f. o. b. the railroad cars for \$3.15 per hundredweight or (2) the buyer could pick it up out of the pile at the roadside for the lesser sum of \$3.12½ per hundredweight, and the hauling cost from there presumably would be the buyer's obligation. So it would seem that when petitioners Brietigam were paying the stipulated higher price under the first arrangement, title to the grain would not pass until it was placed in the cars and the truckers in hauling to the designated place of delivery were working for the seller; but when petitioners changed to the second arrangement at the lower price with delivery at the roadside pile, the trucking thereafter became petitioners' responsibility, with the Houchins acting as their agents and lending what assistance they could as a matter of gratuitous cooperation. While petitioners cite the form of the warehouse receipts—"Received in storage from B. V. Farming Company for account of Lemoore Grain and Feed Company"—as indicating that title to the grain did not pass until it was warehoused, yet certain testimony of H. S. Brietigam, one of the petitioners, clearly indicated that title to the grain passed to petitioners when they took it "out of the pile." In line with such testimony, the form of the warehouse receipts might be regarded as no more than a means of identifying the source of a particular lot of grain rather than a mark of title transfer.

[4-5] Admittedly petitioners Brietigam were using for the hauling operations specified individual truckers who were not part of the farming and grain storage business of the Houchins' respective companies. In support of the understanding of the parties that these truckers were the employees of petitioners Brietigam is the

above-quoted letter of the B. V. Farming Company under date of July 21, 1948—two days before the injury to Robbins—requesting the Lemoore Grain and Feed Company thenceforth to make their "checks * * * payable directly to the truckers, *as these men are not employed by us* [B. V. Farming Company] * * * [but are] *handling your* [Lemoore Grain and Feed Company] *hauling*"; and petitioners Brietigam thereafter so complied by issuing individual checks to the respective truckers. Although "the mere payment of wages or salary, *of itself*, is insufficient to establish that the recipient thereof is the servant of the one paying the same", Independence Indemnity Company v. Industrial Accident Commission, 203 Cal. 51, 58, 262 P. 757, 760 (emphasis added), that factor is a consideration in the overall view of the employment question. Press Publishing Co. v. Industrial Accident Commission, 190 Cal. 114, 117-118, 121, 210 P. 820; Keeling v. Industrial Accident Commission, *supra*, 16 Cal.App. 2d 733, 735, 61 P.2d 373. While it is not entirely clear from the record as to who in the C. E. Houchin organization contacted Francis Houchin in regard to the matter of securing the trucking services, apparently the latter understood that such services were for petitioners Brietigam. Francis Houchin obtained the truckers as specified according to the agreement made between Brietigam and Fox in their telephone conversation, and he offered the truckers the precise tonnage rate for the hauling that Brietigam was willing to pay. Petitioners argue that some of the truckers thought they were working for Francis Houchin, and that to "create the relationship of employer and employee or master and servant, there must be an express or implied contract or acts such as will show that the parties recognize one as the employer and the other as the employee." Larson v. Lewis-Simas-Jones Co., 29 Cal. App.2d 83, 89, 84 P.2d 296, 299. But such cited language was used in testing the difference between an employee and a party to a joint adventure, a situation distinguishable from that here in question, in-

volving acts of an alleged agent in hiring help for the benefit of another, and so establishing between the latter parties an employer-employee status. *Schneider on Workmen's Compensation*, Vol. I, p. 617; *Yolo Water & Power Co. v. Industrial Accident Commission*, 35 Cal.App. 14, 16-17, 168 P. 1146. While petitioners Brietigam apparently did not direct the truckers or their helpers, the swampers, in their loading and hauling operations, it is the "right to control and direct the activities of the alleged employee * * * whether exercised or not, [that] gives rise to the employment relationship." *Industrial Indemnity Exchange v. Industrial Accident Commission*, 26 Cal.2d 130, 135, 156 P.2d 926, 928, and cases cited. In view of the evidence bearing on the ownership of the grain by petitioners Brietigam at the time of performance of the trucking services and their payment of the truckers, it may reasonably be inferred that the Brietigams had the necessary right of control as well as the authority to discharge at will any of the truckers or their helpers in the event their services were no longer wanted—another factor constituting strong evidentiary support of the employment relationship. *Riskin v. Industrial Accident Commission*, 23 Cal.2d 248, 253, 144 P.2d 16. So distinguishable on their respective facts are the cases cited by petitioners where it appeared that an independent contractor relationship intervened and that the alleged employer did not have the right to terminate the work at his pleasure: *Freiden v. Industrial Accident Commission*, 190 Cal. 48, 50, 210 P. 420; *Winther v. Industrial Accident Commission*, 16 Cal.App.2d 131, 137-138, 60 P.2d 342; *State Compensation Insurance Fund v. Industrial Accident Commission*, supra, 46 Cal.App.2d 526, 529-530, 116 P. 2d 173. See *Riskin v. Industrial Accident Commission*, supra, 23 Cal.2d 248, 255-256, 144 P.2d 16.

Since the conflicting evidence was clearly susceptible of opposing inferences, and the inference drawn by respondent commission on the employment issue was amply

supported, the commission's finding will not be disturbed.

The award is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



107 Cal.App.2d 78

PEOPLE v. GLICK.

Cr. 4669.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1951.

Hearing Denied Nov. 19, 1951.

Marvin Howard Glick was convicted in the Superior Court of the County of Los Angeles, Charles W. Fricke, J., of assault with a deadly weapon, and he appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that defendant perpetrated an assault with a deadly weapon, and sustained findings of malice aforethought and an intent to kill.

Judgment affirmed.

1. Homicide $\S$ 257(1, 8)

In prosecution for assault with a deadly weapon with intent to commit murder, evidence sustained finding that defendant perpetrated an assault with a deadly weapon by firing a pistol at his wife and her daughter by a previous marriage.

2. Homicide $\S$ 230, 231

In prosecution for assault with a deadly weapon with intent to commit murder, by firing a pistol at defendant's wife and her daughter by a previous marriage, evidence that defendant told his wife and her daughter that he would kill them, and that defendant went to their home and shot at them with a pistol, sustained findings of malice aforethought and an intent to kill.

3. Criminal Law $\S$ 543(2)

Evidence that process server was informed by employer of driver of taxicab in which defendant was riding when defendant allegedly shot at defendant's wife and her daughter by a former marriage, that driver had left employment, and that process server inquired concerning driver at driver's former place of residence, at office of registrar of voters, at post office department, at county hospital, and at retail credit association, but could not discover driver's whereabouts, and that on other occasions process server was informed that driver had not returned to work, justified trial court in permitting testimony of driver at preliminary hearing to be admitted in prosecution for assault with a deadly weapon with intent to commit murder, on ground that driver could not with due diligence be found within state. Pen.Code, $\S$ 686, subd. 3.

4. Homicide $\S$ 347

Where evidence sustained conviction of assault with a deadly weapon with intent to commit murder, and there were no extenuating circumstances which would justify reducing judgment to a conviction of firing a pistol on a public highway, judgment would not be reduced. Pen.Code, $\S$ 374c.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

Morris Lavine, Los Angeles, for appellant.

McCOMB, Justice.

After trial before the court without a jury defendant was found guilty of two counts of assault with a deadly weapon with intent to commit murder. From the judgment defendant appeals.

The evidence being viewed in the light most favorable to the People (respondent) discloses:

On December 2, 1950, defendant fired a pistol at his wife and her daughter by a previous marriage, intending to kill them.

Questions: First: Is the evidence sufficient to sustain the findings that defendant (1) perpetrated an assault, (2) used a deadly weapon, (3) had malice aforethought, and (4) an intent to kill?

Yes. Mrs. Glick and her daughter testified that as they were approaching their home at about 11:30 p. m. on the night of December 2, 1950, they saw defendant in a taxicab, and as they started to cross the street the cab drove up in back of them and they saw defendant point a gun at them. As they started to run for safety Mrs. Glick looking over her shoulder saw the flash of gun fire. She hid behind a brick wall and her daughter behind a lamp post. When the shooting stopped the cab drove away. Thereafter defendant was apprehended and he had in his possession a revolver which had been recently discharged. Upon being questioned by the arresting officers defendant denied that he fired the gun or had been near the site of the shooting.

In addition, Mrs. Glick testified that she was separated from her husband and that on prior occasions he had threatened to kill both her and her daughter, and on one occasion he took a butcher knife and said, "I am going to kill you all."

Clearly the foregoing evidence sustained the trial court's implied finding of each of the questioned elements set forth above.

[1] (1) and (2). The witnesses testified that defendant fired a revolver at them. Clearly this sustains the finding that defendant perpetrated an assault with a deadly weapon.

People v. Sylva, 143 Cal. 62, 76 P. 814, and People v. Raner, 86 Cal.App.2d 107, 194 P.2d 37, are not here in point for in such cases the trier of fact found that the guns were unloaded.

[2] (3) and (4). The statements made by defendant to his wife and her daughter that he would kill them, plus his act in going to their home and shooting at them, distinctly supported the findings of malice aforethought and an intent to kill them. (See People v. Bradley, 71 Cal.App.2d 114, 120 [8], 162 P.2d 38.)

Second: *Was there sufficient preliminary showing that the requirements of section 686(3) of the Penal Code had been complied with to permit the reception in evidence of the testimony at the preliminary hearing of the driver of the cab from which defendant fired the shots?*

Yes. The record discloses that on January 4, 1951, a process server from the district attorney's office received a subpoena for Robert George Allen, the driver of the cab in which defendant was riding at the time of the incident above related. On January 20, 1951, the process server went to the offices of the Yellow Cab Company, who had been Mr. Allen's employer, and was informed that he had left their employ on January 17, 1951; on the same day he went to Mr. Allen's place of residence and was informed that he had moved. The landlady told the process server that Mr. Allen had left about two weeks before, that several people had been looking for him but that she did not know where he was. The process server then went to the Registrar of Voters, whose records indicated that he was not a registered voter. An inquiry was put through the post office department and the report was received that there was no record of him. The records of the county hospital were checked and it was found that no Robert George Allen was listed, and the records of the county and city jails also disclosed that he had never been booked at either. A check of the retail credit association resulted in a showing that he had no accounts with the large department stores in Los Angeles.

On three different occasions the process server returned to the Yellow Cab Company only to learn that Mr. Allen had not returned to work. The same result was received upon questioning his former landlady. He also interviewed numerous cab drivers, none of whom knew where the witness could be located.

[3] The foregoing testimony is clearly ample to support the trial court's finding that there had been sufficient compliance with the requirements of section 686(3) of

the Penal Code to permit the introduction of the questioned testimony. (People v. Stewart, 91 Cal.App.2d 675, 676 [1-2], 205 P.2d 412.)

[4] Third: *Should this court reduce the judgment to a conviction of firing a pistol on a public highway, a violation of section 374c of the Penal Code ? **

No. The evidence in the record fully sustains defendant's conviction on the counts with which he was charged. There are no extenuating circumstances which would justify this court in reducing the offenses to a lesser one.

Affirmed.

MOORE, P. J., concurs.



107 Cal.App.2d 175

**BRINKERHOFF by NELSON v.
FERGUSON.**

MORTON v. FERGUSON.

HAYES by CLEMENTS v. FERGUSON.
Civ. 4167.

District Court of Appeal, Fourth District,
California.

Oct. 29, 1951.

Actions by Clifford Brinkerhoff, by his guardian ad litem, by William Morton and by Arthur R. Hayes, a minor, by his guardian ad litem, against William J. Ferguson for injuries resulting from an automobile collision. The actions were consolidated for trial and verdict was given for defendant. From an order of the Superior Court of Orange County, Raymond Thompson, J., granting a new trial, defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence did not show an abuse

* Section 374c of the Penal Code reads:
"Every person who shoots any firearm

from or upon a public road or highway
is guilty of a misdemeanor."

of discretion by the trial judge in granting the new trial.

Affirmed.

1. Appeal and Error ⇐977(3)
New Trial ⇐6

Granting of new trial rests largely in the discretion of the trial judge, and will not be reversed unless abuse of that discretion is clearly shown by appellant.

2. New Trial ⇐71, 72

On motion for new trial, trial judge must weigh the evidence and in resolving any conflict may draw inferences contrary to those made by jury.

3. Appeal and Error ⇐977(3)

An order granting a new trial may be reversed only when there is no substantial conflict on material issues and the evidence is insufficient, as a matter of law, to support a contrary verdict.

4. New Trial ⇐71

In action by automobile occupants for injuries sustained in collision, evidence that defendant made a left turn with his semi-trailer truck into plaintiffs' lane of traffic at night and conflict in testimony as to the relative speed and distances of the vehicles prior to the collision, though sufficient to support jury finding of no negligence on part of defendant, was not so substantial that granting of new trial to plaintiff was erroneous.

Syril S. Tipton, Los Angeles, for appellant.

S. B. Kaufman, Anaheim, and Thomas E. Heffernan, Corona Del Mar, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order granting a new trial. The three actions were consolidated for trial and on this appeal.

The plaintiffs were injured in a collision between a Ford car, in which they were riding as passengers, and a tractor and semi-trailer owned and driven by the defendant. This "truck" was 45 feet long. The collision occurred at 8:15 P.M. on November 5, 1947, in the intersection of Highway 39 and Crescent Road in Orange

County. Highway 39, running north and south, is a divided highway with trees and shrubbery between the north bound and south bound traffic lanes, each of which is 11 feet wide. Crescent Road runs east and west and is 27 feet wide.

The plaintiffs were riding with one Boyde, who was traveling south on Highway 39 at a speed of about 50 miles an hour. The defendant had been traveling north on that highway, and made a left turn in order to go west on Crescent Road. He stopped somewhere in the intersection and saw the lights of the approaching Ford, but misjudged its distance, and then started up and proceeded across the south bound traffic lane. Before he was able to clear that lane the Ford ran into his truck, near its rear end, causing the injuries here involved. A jury returned a verdict in favor of the defendant, the court granted the plaintiffs' motion for a new trial on the ground of insufficiency of the evidence, and this appeal followed.

[1-3] The granting of a new trial rests largely in the discretion of the trial judge, and such an order will not be reversed unless an abuse of that discretion clearly appears. *Stone v. Los Angeles County Flood Control Dist.*, 81 Cal.App.2d 902, 185 P.2d 396. The burden of showing such an abuse of discretion is on the appellant. *Thompson v. Pioneer Laundry Co.*, 54 Cal.App.2d 360, 128 P.2d 915. The trial judge must himself weigh the evidence, *Green v. Soule*, 145 Cal. 96, 78 P. 337, and in resolving any conflicts he may draw inferences contrary to those made by the jury. *Smith v. Ward Transportation Co.*, 81 Cal.App.2d 213, 183 P.2d 701. An order granting a new trial may be reversed only when there is no substantial conflict on material issues and the evidence is insufficient, as a matter of law, to support a contrary verdict. *De La Falaise v. Gaumont-British Picture Corp.*, 39 Cal.App.2d 461, 103 P.2d 447.

[4] The appellant contends that there is no substantial evidence of negligence on his part; and that it must be held, as a matter of law, that there is no substantial evidence which would support a verdict to the contrary. While the record amply supports the jury's verdict, it cannot be held,

as a matter of law, that there is no substantial evidence which would support a contrary conclusion.

The appellant testified that because of the length of his truck he made a wide sweep into the intersection; that when he was part way through his turn he stopped for six or eight seconds; that after he stopped he looked down the highway and saw the approaching lights; that he thought these lights were from 1000 to 1200 feet away; and that he then shifted gears, which took another second, and started forward. At one time he testified that he first saw the Ford when he stopped, and at another time he said he saw its lights, a considerable distance away, as he approached the intersection. He also testified that as he was coming to "the bend of the intersection," and before he stopped, he estimated the Ford was 1500 feet away. In referring to the "bend of the intersection" he must have meant where he was making his turn. He testified that he misjudged the speed of the Ford; that when his truck was about half way "across the street" he saw that the Ford was coming "much faster" than when he first saw it; and that at the time his truck was hit he was on the proper side of Crescent Road, going west. There was evidence that immediately after the accident appellant's vehicle was on the south or wrong side of Crescent Road, and that he told an officer who arrived within a few minutes that his vehicle was on the south side of Crescent Road at the time of the impact. There were rubber marks extending from the point of the accident to where the truck stood when the officer arrived, a distance of 45 feet. There is a conflict in the evidence as to whether these marks were made before or after the collision.

A witness, who had been traveling north on Highway 39 a short distance behind the appellant, testified that as he approached this intersection he saw the lights of the car coming south, and that "when the truck was a hundred and fifty feet south of the intersection, the Ford was two hundred and fifty yards north of the intersection." He also testified that after the truck stopped and changed gears it moved out across the road and the Ford came on down.

The respondent Morton testified that he was riding in the front seat of the Ford car; that he was watching the roadway; that when they were about 150 feet from the intersection he saw the lights of appellant's truck just coming out into the street ahead of them; and that Boyde "took his foot off the gas, then swerved to the left." Another respondent testified that when they were about 150 feet from the intersection Morton hollered "Look out," and that he opened his eyes and "I seen this truck coming out on the side." The other respondent testified that he first saw a beam of light across the road; that in just a few moments the truck started out and seemed to keep moving; and that the driver of the Ford swerved to his left.

The record fails to disclose just where the truck stopped, how far apart the north and south lanes of this highway were, or how far the truck had to travel, after it stopped, in order to clear the south-bound traffic lane. Some of these matters may have appeared on a map introduced in evidence upon which the witnesses marked various points, but that exhibit has not been produced here. See, *Kipp v. Warriner*, 86 Cal.App.2d 814, 195 P.2d 888. Whether this long truck should have been started from a standing position and driven into the path of the other car, under the circumstances then existing, naturally presents a question of fact rather than one of law. There was some evidence indicating that the Ford was fairly close at the time the truck entered the intersection, and several seconds then elapsed before it completed its turn and entered the south-bound lane, during which time the Ford must have traveled a considerable distance. The fact that the appellant misjudged the approach of the Ford is not controlling, and the difficulty of estimating its speed and distance at night is an element to be considered. There was some conflict as to facts material to the main issues, and different inferences are possible from portions of the evidence. Since the evidence would have supported a contrary verdict, no abuse of discretion appears.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

PEOPLE v. BISCAILUZ, Sheriff of Los Angeles County et al.

Civ. 18464.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1951.

Hearing Denied Dec. 20, 1951.

The People of the State of California brought proceedings against Eugene W. Biscailuz, Sheriff of the County of Los Angeles, and Produce Clearings, a corporation, as the real party in interest, for a writ of mandate to compel the Sheriff to pay to the Department of Employment money held by the Sheriff pursuant to a levy of a warrant issued by the Department for the collection of contributions owed by one Martin Topper to the Department under the provisions of the Unemployment Insurance Act. The Superior Court, Los Angeles County, Frank G. Swain, J., denied petitioner's application, and petitioner appealed. The District Court of Appeal, McComb, J., held that since Martin Topper had assigned funds owed to him by another to Produce Clearings prior to the time that the Department of Employment had issued process against such funds, the assignment took priority over the claim of the State, though the State had served notice on the debtor of Martin Topper to withhold the amount owed prior to the date of the assignment.

Affirmed.

1. Taxation ☞509

Where employer, who was delinquent in payments owed to the State under Unemployment Insurance Act, assigned a debt owed to employer prior to time that State issued process against the funds represented by the debt, the assignee's claim took priority over the claim of the State. Gen. Laws, Act 8780d; Civ.Code, §§ 3017-3029.

2. Garnishment ☞51

Generally, garnishees will only be held for debts owing at time of service of writ, and credits which have been transferred or assigned by the creditor cannot subsequently be subject to garnishment as belonging to him.

3. Taxation ☞509

Priorities given by the Unemployment Insurance Act to the State's claim for delinquent contributions do not give the State any priority or preference in the absence

of compliance with the steps outlined by the act for the perfection of a lien upon the property of a debtor. Gen.Laws, Act 8780d.

4. Assignments ☞84

The provisions of the Civil Code relating to priorities of assignments of accounts receivable apply to the State. Civ. Code, §§ 3017-3029.

5. Statutes ☞233

Though ordinarily general language in a statute is not sufficient in itself to indicate an intent to make the statute applicable to the government, there is an exception to this rule if the State is included by necessary implication.

Edmund G. Brown, Atty. Gen. and William E. James, Deputy Atty. Gen., for appellant.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent Eugene W. Biscailuz.

Derthick & Cusack, Los Angeles, for respondent Produce Clearings.

McCOMB, Justice.

From a judgment denying petitioner's application for a writ of mandate to compel respondent sheriff of Los Angeles County to pay to the Department of Employment (hereinafter referred to as the department) \$449.59 held by the sheriff pursuant to the levy of a warrant issued by the department for the collection of contributions owed by one Martin Topper to the department under the provisions of the California Unemployment Insurance Act, Gen.Laws, Act 8780d, petitioner appeals.

Facts: Martin Topper, an employer within the meaning of the term in section 9 of the California Unemployment Act (hereinafter referred to as the act), became delinquent in payments to the department in sums totaling in excess of \$3,000. Certificates of delinquency evidencing the indebtedness of Martin Topper were filed with the county recorder of the County of Los Angeles in accordance with section 45.10(a) of the act.

On October 7, 1949, the department served by registered mail a notice to withhold on McDonald Brothers, who, at the time, owed Martin Topper \$449.49.

Thereafter the notice was duly and regularly renewed and on December 20, 1949, a warrant was issued to the sheriff by the department pursuant to the provisions of section 45.10(b) of the act directing the sheriff to levy execution on the sum of money held by McDonald Brothers. This he did.

Subsequently, Produce Clearings, a corporation, served notice on the sheriff that the money which he had received from McDonald Brothers belonged to it pursuant to an assignment of such sum to it by Mr. Topper in August of 1949, and that it had served notice in November, 1949, on McDonald Brothers that their obligation to Mr. Topper had been sold and assigned to it.

The trial court held that Produce Clearing was entitled to the money in the sheriff's possession and not the department.

[1,2] *Questions: First: Did the assignment by Mr. Topper of the funds, which McDonald Brothers owed him, to Produce Clearings prior to the time that the department (a state agency) issued process against such funds take priority over the claim of petitioner against Mr. Topper as a debtor of the state?*

Yes. It is the general rule that garnishees will only be held for debts owing at the time of the service of the writ, and credits which have been transferred or assigned by the creditor cannot subsequently be subject to garnishment as belonging to him. (Van Orden v. Anderson, 122 Cal. App. 132, 142[7], 9 P.2d 572; McIntyre v. Hauser, 131 Cal. 11, 14, 63 P. 69).

[3] *Second: Did the Unemployment Insurance Act create a lien or preference in the Department of Employment (State) prior to the time it commenced proceedings to enforce its claim?*

No. Priorities given by the act to the state's claim for delinquent contributions do not give the department any priority or preference in the absence of compliance with the steps outlined by the act for the

perfection of a lien upon the property of a debtor. (Cf. People v. Biscailuz, 95 Cal.App.2d 635, 641 [3] et seq., 213 P.2d 753. United States Fidelity & Guaranty Co. v. Triborough Bridge Authority, 297 N.Y. 31, 74 N.E.2d 226, 227[1]; In re Van Winkle, D.C., 49 F.Supp. 711, 712[1-2].)

In the instant case at the time the department caused a warrant to be issued and served upon McDonald Brothers for the funds in its possession belonging to Mr. Topper, Martin Topper had transferred his claim against McDonald Brothers to Produce Clearings, and notice of such assignment and transfer had been given to McDonald Brothers. Therefore when petitioner prosecuted its claim, McDonald Brothers did not hold any property belonging to or owe any money to Mr. Topper. The money in their possession which formerly belonged to Mr. Topper was at such time the property of Produce Clearings.

[4,5] *Third: Do the provisions of the Civil Code (sections 3017-3029) relating to assignment of accounts receivable apply to the state?*

Yes. Though ordinarily general language in a statute is not sufficient in itself to indicate an intent to make the statute applicable to the government (Nutter v. City of Santa Monica, 74 Cal.App. 2d 292, 300, 168 P.2d 741), there is an exception to this rule if the state is included by necessary implication. (Estate of Dairy Belle Farms v. Brock, 97 Cal. App.2d 146, 151[3], 217 P.2d 704.)

Section 3017, Civil Code reads as follows: "'Creditor' means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Clearly such provision is for the benefit of the state, for had Produce Clearings failed to comply with the provisions of sections 3017-3029 of the Civil Code relating to assignments of accounts, the department's levy would have taken precedence over the prior assignment made by Mr. Topper.

It is to be noted that the department had a claim against its debtor (Martin Topper) and that claims are included within the provisions of Section 3017 of the Civil Code.

Affirmed.

MOORE, P. J., concurs.



107 Cal.App.2d 98

In re STAGNARO'S ESTATE.

McGRATH, U. S. Atty. Gen. v. COX et al.
Civ. 14737.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1951.

Rehearing Denied Nov. 24, 1951.

Proceeding in the matter of the estate of Domenico Stagnaro, deceased, by J. Howard McGrath, Attorney General of the United States, as successor to the Alien Property Custodian, against Walter C. Cox, as partial assignee of certain of the heirs of Domenico Stagnaro, and others involving proper distribution of interests of heirs in decedent's estate, allegedly vested in Alien Property Custodian as enemy-owned property. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered a decree of final distribution and from a part of such decree, the Attorney General appealed. The District Court of Appeal, Goodell, J., held that blanket order vesting in Alien Property Custodian as enemy-owned property the interests of all heirs, names unknown, of decedent, except a named resident of the United States, was sufficient and that upon presentation of vesting order, probate court was bound to distribute the shares of such heirs to Alien Property Office.

Portion of decree from which appeal was taken reversed.

I. Descent and Distribution § 61

Proceeds of sale in probate of realty which came to decedent through his predeceased wife were distributable to pre-

deceased wife's collateral relatives under Probate Code provision for turning property back to the family from which it came, but such relatives took as heirs of deceased widower and not as heirs of predeceased wife. Probate Code, § 229.

2. War and National Defense § 12

Vesting order is the initial step and a condition precedent to a valid seizure of enemy-owned property under Trading with the Enemy Act. Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

3. War and National Defense § 12

Order vesting in Alien Property Custodian as enemy-owned property the interests of heirs in estate of intestate decedent could not specify all the heirs or define their interests with particularity prior to distribution, since the quantum of interest of any one heir could not be determined until the identity of all the heirs was determined, the size of the distributable share of each being dependent upon the total number entitled to inherit, which could not be determined until the time arrived for distribution. Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

4. Descent and Distribution § 74

Title to property became vested in owner's heirs upon his death intestate, regardless of whether such heirs were known or unknown.

5. War and National Defense § 12

Blanket order vesting in Alien Property Custodian as enemy-owned property the interests of three named Italian residents in estate of intestate decedent and the interests of all other heirs, names unknown, of named decedent, except named resident of the United States, and determining that, to the extent that such nationals were persons not within designated enemy country, the national interest of the United States required that they be treated as nationals of designated enemy country, was sufficient as against objections that it did not determine that any particular heir was an enemy or should be treated as such or that any specific property should be turned over to Alien Property Custodian. Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

6. War and National Defense ☞12

Alien Property Custodian had power under Trading with the Enemy Act to determine ex parte that to the extent that heirs of intestate decedent, whose names were unknown, were persons not within designated enemy country, the national interest of the United States required that they be treated as nationals of designated enemy country and their interests in decedent's estate vested in Custodian. Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

7. War and National Defense ☞12

Where United States Attorney appeared at hearing on final distribution of intestate decedent's estate and presented order vesting in Alien Property Custodian as enemy-owned property the interests in decedent's estate of all heirs, names unknown, except one named heir residing in the United States, probate court was bound to distribute the shares of such heirs to the Office of Alien Property, subject to right of any heir who was neither an enemy nor an ally of an enemy to assert and establish his right to such property by a suit in equity. Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

Harold I. Baynton, Asst. U. S. Atty. Gen., Director, Office of Alien Property, Chauncey F. Tramutolo, U. S. Atty., N. D. California, San Francisco, Valentine C. Hammack, Myron D. Alexander, Sp. Assts. to the Atty. Gen., Thomas H. Creighton, Jr., George B. Searls, Joseph Laufer, Attys., Department of Justice, Washington, D. C., for the appellant.

J. A. Pardini, Elda Granelli, San Francisco, for respondent Lorenzo Carniglia.

Mana & Mana, San Francisco, for respondent Rose Brusco.

Elkins & Wright, San Francisco, for respondents Walter C. Cox and certain named heirs.

F. Campagnoli, San Francisco, of counsel, for respondents.

GOODELL, Justice.

This appeal was taken by the Attorney General of the United States, as successor

of the Alien Property Custodian, from a part of the decree of final distribution in this estate.

Domenico Stagnaro, a resident of San Francisco, died intestate on December 22, 1944, leaving an estate valued at upwards of \$25,000.

On January 3, 1946 the Alien Property Custodian, acting under the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq., made a vesting order which embraced the right, title and interest of all the heirs in the estate excepting one. At the hearing on final distribution the United States Attorney presented the vesting order and asserted thereunder the right of the Government to have the shares of 30 of the 31 heirs distributed to the Office of Alien Property. The court entered a decree distributing the shares of 28 of the 31 to the heirs themselves in the usual way and those of the other 3, who resided in Italy, to the Office of Alien Property.

[1] Nineteen of the heirs are kindred of decedent, and the other 12 are kindred of his wife, Celestina, who predeceased him. A piece of real property which came to decedent through his wife was sold in probate and the proceeds were available for distribution. The derivation of this property brought into operation the provisions of § 229 of the Probate Code "to turn the property back to the family from which it came", Estate of Putnam, 219 Cal. 608, 611, 28 P.2d 27, 28, and accordingly this money, representing the land, was distributed to Celestina's collateral relatives. They took, of course, as "heirs of the decedent * * * widower, not as heirs of the predeceased spouse." Estate of Watts, 179 Cal. 20, 23, 175 P. 415, 416; In re Estate of Marshall, 42 Cal.App. 683, 686, 184 P. 43. Three of Celestina's kindred resided in Italy and the Court distributed their shares to the Office of Alien Property. The other 9 resided in California and the court distributed their shares to them in the usual way. The Attorney General did not appeal from that part of the decree.

The appeal is taken from that part of the decree which distributes—

"To the following heirs of Domenico Stagnaro, deceased, who are all first cousins

of said decedent, the sum of \$9,314.01 less one half ($\frac{1}{2}$) of the extraordinary compensation allowed by Court in the following proportions, to wit:

"To Walter C. Cox, twenty (20) per cent of the distributive share of the following named heirs, in accordance with the assignments executed by them and approved herein, to wit:" Here follow the names and residences of the 15 heirs who had assigned (9 living in Italy, 5 in Chile and 1 in France) and the 4 who had not assigned (3 living in San Francisco and 1 in San Diego).

The only persons whose names were set forth in the vesting order were Letterina Carniglia Bisio, Lorenzina Carniglia and Giobatta Carniglia, residents of Italy, and respondent Rose Brusco, a resident of San Francisco. After vesting the interests of the three Italian residents the order proceeds to blanket in all the other heirs, except Rose Brusco, as follows: "Heirs, names unknown, of Domenico Stagnaro, also known as Domenic Stagnaro, deceased, except Rose Brusco, a resident of the United States * * *. And determining that to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Italy)."

Appellant contends that all the right, title and interest of all these 19 heirs became effectively vested in the Custodian by the vesting order and that the court was bound to distribute their respective shares to the Office of Alien Property (just as it did the shares of the three Italian residents).

Respondents argue that "The custodian did not determine in the case at issue that any particular heir is an enemy or that the national interest of the United States required that any particular person be treated as a national of a designated enemy country, nor did he determine that any specific property be turned over to the Alien Property Custodian and such determinations are prerequisites to vesting and seizure."

[2] The vesting order was the initial step and a "condition precedent to a valid seizure". *Isenberg v. Sherman*, 212 Cal. 454, 500, 298 P. 1004, 1023, 299 P. 528. It

was made, as was said in *Stoehr v. Wallace*, 255 U.S. 239, 41 S.Ct. 293, 296, 65 L.Ed. 604, "in virtue of a determination by an executive officer in an *ex parte* administrative proceeding."

[3] In the nature of things the vesting order could not have specified all the heirs or defined their interests with particularity. It is self-evident that the quantum of interest of any one heir could not be determined until the identity of all the heirs was determined, since the size of the distributable share of each depended upon the total number entitled to inherit, and such questions could not be settled until the time came for distribution.

At the time when the Custodian made the vesting order the estate's attorneys had reported to him the names of no more than 3 heirs in Italy and 10 in California. Four years later, on distribution, it turned out that instead of only 13, there were as many as 31 heirs. In fact it was stated at the hearing that "some of the heirs were not discovered until a month ago."

[4] There was nothing irregular or unusual about the language of the vesting order viz., "Heirs, *names unknown*, of Domenico Stagnaro * * *" since "The decedent died intestate, and upon his death title to the property became vested in his heirs (Prob. Code, § 300) *whether such heirs were known or unknown*." *Johns v. Scobie*, 12 Cal.2d 618, 623, 86 P.2d 820, 822, 121 A.L.R. 1404, citing *State v. Miller*, 149 Cal. 208, 85 P. 609. (Emphasis added.)

Respondents complain that the vesting order treated all the 19 heirs as if they were residents of Italy without having ascertained that they were. It reads: "Under the authority of the Trading with the Enemy Act * * * and pursuant to law, the undersigned, *after investigation, finding*; * * * *And determining* that to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Italy)." (Emphasis added.)

[5, 6] Respondents' attack on the order (made for the first time on appeal) is not well founded. The power of the Custodian

to make such a determination (even though made *ex parte*) has been repeatedly upheld. In *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 41 S.Ct. 214, 215, 65 L.Ed. 403, the Custodian filed libels to obtain possession of securities, alleging that *after investigation he had determined that a certain German insurance company was an enemy* and that such securities were either its property or held by it as trustee. The claimants denied that the property was held for the benefit of an enemy, set up the trust under which they held it, alleged in detail the reasons for their right to retain it, and sought to have it decided *in the possessory actions* whether the property was enemy property in fact. The Custodian moved *on the pleadings* for decrees ordering the marshal to seize the property, contending that "for the purposes of immediate possession, the determination of the * * * Custodian is conclusive, whether right or wrong." In sustaining that contention the court said: "There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of mistake. As it can authorize a seizure in pais, it can authorize one through the help of a Court." Again: "It cannot be supposed that a resort to the courts is to be less immediately effective than a taking with the strong hand." And again: "The present proceeding gives nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more."

In *Stoeck v. Wallace*, 255 U.S. 239, 65 L. Ed. 604, 41 S.Ct. 293, 296, a somewhat similar question was presented. The Custodian's *ex parte* determination of enemy ownership was attacked on the ground that it had been arrived at, and certain shares taken, without first according the claimant a hearing in a court of justice. In holding the claimant's position untenable the court, after citing the *Garvan* case, *supra*, said: "There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized;

and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit, *which the claimant may bring so promptly after the seizure as he chooses*, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious." (Emphasis added.)

In *Commercial Trust Co. of New Jersey v. Miller*, 262 U.S. 51, 43 S.Ct. 486, 487, 67 L.Ed. 858, the court says of the *Garvan* and *Stoeck* cases: "They decide * * * that the determination of the Custodian is conclusive whether right or wrong."

Hunter v. Central Union Trust Co. of New York, D.C., 17 F.2d 174, relied on by respondents is not in point since there the demand which the Custodian made on the trust company contained no administrative determination such as those discussed in the *Garvan*, *Stoeck* and *Miller* cases, and such as there was in this case. Instead, it delegated to the trust company the duty of ascertaining whether the certificates were owned or held by enemy aliens.

In *re Blau's Estate*, 4 N.J.Super. 343, 67 A.2d 316, 319, is not in point. There the vesting order embraced 12/31 of the estate, while here by the language "Heirs, names unknown" the order embraced all the interests of all the heirs. If when the court there said that the Custodian "could not vest in himself, by a vesting order, specific interests in the estate" it meant that it was not possible for the Custodian in a case such as the present one to descend into fractions in his vesting order until the probate court had itself determined just what the

fractional parts were, we agree with it, as appears from what we have said earlier. But the court's language is very broad. If it means that the Custodian cannot make a vesting order such as the omnibus one in this case until the probate court by its decree of distribution definitively divides the estate up into fractional parts, we by no means agree with it.

[7] The Trading with the Enemy Act does not prescribe any particular mode of seizure. *Isenberg v. Sherman*, supra, 212 Cal. 454, 500, 298 P. 1004, 299 P. 528. However, when the United States Attorney appeared at the hearing, armed with the vesting order, and asserted the Government's right to distribution, he was doing everything within his power toward effecting a seizure. The probate court was the proper forum, and the action was timely since the court was then engaged in distributing the estate. It was the duty of the court to distribute the 19 shares to the Office of Alien Property as it did the shares of the 3 residents of Italy.

That part of the decree from which the appeal was taken is reversed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur. The respondents' argument, as I understand it, is that the determination that persons whose names are unknown are nationals of Italy, etc., is no real determination at all. "How", respondents say in effect, "can the Custodian validly determine without knowing who the heirs are, or even how many, that they are Italian nationals?" The argument is impressive, but it is only valid if we can say that under no circumstances could such a determination be reasonably made. The act places the power of determination in the President or his nominee, the Custodian. It assumes that he may make mistakes in his determination and hence allows for relief from such mistakes by section 9. *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 567-568, 41 S.Ct. 214, 215, 65 L.Ed. 403. "The reservation", says Justice Holmes, speaking for the court in that case, "implies that mistakes

may be made and assumes that the transfer will take place whether right or wrong."

I assume that the Custodian in making such determinations is entitled to act on reasonable probabilities as are courts in civil actions. I cannot say that under no circumstances could the Custodian determine that it was reasonably probable that the unknown heirs of an Italian decedent were nationals of Italy. If he has the power to make such a determination that is the end of this case.



107 Cal.App.2d 171

PEOPLE v. McGOLDRICK,

Cr. 2268.

District Court of Appeal,
Third District, California.

Oct. 29, 1951.

Rehearing Denied Nov. 7, 1951.

John F. McGoldrick was convicted before Lilburn Gibson, J., Mendocino County, of the crime of manslaughter and he appealed. The District Court of Appeal, Peek, J., held that the evidence was sufficient to sustain the conviction for the crime of manslaughter.

Judgment affirmed; appeal from purported order denying motion for new trial dismissed.

1. Criminal Law ⇨1086(1)

Where party was convicted of criminal offense and appealed from judgment and purported order denying motion for new trial, but record did not show that motion for new trial had been made, that portion of appeal would be dismissed.

2. Criminal Law ⇨1144(13)

Appellate court in reviewing appeal from conviction must view evidence in the light most favorable to respondent.

3. Homicide ⇨250

Evidence was sufficient to sustain conviction for crime of manslaughter.

4. Criminal Law ⇨824(1)

In a criminal case, even though the parties have not so requested, court on its own motion should instruct jury on the general principles of law applicable to case.

5. Criminal Law ⇨825(1)

In criminal case, unless instructions on specific points developed at trial are requested by parties desiring them, it is not incumbent on court to give them of its own motion where jury is otherwise fully and fairly instructed on general principles of law involved in case.

6. Criminal Law ⇨824(8)

Failure in criminal prosecution to ask for instruction limiting effect of evidence of prior felony conviction, admitted generally, waived objections to court's failure to give instruction limiting effect of such evidence.

7. Witnesses ⇨277(4)

Direct examination of defendant in criminal prosecution makes it possible for state to interrogate defendant on cross-examination. Pen.Code, §1323.

8. Criminal Law ⇨1038(3)

Where no instruction was requested by defendant to limit purpose for which evidence of prior felony conviction could be considered, he could not complain for first time on appeal of trial court's failure to give instruction limiting purpose of such evidence.

9. Criminal Law ⇨406(1)

Statements by defendant to officers relative to commission of crime, being admissions, were original evidence admissible against defendant and could be considered for purposes other than impeachment.

Nathan C. Coghlan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Wallace Colthurst, Deputy Attys. Gen., for respondent.

PEEK, Justice.

[1] This is an appeal by defendant from his conviction of the crime of manslaughter.

Following the return of the verdict of the jury his request for probation was denied and he was sentenced for the term prescribed by law. He now appeals from the judgment and from the purported order denying his motion for a new trial. However, since the record does not show that such a motion was made, that portion of his appeal must be dismissed.

The evidence most favorable to respondent shows that shortly before the homicide the decedent met a woman companion and with her drove to a bar near the city of Willits. They entered through the rear door and walked directly to a piano located at the end of the bar room. The woman seated herself on the piano bench next to the witness Driver, who was then playing the instrument. The decedent sat at a table, leaning over on the piano. During this time the defendant was standing near the front of the bar drinking with four companions, one of whom was the husband of the woman companion of decedent but from whom she had been separated for several months. The defendant then left his companions, walked back to the piano, and in so doing bumped the decedent. According to Driver—the only witness who testified to seeing any blows struck—while decedent was still seated, the defendant struck him with his fist causing him to fall backward. In falling, decedent's head hit the floor and as a result thereof he died that evening. In rebuttal the prosecution called as its witness a shorthand reporter for the City and County of San Francisco, who testified that she was present at the Hall of Justice in that city on the night defendant was apprehended and brought in for questioning; that defendant, when asked if decedent struck him, replied that he did not; that his hand merely "braised" the top of defendant's hair; and that when defendant was asked if he struck decedent a "hard blow" he replied "Yes, I swung with all my force behind it when I swung."

Defendant testified in his own behalf, stating that the deceased accidentally bumped him as he walked to the piano; that the deceased then got up from where he was sitting and swore at him; that they then scuffled out on to the floor; that de-

cedent hit defendant on the side of his head and it was not until then that he "started swinging" and struck the decedent. The defendant further testified that he had previously been convicted of stealing an automobile for which he had served time in San Quentin prison; that he was subsequently paroled and sometime thereafter was remanded to custody as a parole violator.

Defendant now contends (1) that the evidence was insufficient to support the charge of manslaughter; (2) that the trial court erred in its instruction upon the issue of self defense; (3) that the trial court erred in failing to instruct the jury as to the limited purpose of evidence of the prior felony conviction, and (4) that the trial court likewise erred in failing to instruct the jury as to the limited purpose of the evidence of defendant's contradictory statements.

[2,3] Viewing the record as we must in the light most favorable to respondent, *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778, there can be no question but that the evidence was more than sufficient to support the verdict, and therefore appellant's first contention must fail.

In effect, appellant's argument in support of his second contention is not that the jury received no instruction as to the law of self defense but rather that the jury was not instructed specifically that if the deceased was guilty of an unlawful attempt to violently injure the defendant, that it was not his duty to retreat; that he could stand his ground and defend himself and in so doing he had a right to meet such an assault with such force as it seemed to him was reasonably necessary.

The particular instructions which were given by the court of its own motion are found in CALJIC Numbers 320, 321 and 321(b) and are, in substance, a re-statement of the provisions of Sections 195, 197 and 198 of the Penal Code.

[4,5] It is true that in a criminal case, even though the parties have not so requested, the court on its own motion should instruct the jury on the general principles of law applicable to the case. But as the Supreme Court held in the recent case of

People v. Klor, 32 Cal.2d 658, 662, 197 P.2d 705, 707, " * * * this is not the rule as to specific points developed at the trial. Unless instructions thereon are requested by the parties desiring them it is not incumbent on the court to give them of its own motion where the jury is otherwise fully and fairly instructed on the general principles of law involved in the case."

Here, as noted, the court on its own motion did so instruct the jury when it gave the instructions previously referred to, and as it was held in *People v. Holt*, 25 Cal.2d 59, 65, 153 P.2d 21, 25, upon which case defendant largely bases his argument for reversal, "The basic law of self-defense is set forth in sections 197 and 198 of our Penal Code."

[6-8] Appellant's next contention, that the trial court erred in refusing to instruct the jury on the limited purposes of the evidence of the prior felony conviction, falls within the general rule that failure to ask for an instruction limiting the effect of evidence admitted generally waives objection thereto. 10 Cal.Jur. 816. At the outset it should be noted that the evidence complained of was adduced on direct examination of defendant by his counsel, thereby making it possible for the State to further interrogate defendant on cross-examination. Penal Code section 1323. Furthermore no instructions were requested by defendant to limit the purposes for which the evidence could be considered, and therefore, having failed to so request the court, he cannot be heard to complain for the first time on appeal of the trial court's failure to so instruct. *People v. Owens*, 79 Cal.App.2d 290, 299, 179 P.2d 401.

[9] Finally, appellant contends that it was error for the court to fail to instruct on its own motion that the testimony of the shorthand reporter pertaining to appellant's prior inconsistent statements could be considered only for purposes of impeachment. Even if such an instruction had been requested it would not have been proper since the declarations and statements of the defendant, being admissions, were original evidence against him and the rules as to impeachment of witnesses did not apply.

8 Cal.Jur. 98; *People v. Ferrara*, 31 Cal. App. 1, 5, 159 P. 621.

The judgment is affirmed, and the appeal from the purported order denying the motion for a new trial is dismissed.

ADAMS, P. J., and VAN DYKE, J., concur.



LAWRENCE BARKER, Inc. v. BRIGGS.
Civ. 18530.

District Court of Appeal, Second District,
Division 2, California.

Oct. 29, 1951.

Rehearing Denied Nov. 14, 1951.

Hearing Granted Dec. 20, 1951.*

Action by Lawrence Barker, Inc., against Walter M. Briggs to recover possession of a parcel of real property leased by the plaintiff to the defendant. The defendant in his answer set up a counterclaim for damages for breach by plaintiff of a covenant in the lease pertaining to a party wall. The Superior Court of Los Angeles County, Clarence M. Hanson, J., gave judgment for the plaintiff and the defendant appealed. The District Court of Appeal, McComb, J., held that a money judgment would fully and adequately compensate the plaintiff for any injury which he suffered by reason of defendant's breach of the provisions of the lease.

Judgment reversed and cause remanded.

1. Limitation of Actions ⇐129

Where lessee's claim for damages allegedly sustained during period beginning August, 1946, because of lessor's failure to maintain party wall in safe condition, was first asserted in answer filed in October, 1949, lessee's claim was barred by three year statute of limitations. Code Civ.Proc. § 339, subd. 1.

2. Appeal and Error ⇐1056(1), 1071(6)

In action by lessor against lessee to recover possession of leased property, where cross-complaint for declaratory relief and answer thereto showed clearly that

* Subsequent opinion 248 P.2d 897.

there was a dispute between parties as to proper method of computing percentage of rentals due lessor, refusal of trial court to receive evidence, make findings and construe disputed terms of lease was prejudicial error.

3. Landlord and Tenant ⇐275

Lessor was not entitled to possession of leased premises and to maintain lease at same time.

4. Equity ⇐24

Whenever a penalty or forfeiture is used merely to secure payment of a debt, performance of a duty, or enjoyment of a right, equity, in considering performance of obligation, the real thing intended, will relieve against such penalty or forfeiture whenever compensation will adequately reimburse aggrieved party for breach of contractual obligation.

5. Landlord and Tenant ⇐108(1)

Where parking lot lease provided for minimum guaranteed rental plus percentage of gross receipts in excess of certain amount derived by lessee from operation of lot, and for furnishing of annual report showing gross receipts from demised premises, and lessor instituted action to recover possession alleging that lessee was in default because of failure to furnish timely and accurate reports, money judgment would fully and adequately compensate lessor for any injury suffered by reason of lessee's alleged breach, and lessor was not entitled to possession of leased property.

Benjamin J. Goodman, Krystal & Paradise and Sidney D. Krystal, all of Los Angeles, for appellants.

Kenyon F. Lee, Los Angeles, and Thomas D. Mercola, Beverly Hills, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action to recover possession of a parcel of real property leased by plaintiff to defendant for a term of years, defendant appeals.

Facts: January 1, 1945, plaintiff entered into a parking lot lease with defendant for

a term of 10 years from January 1, 1945, covering the premises located at 536 South Spring Street, Los Angeles. The lease provided among other things for (a) a minimum guaranteed rental of \$1,250 per month plus 60 percent of all gross income or receipts in excess of \$25,000 derived by the lessee for the use or occupancy of the demised premises in any calendar year; (b) for the furnishing by lessee to lessor within 60 days after the end of each calendar year of an annual report or statement prepared and certified by a reputable certified public accountant, showing the gross income or receipts of lessee from the demised premises for the preceding year; and (c) for a security deposit by lessee, which at the time of trial was in excess of \$15,000. The lease did not contain any provisions concerning the manner, time or method of operation of the demised premises by lessee.

Pursuant to the terms of the lease defendant entered into possession of the demised premises on or about January 1, 1945, and thereafter operated it as a parking lot. Also pursuant to the lease defendant furnished to plaintiff from the years 1945 to 1949, inclusive, annual statements or reports prepared by a reputable certified public accountant. The reports for the years 1945, 1946, 1947, and 1948 were not furnished until 60 days after the close of each respective year. However, prior to July 22, 1949, plaintiff did not object in writing to the fact that any of the reports was late.

Subsequent to the execution of the lease defendant entered into a parking lot lease with another lessor covering premises located at 537 South Main Street, Los Angeles, which property although separated by an alley is contiguous with the demised premises on the easterly side thereof.

On or about January 1, 1948, when the demised premises at 536 South Spring Street were filled to capacity with parked cars, defendant parked overflow cars on the parking lot located at 537 South Main Street. Defendant kept and maintained records to show the number of cars that entered 536 South Spring Street but were actually parked on 537 South Main Street. In accounting to plaintiff for additional

percentage rentals, defendant made an allowance to plaintiff of 25 percent of the gross receipts on overflow cars parked on 537 South Main Street.

From 1945 to 1947, defendant operated the demised premises at night with a full time parking attendant in charge. This procedure proved unprofitable and during the period from January 1, 1948, through July 26, 1949, defendant operated the premises at night in conjunction with its nighttime operation of the property located at 537 South Main Street. He maintained a full time parking attendant at 537 South Main Street who would service cars entering 536 South Spring Street.

During this period defendant accounted to plaintiff for gross receipts accountable to night parking at 536 South Spring Street by allocating a portion of the Main Street night gross receipts to 536 South Spring Street.

July 22, 1949, plaintiff by written notice informed defendant that he was in default under the terms of the lease by failing to furnish lessor a timely report or statement for the year 1948 of gross receipts and failing to pay the full amount of percentage rental called for by the terms of the lease for the calendar year 1948. By this notice plaintiff claimed possession of the demised premises *without cancelling the lease*. At the same time he demanded the right to hold defendant's security deposit under the lease.

Defendant claimed that he was not in default under the terms of the lease and refused to deliver possession of the premises. Plaintiff then instituted the present action in ejectment.

Defendant in his answer set up a counterclaim for damages for breach by plaintiff of a covenant in the lease pertaining to a party wall. Defendant also filed a cross-complaint seeking declaratory relief, alleging that the terms and provisions of the lease were uncertain and seeking adjudication of the respective parties' rights thereunder.

The trial court:

(a) Sustained an objection to the introduction of evidence under the counterclaim;

(b) Denied defendant's prayer under the cross-complaint for declaratory relief; and

(c) Gave judgment that plaintiff be restored to possession of the leased premises.

[1] *Questions: First: Did the trial court err in sustaining plaintiff's objection to the introduction of any evidence on defendant's counterclaim for the reason that the statute of limitations barred such claim?*

No. Defendant offered to prove that he had suffered damages caused during the period from August 15, 1946, through October 15, 1946, because plaintiff had not maintained a party wall in safe condition with the result that defendant had suffered damages in the sum of \$3,731.20. Defendant asserted this claim first in his answer filed October 3, 1949. Therefore since more than 3 years had elapsed from the time of the occurrence which gave rise to the claim it is barred by the provisions of section 339, subdivision 1 of the Code of Civil Procedure. The trial court's ruling was correct.

[2] *Second: Did the trial court commit prejudicial error in not making findings and construing the disputed terms of the lease pursuant to the issues created by the cross-complaint for declaratory relief and the answer thereto?*

Yes. The cross-complaint showed clearly that there was a dispute between the parties as to the proper method of computing the percentage of rental due the lessor under the terms of the lease. Therefore the trial court should have received evidence pertaining to the disputed provisions in the lease and thereafter have made findings of fact, drawn conclusions of law and given a judgment construing the ambiguities in the lease for the future guidance of the parties.

Third: Did the trial court commit prejudicial error in giving plaintiff possession of the leased property?

Yes. The trial court found that the lease had been breached by defendant in three respects: (1) That defendant had not furnished to plaintiff for the years 1947, 1948 and 1949 reports for the calendar year preceding within 60 days after the close of each year, in accordance with the provisions of the lease, and that such reports as

were furnished did not accurately reflect the gross income attributable to the use and occupancy by defendant of the leased premises; (2) That the reports as furnished were not certified by the public accountants in accordance with the provisions of the lease; and (3) That the report furnished for the year 1949 did not accurately reflect the gross revenue for such year.

Predicated upon these breaches the trial court found that defendant forfeited his right to possession of the leased property and gave plaintiff immediate possession of the property. Clearly plaintiff was not entitled to possession of the premises and to maintain the lease at the same time. (*Maurice Mercantile Co. v. American Employers' Ins. Co.*, 140 Cal.App. 354, 358 [1], 35 P.2d 1047; *Costello v. Martin Brothers*, 74 Cal.App. 782, 786 et seq. [1], 241 P. 588.)

[4] The rule is settled also that whenever a penalty or a forfeiture is used merely to secure the payment of a debt, the performance of a duty, or the enjoyment of a right, equity, in considering the performance of the obligation, the real thing intended, will relieve against such penalty or forfeiture wherever compensation will adequately reimburse the aggrieved party for a breach of the contractual obligation. (*Gonzales v. Hirose*, 33 Cal.2d 213, 216 [2], 200 P.2d 793; *El Rio Oils Ltd. v. Chase*, 95 Cal.App.2d 402, 410 et seq. [6], 212 P.2d 927.)

[5] In the present case it is evident that a money judgment will fully and adequately compensate plaintiff for any injury which he has suffered by reason of defendant's breach of the provisions of the lease. Therefore the foregoing rule is applicable and the trial court sitting as a court of equity should have relieved defendant from his default upon making adequate award for damages.

In view of our decision it is unnecessary to consider other questions raised by counsel.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

MOORE, P. J., concurs.

107 Cal.App.2d 204

LEVY v. BRILL

No. 14787.

District Court of Appeal, First District,
Division 1, California.

Oct. 31, 1951.

A. F. Levy brought action against John H. Brill. The Superior Court of the State of California, in and for the City and County of San Francisco, Preston Devine and Thomas M. Foley, JJ., entered an order denying motion of plaintiff to reinstate action and restore proceedings after judgment was entered in favor of the defendant, and the plaintiff appealed. The District Court of Appeal, Bray, J., held that since appeal was not in time, there was a fatal lack of jurisdiction in the District Court of Appeal to consider the appeal.

Appeal dismissed and order affirmed.

1. Appeal and Error ⇐1

To entitle one to appeal, he must conform to procedure provided for appeals. Rules on Appeal, rules 2, 3.

2. Appeal and Error ⇐356

Where appeal was not within time prescribed by law, there was a fatal lack of jurisdiction in the District Court of Appeal to consider the appeal. Rules on Appeal, rules 2, 3.

3. Appeal and Error ⇐82(1)

Order denying motion to reinstate action was a special order made after final judgment and therefore an appeal lay from such order. Code Civ.Proc. § 963.

4. Judgment ⇐336

There is no such proceeding as a motion after judgment to reinstate action and restore proceedings.

5. Judgment ⇐336, 403, 485

New Trial ⇐1

A judgment can be nullified by court which rendered it only on motion for a new trial, by motion under statute where application is made to set judgment aside within six months, by motion therefor at any time where the judgment is void on its face, or by an independent suit in equity where judgment is regular on its face but

extrinsically void for want of jurisdiction or by reason of fraud or mistake. Code Civ.Proc., § 473.

A. F. Levy, pro. per.

John H. Brill, pro. per.

BRAY, Justice.

On September 2, 1947, defendant's demurrer to the complaint was sustained, ten days to amend. September 15, plaintiff filed a motion that "a final adjudication" be entered "so the controversy may continue in a higher court." This motion was denied the same day. Plaintiff having failed to amend his complaint, a judgment for costs in favor of defendant was entered October 16. Nothing further occurred until June 24, 1950, when plaintiff filed a "Motion to Reinstate Action" and "to restore proceedings" on the grounds "that they appear irregular on their face." (In what respect does not appear.) This motion was denied June 28.¹ Plaintiff in propria persona appeals from the order denying this motion and purports to appeal from the judgment for costs entered more than two and a half years theretofore.

[1,2]. Obviously, plaintiff did not appeal from the judgment in the time prescribed by law. (See Rules on Appeal, Rules 2 and 3.) To entitle one to appeal he must conform to the procedure provided for appeals. *Jackson v. Jackson*, 71 Cal. App.2d 837, 163 P.2d 780. The appeal not being in time, there is a fatal lack of jurisdiction in this court to consider it. *Estate of Raahauge*, 91 Cal.App.2d 615, 205 P.2d 1122.

[3-5] As the order denying the "Motion to Reinstate Action" is a "special order made after final judgment" (Code Civ. Proc. § 963, subd. 2), an appeal lies from the order. However, the trial court properly denied such motion. There is no such proceeding as a motion after judgment to reinstate the action and restore proceedings known to our law. In *Fisch & Co., Ltd. v. Superior Court*, 6 Cal.App.2d 21, 23,

1. The record giving this date as *July* 28 is obviously erroneous, as the appeal from it was filed July 13.

43 P.2d 855, 856, the court sets forth the only recognized methods of attacking a judgment in the trial court, saying: "A judgment can be nullified by the court which rendered it only: (1) On motion for a new trial; (2) by a motion under the provisions of section 473 of the Code of Civil Procedure, where application is made to set it aside within six months; (3) by motion therefor at any time where the judgment is void on its face; or (4) by an independent suit in equity, where the judgment is regular on its face but extrinsically void for want of jurisdiction or by reason of fraud or mistake." The proceeding attempted here is not included within any of the above methods.

The purported appeal from the judgment is dismissed; the order appealed from is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



107 Cal.App.2d 125

PEOPLE v. LEVENE.

Cr. 2746.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1951.

Jack Levene was convicted in the Superior Court, City and County of San Francisco, Harry J. Neubarth, J., of offenses of keeping a place for recording bets and of registering bets and he appealed. The District Court of Appeal, Dooling, J., held that the trial court did not err in admitting the records of the bets and the racing guide in evidence.

Affirmed.

1. Gaming ⚡98(3, 5)

In prosecution for keeping place for recording bets and registering of bets, evidence of records of bets found on premises sufficiently established that some person had violated statute condemning bookmaking. Pen.Code, § 337a, subds. 2, 4.

2. Criminal Law ⚡563

Evidence of the corpus delicti need not connect the defendant with the crime.

3. Gaming ⚡75(1)

Fact that one other than defendant had rented premises did not prevent conviction of defendant for occupying premises for purpose of recording bets. Pen.Code, § 337a, subds. 2, 4.

4. Gaming ⚡75(1)

One need not be owner or lessee of premises in order to occupy premises for illegal purpose of keeping place for recording bets. Pen.Code, § 337a, subd. 2.

5. Criminal Law ⚡444

In prosecution for keeping place for recording bets and registering of bets, records of bets and racing guides found on premises were properly admitted in evidence, even though one officer did not positively identify them. Pen.Code, § 337a, subds. 2, 4.

6. Criminal Law ⚡383

An objection that evidence is not positive goes to its weight rather than to its admissibility.

7. Criminal Law ⚡721(1)

In criminal prosecution it is proper for prosecutor to argue the effect of the defendant's failure to take the stand. Const. art. 1, § 13.

8. Criminal Law ⚡730(5)

In prosecution for keeping place for recording bets and registering of bets, though prosecutor's statement of law to jury, which was not objected to by defense, was inaccurate, no substantial prejudice resulted to defendant in view of fact that court gave proper instruction on the law. Pen.Code, § 337a, subds. 2, 4.

9. Criminal Law ⚡784(7)

In prosecution for keeping place for recording bets and registering of bets, court should have given instruction that where circumstantial evidence was relied on for conviction facts and circumstances must not only be entirely consistent with theory of guilt but must be inconsistent with any other rational conclusion. Pen.Code, § 337a, subds. 2, 4.

10. Criminal Law ⚡1173(2)

In prosecution for keeping place for recording bets and registering of bets based

upon circumstantial evidence in view of fact that evidence of defendant's guilt was so clear, failure to give instruction on circumstantial evidence was not reversible error. Pen.Code, § 337a, subds. 2, 4.

George V. Curtis, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State, Clarence A. Linn, Deputy Atty. Gen., Timothy J. Crowley, San Francisco, of counsel, for respondent.

DOOLING, Justice.

Defendant appeals from judgments of conviction of the violation of subsections 2 and 4 of section 337a of the Penal Code and from the order denying a new trial.

On September 7, 1950 a party of police officers forcibly entered an office in San Francisco. They had obtained a key to this office from the manager of the building, but when they found that this key would not open the door because it was "double-locked" they broke the door down. The defendant was the only person in the office and a key which opened the lock on the outer door was found on his person. In the room were two radios, a typewriter, a combination cash register and adding machine, and a pen which wrote in red ink. On top of a cabinet the officers found a racing guide, the "Daily Bulletin and Sports Review", for the current day on which notations had been made in red ink and several sheets of paper with notations in red ink which one of the officers testified were recordings of bets on horses which had run that day.

One of the witnesses testified to the following conversation:

"I says 'Been bookmaking about two weeks?', he says, 'No, I'm not a bookmaker.' And I asked him, I said, 'Well, how do you account for this?' showing him the record of bets. He says, 'Those are my own bets.' * * *

"After that I called his attention to Judy, Martin, Doc and several other names that are on the extreme left side of the sheet, and I said, 'What is all this?' I says,

'Those are not all your own.' He says, 'Well, I take a few for my friends.' Then I asked him if he had written those numbers and bets on the sheets, and he said 'No'. He denied it. He hadn't written it. So there was the pen lying on the desk * * * It had red ink, it was writing in red ink, and I asked him, 'Is this your pen?' He said yes, it was his pen."

The defendant did not take the stand. He produced one witness, Zimmerman, who testified that he had rented and furnished the office to go into the business of drug distributor with defendant, and that defendant was spending such time in the office as he saw fit before the business got into operation. Zimmerman denied any knowledge of the records of bets which had been found in the office.

[1, 2] Defendant's claim that the corpus delicti was not established so as to authorize the introduction of the evidence of his admissions is not well taken. The evidence of the records of bets found on the premises sufficiently established that some person had violated sec. 337a Penal Code. The evidence of the corpus delicti need not connect the defendant with the crime. *People v. Shapiro*, 40 Cal.App.2d 321, 323, 104 P.2d 688.

[3, 4] Nor is there any substance to defendant's claim that because Zimmerman rented the office defendant could not be found guilty of "occupying" the premises under subd. 2 of 337a. Zimmerman's testimony proved defendant's occupancy, rather than disproving it. One need not be owner or lessee in order to occupy premises in violation of this statute. *People v. Ines*, 90 Cal.App.2d 495, 499, 203 P.2d 540; *People v. Partee*, 70 Cal.App.2d 736, 739, 161 P.2d 586; *People v. Steinfeld*, 38 Cal.App.2d 280, 282, 101 P.2d 89. The distinction in *People v. Simon*, 66 Cal.App.2d 860, 153 P.2d 420 is clear. In the Simon case the evidence indicated no more than that the defendant was a casual visitor to the premises.

[5, 6] The claim is made that the court erred in admitting the records of bets and the racing guide because one officer did not positively identify them as the ones

found on the premises. The law is otherwise. "The fact, however, that he was not positive does not destroy the value of the identification. * * * It is not necessary that the identification be made in positive terms by any of the witnesses." *People v. Waller*, 14 Cal.2d 693, 700, 96 P.2d 344, 348. "An objection that evidence is not positive goes to its weight rather than to its admissibility." *Weingetz v. Cheverton*, 102 Cal.App.2d 67, 73, 226 P.2d 742, 746.

The discussion of this point is rendered academic by the fact that the witness Marino positively identified these exhibits, although counsel argue the question as if the qualified identification of the witness Osuna was the only one in the record.

[7] Complaint is made of certain statements in the prosecutor's argument to the jury. His references to the witness Zimmerman could not have prejudiced the defendant and it is proper for the prosecutor to argue the effect of the defendant's failure to take the stand. *People v. Zirbes*, 6 Cal.2d 425, 57 P.2d 319; Cal.Const. art. I, sec. 13.

[8] The prosecutor's statement: "There is a presumption against him now on each of those things which he should be able to explain and will not explain" is not an accurate statement of the law, but defendant's counsel made no objection at the time and the court later correctly instructed the jury that "the failure of a defendant to deny or explain evidence against him does not * * * create a presumption of guilt * * * nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt." We cannot find any substantial prejudice to defendant under these circumstances.

[9, 10] We agree with defendant that the court should have given an instruction that where circumstantial evidence is relied on for conviction the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. *People v. Koenig*, 29 Cal.2d 87,

91-92, 173 P.2d 1; *People v. Zerillo*, 36 Cal.2d 222, 233, 223 P.2d 223. But here, as in *People v. Koenig*, supra, the evidence of defendant's guilt is so clear that we cannot hold the failure to give such instruction to be reversible error.

The judgments and order denying a new trial are affirmed.

NOURSE, P. J., and GOODELL, J.,
concur.



107 Cal.App.2d 184

MILSTEIN v. TURNER et al.

Civ. 18243.

District Court of Appeal, Second District,
Division 1, California.

Oct. 30, 1951.

Action by M. M. Milstein against Fred Turner, Jr., and another, in ejectment. The Superior Court of Los Angeles County, Arthur Coats and Arnold Praeger, JJ., entered judgment in ejectment, and defendants appealed. A third party who had sought to interject himself as party defendant by filing answer after trial of case and submission to court for decision, also appealed from order striking answer from files. The District Court of Appeal, Ranson, J., pro tem., held that third party who had not been named as party defendant in case could not assume such roll by simple expedient of filing answer without leave of court and without notice to plaintiff even though he may have been possessed of meritorious case against plaintiff, and that judgment quieting title in plaintiff could not be collaterally attacked by defendant in ejectment suit.

Judgment and order affirmed.

1. Ejectment $\S$ 50

Where one not party to ejectment action, by simple expedient of filing answer in case without leave of court and without notice to plaintiff, sought to inject himself as party defendant after case had been tried and submitted to court for decision such answer was properly stricken on motion

of plaintiff, since even if such third party had been possessed of meritorious case against plaintiff, he was not entitled to inject such case into another instituted by plaintiff against other party by simple device of filing answer therein.

2. Ejectment ⇨69

Where plaintiff in whom title to realty had been quieted brought action against parties in possession thereof for ejectment, answer of defendants alleging that they were in actual possession of premises, that action was pending by third party against plaintiff charging that title to property claimed by plaintiff was based upon judgment obtained against third party through fraud, and that as such action was undetermined the title of plaintiff was unsettled, in absence of any allegations showing privity of title between the defendants and such third party, barred them from setting up any defense which third party might have had if he had been named as party defendant.

3. Judgment ⇨518

In ejectment action against son and his wife, brought by father's judgment creditor who had obtained sheriff's deed to the land involved and subsequently a judgment quieting title as against father, defense that in a pending action against plaintiff, father was charging fraud in obtaining the judgments, was a "collateral attack" and not maintainable.

See publication Words and Phrases, for other judicial constructions and definitions of "Collateral Attack".

4. Judgment ⇨707

Even though judgment in quiet title action was being attacked by party to quiet title action in still another action on ground of want of jurisdiction and alleged fraud judgment was final as against persons who were not parties to the quiet title action.

5. Execution ⇨244

In action in ejectment wherein plaintiff's claim was based upon judgment quieting title in himself under sheriff's deed, and defendant in ejectment action had not been party to quiet title action, evidence as to purchase price paid by plaintiff for personal judgment upon which he caused execu-

tion to issue and from which sheriff's deed resulted, and as to allegedly grossly inadequate price received at sheriff's sale was properly excluded, since defendants, as complete strangers to such transaction, were not entitled to question it.

Walter Gould Lincoln, Los Angeles, for appellants.

Wapner & Wapner, Joseph M. Wapner, and Joseph A. Wapner, all of Los Angeles, for respondent.

HANSON, Justice Pro Tem.

In this case there are two separate appeals, one by the defendant Fred Turner, Jr. and his wife from a judgment in ejectment rendered in favor of the plaintiff Milstein (the respondent on appeal), and the other an appeal by Fred Turner, Sr. (the father of Fred Turner, Jr.) who while not named as a party defendant in the case endeavored to assume that role (after the case had been tried and submitted to the court for decision), by the simple expedient of filing an answer in the case, without leave of court and indeed without notice to the plaintiff. On motion of the latter the court struck the answer of Turner, Sr., from the files. His appeal is from the order thus made, and from an order denying his motion to set aside said order.

[1] The appeal of appellant Fred Turner, Sr., requires no statement of the facts upon which he rests his appeal. It is enough to say that if he were possessed of a most meritorious case against the plaintiff he was not entitled to inject that case into a case instituted by the plaintiff Milstein against his son by the simple device of filing an answer in it. The order of the trial court striking the answer of Turner, Sr., was correct. *Mercantile Trust Co. of San Francisco v. Stockton, etc., Co.*, 44 Cal.App. 558, 186 P. 1049; *Lester v. Beer*, 74 Cal.App.2d Supp. 984, 168 P.2d 998; *Liera v. Los Angeles Finance Co.*, 99 Cal.App.2d 254, 221 P.2d 737.

The appeal of Fred Turner, Jr., and his wife, which we alone discuss from this point on, requires but a brief statement of

the facts to demonstrate that there is likewise no merit in their appeal.

The plaintiff Milstein instituted an action in 1947 against Turner, Sr., to quiet title to the land here involved basing his right thereto upon a sheriff's deed issued to him pursuant to an execution which had been issued upon a personal judgment against Turner, Sr. In that action Turner, Sr., answered setting up various defenses none of which included a claim of a superior or indeed any homestead right against the plaintiff's claim of title in that action. The decree in that case adjudged that title to the property was vested absolutely in the plaintiff with a right of immediate possession thereto. Upon an appeal by Turner, Sr., the judgment was affirmed by this division of the court. 89 Cal.App.2d 296, 200 P.2d 799.

Thereafter on October 18, 1949, the present action was instituted by Milstein against the defendants Turner, Jr., and his wife for possession of the premises along with damages for its wrongful detention. The two defendants just named were in actual possession of the premises at the time and, indeed, had been in possession of them at and ever since Milstein originally caused them to be levied upon by virtue of the personal judgment he held against Turner, Sr. By their answer the defendants Turner, Jr., and his wife, aside from a general denial, averred they (1) were in actual possession of the premises, (2) that an action was pending instituted by Turner, Sr., against Milstein charging that any title to the property claimed by Milstein was based upon judgments obtained through fraud by Milstein against Turner, Sr., (3) that as said action was undetermined the title of Milstein was unsettled.

[2,3] The answer of the defendants did not aver that they claimed a right of possession on any other ground, as, for instance, that they were tenants of Turner, Sr., or were occupying the premises by his sufferance. Upon the issues joined, as we have just stated them, it is clear that the answer set up no defense to the plaintiff's right of possession based, as it was, upon

and supported by the decree quieting title which was presented as a part of the evidence of plaintiff Milstein. Not only did the defendants fail to show any right of possession, much less a superior right of possession over the right of possession accorded by the decree quieting title, but what is more this very failure of showing any privity of title with Turner, Sr., barred them from setting up any defense which Turner, Sr., might have had if he had been named as a party defendant. In saying this we are not to be understood as intimating he had any defense. Furthermore, as the attack launched was not a direct but a collateral attack on the judgment it was not maintainable. *Milstein v. Turner*, 89 Cal.App.2d 296, 200 P.2d 799.

[4] The contention that a final judgment in a title action may not be classed as being final by persons not parties to the action just because it is being attacked by a party to such action, in still another action, for want of jurisdiction and for fraud is completely without merit. Cf. *Smith v. Smith*, 134 Cal. 117, 66 P. 81.

[5] What we have so far said is sufficient to dispose of both appeals. We pause, however, to say a few passing words as to two minor contentions urged upon us. *First*, it is contended that the court erred in rejecting evidence which would have disclosed that the plaintiff purchased the personal judgment upon which he caused execution to issue—resulting in a sheriff's deed to him—for approximately one third its face value. *Second*, it is claimed that the property sold at the sheriff's sale for a grossly inadequate price. Again the short answer is that an utter stranger to the transaction may not question it.

The next contention is that two of the findings contradict one another and that the court failed to find on certain issues. The contradiction referred to is with respect to an immaterial finding. Next it is true, as appellant contends, that the court failed to find on two issues which appellants sought to inject into the case. But the short answer thereto is that the court rightly refused to do so. These and other contentions made by appellants are too

technical and hypercritical to warrant our taking the time to answer them.

The judgment and orders are affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.



**SUBSEQUENT INJURIES FUND OF
STATE v. INDUSTRIAL ACC. COM-
MISSION et al.**

Civ. 18524.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1951.

Hearing Granted Dec. 18, 1951.*

The Subsequent Injuries Fund of the State of California filed a petition for writ of review to review and annul portion of order of Industrial Accident Commission of the State of California awarding special additional compensation to Lois A. Patterson. The District Court of Appeal, McComb, J., held that Industrial Accident Commission had jurisdiction to make an award against Subsequent Injuries Fund of compensation for difference between permanent disability in excess of 70% resulting from combined effect of injuries to right and left eyes sustained at different times and the permanent disability resulting from later injury and that claim for such compensation filed within three years after such award was made was not barred by limitations.

Award affirmed.

1. Workmen's Compensation ⇨35

The statute directing Industrial Accident Commission to fix and award the amount of special additional compensation to be paid by State Compensation Insurance Fund where combined effect of permanent partial disability and subsequent compensable injury is a permanent disability equal to 70% or more of total is not unconstitutional on ground that payments thereunder would not constitute workmen's

compensation. Labor Code, §§ 4751, 4754; Const. art. 20, § 21.

2. Workmen's Compensation ⇨1030

Where compensable injuries to right and left eyes sustained at different times resulted in 73¾% permanent disability, Industrial Accident Commission had jurisdiction under statute to make an award against Subsequent Injuries Fund of special additional compensation for the difference between the 73¾% permanent disability resulting from combined injuries and the 24% permanent disability resulting from the later injury. Labor Code, §§ 4751, 4754.

3. Workmen's Compensation ⇨2016

Cause of action against Subsequent Injuries Fund for special additional compensation for difference between permanent disability in excess of 70% resulting from combined effect of compensable injuries to right and left eyes sustained at different times and permanent disability resulting from second injury did not arise until Industrial Accident Commission made its award fixing the percentage of permanent disability resulting from later injury and claim for such compensation filed with Subsequent Injuries Fund within three years after award was made was not barred by three-year statute of limitations governing actions upon a liability created by statute. Labor Code, §§ 4751, 4754; Code Civ.Proc. § 338, subd. 1.

4. Action ⇨61

Workmen's Compensation ⇨1204

No cause of action for damages or compensation exists until injured party has the right to sue or file a claim.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for petitioner.

Edmund J. Thomas, Jr., San Francisco, and Thomas L. Higbee, San Diego, for respondent Commission.

Riedman & Silverberg, Long Beach, for respondent Lois A. Patterson.

McCOMB, Justice.

Petitioner seeks to review and annul that portion of an order of respondent commission (hereinafter referred to as the commission), awarding compensation to Lois A. Patterson (hereinafter referred to as the employee), for benefits which he claims against petitioner (Subsequent Injuries Fund of the State of California).

Chronology

i. May 7, 1945, employee received a compensable injury to his left eye.

ii. February 8, 1946, the employee received a second compensable injury to his right eye.

iii. June 30, 1946, the employee filed timely application for compensation benefits for the injuries.

iv. January 9, 1947, after hearing the commission made findings and award for separate and distinct periods of temporary disability in each case and in addition the following finding: "3. Applicant's condition is not yet stationary and permanent, and jurisdiction is hereby reserved to determine extent of permanent disability within 245 weeks from date of injury upon request of any party in interest."

v. January 24, 1947, the employee filed in each case a "petition for permanent disability rating."

vi. July 6, 1948, the permanent disability rating bureau of the commission recom-

mended a rating of 24% permanent disability resulting from the last industrial injury and 73¾% for the permanent disability resulting from both injuries.

vii. January 31, 1950, the commission made findings and an award in accordance with the recommendations of the rating bureau.

viii. May 26, 1950, the employee filed his claim against petitioner pursuant to the provisions of section 4751 of the Labor Code.¹

ix. January 23, 1951, after a hearing at which petitioner contended that the employee's claim was barred by the statute of limitations as set forth in section 338(1), of the Code of Civil Procedure,² the commission made an award against petitioner for compensation for the difference between the 73¾% permanent disability resulting from the combined injuries and the 24% permanent disability resulting from the last injury. The commission expressly found that the employee's claim against petitioner was not barred by the statute of limitations.

Questions: First: Is section 4754 of the Labor Code³ constitutional, and did it confer jurisdiction upon the commission to make the award here in question?

[1,2] *Yes.* In *The Subsequent Injuries Fund of the State of California v. Warnock*, second Civil 18016 (1950), the petitioner herein contended in an application for

1. Section 4751 of the Labor Code reads: "If an employee who is permanently partially disabled received a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the last injury as provided in this article."

2. Section 338(1), Code of Civil Procedure reads: "Within three years: 1. An ac-

tion upon a liability created by statute, other than a penalty or forfeiture."

3. Section 4754 of the Labor Code reads: "The commission shall fix and award the amounts of special additional compensation to be paid under this article, and shall direct the State Compensation Insurance Fund to pay the additional compensation so awarded. Such additional compensation may be paid only from funds appropriated for such purpose. Out of any such appropriation the fund may reimburse itself for the cost of service rendered in payment of compensation awards pursuant to this article and maintenance of accounts and records pertaining thereto, which cost shall not exceed 5 percent of the amount of award paid."

a writ of review that section 4751 of the Labor Code (Subsequent Injuries Fund section) was unconstitutional on the ground that payments thereunder were not "workmen's compensation" within the meaning of Article 20, Section 21, of the State Constitution. This court on August 21, 1950, denied petitioner's application and on October 19, 1950, the Supreme Court denied a petition for a hearing. No reason has been presented to show that such decisions were erroneous.

Second: *Was the employee's cause of action barred by the statute of limitations (Sec. 338(1), Code of Civil Procedure)?*

[3] No. Petitioner contends that since more than three years elapsed from the time of the employee's injury until his claim was filed with it, such claim is barred by the statute of limitations.

[4] This argument is fallacious for the reason that petitioner's cause of action did not arise until January 31, 1950, the date the commission made its award fixing at 24% the employee's permanent disability resulting from his second injury. No cause of action exists until the injured party has the right to sue or file a claim. (Cf. *Hutchinson v. Ainsworth*, 73 Cal. 452, 455, 15 P. 82.)

In the instant case until the commission made its award, the employee had no cause of action or claim against petitioner for it is self-evident that the commission might have found that there was no permanent disability or various degrees of permanent disability. Hence the finding of the commission was a prerequisite to any claim which the employee might file with petitioner.

Since the employee's claim was filed within the time permitted by the statute of limitations upon which the commission relies, it is unnecessary for us to determine which section of the code is applicable in a case such as is presented here.

The award is affirmed.

MOORE, P. J., concurs.

GREEN v. GORDON et al.

Civ. 14887.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1951.

Hearing Granted Dec. 20, 1951.*

Proceeding by John D. Green, etc., against Walter A. Gordon, and others, seeking a writ of mandate to compel defendants to entertain plaintiff's application for parole. The Superior Court, Marin County, Jordan L. Martinelli, J., dismissed the petition and plaintiff appealed. The District Court of Appeal, Dooling, J., held that petition alleging that the governor, in commuting plaintiff's death sentence to life imprisonment, acted contrary to law in attaching condition to order of commutation that prisoner should not be paroled, did not state a cause of action.

Affirmed.

1. Pardon ⇨14.1

Governor, in exercise of his constitutional power to commute sentences, may attach such conditions to his act of clemency as he thinks proper so long as the condition is reasonable and compatible with genius of the laws and is not illegal, immoral or impossible of performance. Const. art. 7, § 1.

2. Constitutional Law ⇨58

The Legislature has no power to interfere with Governor's constitutional authority to commute a sentence of death to life imprisonment. Const. art. 7, § 1.

3. Pardon ⇨4

Provision in Penal Code making one imprisoned for life ineligible for parole until he has served at least seven years does not curtail Governor's constitutional power to commute a sentence of death to life imprisonment without possibility of parole. Pen. Code, § 3046; Const. art. 7, § 1.

4. Mandamus ⇨141

In proceeding by prisoner for order to show cause why he should not be paroled, return to the order could be heard by Superior Court judge other than the judge who entered final judgment.

* Subsequent opinion 246 P.2d 38.

5. Criminal Law §101(2)

Transfer of cases from one judge to another is within the power of the Superior Court.

6. Mandamus §154(4)

In proceeding by prisoner for an order to show cause why he should not be paroled, petition alleging that Governor, in commuting prisoner's death sentence to life imprisonment, acted contrary to law in attaching to the order of commutation a condition that prisoner should not be paroled, did not state a cause of action.

7. Pardon §14.2

Where Governor, in exercise of his constitutional power, commuted a death sentence to life imprisonment, condition attached to commutation that prisoner could never be paroled was valid. Const. art. 7, § 1.

Elizabeth Cassidy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant Green is an inmate of the State Prison in San Quentin. In 1932 he was convicted of murder in the first degree and sentenced to death, which judgment was affirmed. *People v. Green*, 217 Cal. 176, 17 P.2d 730. He applied to the governor for a commutation of his sentence to life imprisonment, and the governor commuted his sentence to "life imprisonment without parole." Appellant has several times applied to respondents, who constitute the Adult Authority, for parole and they have refused to consider his applications because of the form of the commutation.

Appellant filed a petition in the Superior Court entitled "Petition For Order To Show Cause", which was in effect a petition for a writ of mandate, to compel respondents to entertain appellant's application for parole. An order to show cause was issued by Judge Butler and on the return of the order the matter was heard by Judge Martinelli. Judge Martinelli dismissed the

petition and from the judgment of dismissal this appeal is taken.

On the merits appellant contends that the governor had no power to attach the condition that appellant should not be paroled to his order of commutation. Appellant argues that since the penalty fixed by the legislature for murder in the first degree is either death or life imprisonment with possibility of parole after seven years (Penal Code, sec. 3046) the governor acted "contrary to law" in attaching the condition which denies appellant the right to parole.

The weakness in this argument is that the governor's power to commute sentences comes from the constitution (Art. VII, sec. 1) which gives to the governor "the power to grant reprieves, pardons, and commutations of sentence * * * upon such conditions, and with such restrictions and limitations, as he may think proper * * *." (Emphasis ours.)

[1] In acting under this constitutional authority the governor may attach such conditions to his act of clemency as he thinks proper, *Ex parte Kelly*, 155 Cal. 39, 41, 99 P. 368, 20 L.R.A.,N.S., 337; *Ex parte Marks*, 64 Cal. 29, 28 P. 109; *Matter of Application of Wilson*, 29 Cal.App. 702, 157 P. 529, so long as the condition is "reasonable and compatible with the genius of our laws" and is not "illegal, immoral or impossible of performance." 39 Am.Jur., Pardon, Reprieve and Amnesty, sec. 67, pp. 561-562.

[2, 3] With this constitutional power of the governor it is clear that the legislature has no power to interfere, nor can the provisions of sec. 3046, Pen.Code, be reasonably construed as an attempt to curtail the governor's power in commuting a sentence of death.

While the precise question was not discussed in *Re Stewart*, 24 Cal.2d 344, 149 P.2d 689, all the justices in that case apparently assumed the governor's power to commute a death sentence to imprisonment for life without possibility of parole.

[4-7] The return to the order to show cause was properly heard by another judge. There is but one Superior Court, 7 Cal.Jur.

p. 680, and the transfer of cases from one judge to another is within the power of the court. 7 Cal.Jur. 682-683. We must assume that the order to show cause came on properly for hearing before Judge Martinelli. In any event the judgment of dismissal was correct since the petition failed to state a cause of action.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J.,
concur.



107 Cal.App.2d 8

BERGIN v. VAN DER STEEN et al.
Civ. 18354.

District Court of Appeal, Second District,
Division 2, California.

Oct. 23, 1951.

Rehearing Denied Nov. 14, 1951.

Hearing Denied Dec. 18, 1951.

T. M. Bergin brought an action against Barney van der Steen and Beulah Anderson and others for commissions on concession sales. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Moore, P. J., held, *inter alia*, that plaintiff, as successor in interest to the assignor of the original concession contract, was entitled, under the terms of the assignment, to receive commissions on sales made under a substituted concession agreement, but that under the evidence admissible against defendant van der Steen, said defendant was not personally liable for commissions on sales made after the substituted contract term.

Modified and affirmed.

1. Contracts ⇨172

The general rule that an option contained in a contract must be exercised before expiration of original term is not applicable where the parties have manifested an intention that the power is to continue for a reasonable time after the close of the original term.

2. Contracts ⇨147(1)

A contract will be so interpreted as to ascertain the intention of the parties.

3. Contracts ⇨147(1)

The intent of parties to a contract may be found from the circumstances of the execution of the contract, the conduct and declarations of the parties pursuant to its terms, and the nature and custom of the business concerned.

4. Contracts ⇨154

A fair and reasonable interpretation of a contract is always preferred rather than one leading to harsh and unreasonable results.

5. Contracts ⇨175(3)

In action involving concession contract which contained an option for renewal, finding that parties intended that concessionaire should have a reasonable time after expiration of original term in which to exercise option was based upon substantial evidence.

6. Appeal and Error ⇨1010(1)

Where evidence in action involving concession contract supported finding that assignees of concession contract knew that option contained therein was intended to continue for a reasonable time after termination of contract, finding could not be disturbed on appeal.

7. Partnership ⇨300

Where income to partnership from concessions was substantial, option to renew contract was an asset of the partnership for which surviving partner would have to account to administratrix of deceased partner.

8. Partnership ⇨300

Where option to renew concession contract was an asset of partnership, surviving partner in relinquishing option would be presumed to have intended to dispose of the asset in the regular course of settlement of partnership affairs.

9. Assignments ⇨106

Where partnership was assignee of concession contract which contained renewal option, and concession seller would not execute new concession contract in favor

of widow, who was executrix of deceased partner, unless surviving partner and executrix of deceased partner relinquished renewal option rights, such relinquishments would be an assignment within purview of agreement which gave assignor of concession contract a right to commissions on sales in event substituted concession agreement was obtained by assignee or subsequent assignee.

10. Assignments ⇨31

It is the substance and not the form of a transaction which determines whether an assignment is intended.

11. Contracts ⇨303(1)

Where performance of a contract after a temporary suspension does not impose a substantially greater burden upon promisor, his duty is suspended only during the period his performance was hindered and he must thereafter perform.

12. Contracts ⇨215(1)

Where performance of concession contract at horse racing club was prevented during part of term of contract by temporary suspension of horse racing, upon resumption of racing, the contract would not be extended beyond its normal termination date for an additional period equal to the period during which performance was suspended, in the absence of any agreement to the contrary.

13. Contracts ⇨175(3)

In action involving five year concession contract at horse racing club, evidence supported finding that contract was intended to remain in existence for five racing meets and that contract was to extend beyond its normal termination date for an additional period equal to the period during which performance was suspended by temporary suspension of horse racing.

14. Contracts ⇨175(3)

In action by assignor's successor to recover, pursuant to assignment agreement, percentage of sales made by subsequent assignee under substituted concession agreement, evidence admissible against surviving member of assignee-partnership would not support finding that substituted concession agreement was to be extended if

performance thereunder were temporarily suspended.

15. Assignments ⇨131

In action by assignor's successor to recover, pursuant to assignment agreement, a percentage of sales made by subsequent assignee under substituted racing track concession agreement, complaint, which alleged that parties to substituted agreement had construed the five year term of a substituted concession agreement to mean five racing seasons, when read in conjunction with incorporated exhibits, was sufficient to state cause of action for commissions on sales made after time term of substituted concession agreement would have expired if racing had not been temporarily suspended during war years.

16. Pleading ⇨34(7)

Where appellants criticized pleading for first time on appeal, an interpretation as favorable as possible would be given pleading with a view to upholding judgment.

17. Assignments ⇨137

In action involving concession contract, evidence sustained finding that subsequent assignee of concession contract had assumed obligation under original assignment agreement to pay assignor and its successor a percentage of gross proceeds from concession operations. Civ.Code, § 1589.

18. Assignments ⇨134

In action involving obligation under assignment of concession contract, absence of consideration for subsequent assignment raised inference that ultimate assignee would assume obligations which rested upon her assignor, as prior assignee.

19. Frauds, Statute of ⇨129(2)

Where assignor of five year concession contract which contained renewal option and such assignor's successor had completely performed under assignment agreement which gave assignor commissions on sales by assignees and subsequent assignees, such agreement was taken outside statute of frauds requiring contracts not performable in one year to be signed by person to be charged. Civ.Code, § 1624, subd. 1.

20. Assignments 137

In action by successor in interest to assignor of concession contract for commissions on concession sales, wherein assignee defended on ground that he was liable only in the event his immediate assignee was holder of concession rights, evidence supported finding that such immediate assignee had not made further assignment.

John W. Preston, Harry C. Cogen and Aaron L. Lincoff, Los Angeles, for appellant Beulah Anderson.

Leo K. Gold, Beverly Hills, for appellant Barney Van Der Steen.

Birger Tinglof, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent recovered judgment for sums aggregating in excess of \$54,800 as commissions on the gross dollar sales of liquors, foods and tobaccos at the Del Mar Turf Club. The appeal demands a reversal upon a number of grounds which will appear with the unfolding of the story.

On April 4, 1937, the club by a written instrument granted respondent a concession for the sale of such commodities at the Del Mar Race Track for the term of five years, ending with the racing season of 1941. By the same contract respondent was awarded an option for an additional period of five years from and after the close of the first five-year period. Immediately thereafter respondent assigned his concession agreement to Del Mar Caterers, a corporation of which he was sole shareholder. After operating the concession for three years, the Caterers on April 24, 1940, assigned to appellant van der Steen and William L. Anderson as buyers, the original concession agreement. By such assignment the buyers agreed that no transfer of the concession would be made or any new agreement be substituted without written notice to the Caterers or without the execution and delivery to Caterers by the new concessionaire of his agreement to be bound by all the terms and conditions of the assignment. Neither should the buyers by a transfer of the concession be released from their obligations to the Caterers. As

an integral part of the concession agreement, a supplemental contract was executed by the same parties whereby Caterers agreed that upon the expiration of the original term of the concession agreement at the close of the 1941 racing meet it would "not submit any bid to the club for the concession privileges during the optional five year term"; and the buyers agreed that in the event the concession is extended or renewed or "if any new or substituted concession agreement is entered into by us (the buyers), or either of us, or our assignees or by any firm or corporation in which we, or either of us, are interested, we agree to pay or cause to be paid, to you (Caterers) the equivalent of 2½% of the gross dollar sales made by the concession during the added period of five years commencing with the 1942 racing meet.

The concession was operated by the buyers during the 1940 racing season, but on April 9, 1941, prior to the commencement of the 1941 meet, Mr. Anderson deceased. His widow, appellant Beulah Anderson, qualified as executrix of his estate and acted in that capacity until June 2, 1944, when the probate proceedings were terminated. As surviving partner, van der Steen conducted the concession during the 1941 season and paid Caterers as provided by the 1940 contract; also he paid to Mrs. Anderson her decedent's share of the profits of 1941 for which she accounted to the estate.

After the close of the 1941 racing meet, neither respondent nor his corporation submitted a bid to the Turf Club for the concession privileges during the optional five-year term, nor did either make any effort to acquire any rights under the option, respondent having obligated himself by the supplemental contract of April 24, 1940, to refrain from bidding and having relied upon the assumption that the buyers would perform as they had agreed by such contract. But appellant Beulah Anderson obtained from the Turf Club a new concession agreement for the additional period of five years following the expiration of the first five-year period. However, the Turf Club required as conditions precedent to the effectiveness of the new concession to Mrs. Anderson, that the surviving partner and the

executrix of decedent both should "waive and relinquish any and all options, rights and privileges granted the Concessionaire" under the agreement of April 4, 1937, between the Turf Club and respondent.¹ The court found that the new agreement of the Club with Mrs. Anderson is a "new or substituted concession agreement" within the meaning of the supplemental agreement of April 24, 1940, and that it was so intended to be by both appellants; that by the waivers the latter signed on October 27, 1941, appellants "intended to, and did, transfer and assign unto, and vest in Beulah Anderson individually all optional concession rights and privileges" then and previously owned by the partnership * * * composed of Barney van der Steen and decedent; and that "by the execution of the referred to waivers and relinquishments * * * defendants intended to, and did, make Beulah Anderson an assignee and a new or substituted concessionaire" within the meaning of the supplemental agreement.

By respondent's agreement with Turf Club April 4, 1937, the Concessionaire was given a reasonable time after the expiration of the first five years within which to exercise the option of renewal. The court found that such reasonable time had not expired before the substituted agreement was made and that by the Turf Club's agreement of September 30, 1941, with Mrs. Anderson, the concession granted respondent in April, 1937, was extended and renewed within the meaning of respondent's agreement with the "buyers" on April 24, 1940.

Racing meets were forbidden by governmental regulations during 1942, 1943 and 1944. In July, 1945, in contemplation of the resumption of racing, Mrs. Anderson and the Turf Club executed another agree-

ment whereby the parties stipulated that "the suspension of racing * * * as the result of wartime restrictions and regulations shall be understood to have merely suspended said Agreement of September 30, 1941, and the period of time during which said Agreement was inoperative * * * shall be deemed added to said contract and shall extend its term accordingly."

Immediately prior to the 1945 meet, without assigning her concession agreement, Mrs. Anderson pretended to sell the concession business to her two daughters and one Sam Dunham. Although the trio thereafter operated the concessions, from all the evidence the court found that there was no actual transfer of the concession rights and that title thereto was vested in Mrs. Anderson.

The court determined that appellant van der Steen was liable under the terms of the 1940 agreement to which he was a party. Mrs. Anderson's liability was based upon her implied assumption of the obligations imposed by that contract.

[1-4] The first assignment of error is that the additional five-year option granted under the 1937 concession contract could not have been effectively transferred or assigned because the initial contract itself terminated prior to the exercise of the option. It is argued that the first five-year period ended on September 6, 1941, the final day of the 1941 racing season, and that consequently the new concession agreement between Mrs. Anderson and the Turf Club of September 30, 1941, came at least 24 days too late to be a valid exercise of the power to renew the contract. In support of the general rule that an option contained in a contract must be exercised before the expir-

1. Exhibit 18: "The undersigned, as Executrix of the last Will and Testament of William L. Anderson, Deceased, does hereby waive and relinquish any and all options, rights and privileges granted the 'Concessionaire' under and by virtue of that certain agreement dated April 4, 1937, by and between Del Mar Turf Club and T. M. Bergin, and which rights and privileges vested in the said William L. Anderson by virtue of an assignment of said agreement of April 4, 1937.

"Dated: Oct. 27, 1941.

"Estate of William L. Anderson,
"Deceased,

"By Beulah Anderson, Executrix."

Exhibit 19: "The undersigned, as one of the assignees of T. M. Bergin, does hereby waive and relinquish any and all options, rights and privileges granted the 'Concessionaire' under and by virtue of that certain agreement dated April 4, 1937, by and between Del Mar Turf Club and the said T. M. Bergin.

"Dated Oct. 27, 1941.

"Barney Van Der Steen"

ation of the original term or such power is extinguished, numerous authorities are cited. *San Pedro Salt Company v. Hauser Packing Company*, 13 Cal.App. 1, 108 P. 728; *Robertson v. Drew*, 34 Cal.App. 143, 145, 166 P. 838; 3 *Williston on Contracts* [Rev.Ed.] sec. 853, p. 2391. However, such general rule is not applicable where the parties have manifested an intention that the power is to continue for a reasonable time after the close of the original term of the contract. It is elemental that a contract will be so interpreted as to ascertain the intention of the parties. Such intent may be found from the circumstances of its execution, the conduct and declarations of the parties pursuant to its terms and the nature and custom of the business concerned. 3 *Williston on Contracts*, [Rev.Ed.] secs. 618-9, p. 1779. A fair and reasonable interpretation is always preferred rather than one leading to harsh and unreasonable results.

[5] Based upon substantial evidence, the court herein found that the parties to the initial concession agreement intended the concessionaire to have such reasonable time. The contract itself is indefinite on this point, stating merely that "Concessionaire is granted * * * an option for an additional period of five years from and after the close of the first five-year period. * * *" Nothing is stated therein to indicate time to be of the essence of the agreement. On the contrary, considering the nature of the enterprise and the surrounding facts and circumstances it is a reasonable interpretation that the parties contemplated a reasonable time within which the option could be exercised. It must be borne in mind that the brief season during each year when Del Mar was operated was itself uncertain. The time for the racing meet was annually set by the State Horse Racing Board. After the close of any racing meet the concessions are inoperative for approximately ten months before reopening. Under such circumstances, is it likely that the parties considered "time of the essence" in exercising the option?

[6] Additional evidence of the fact that the parties contemplated a reasonable period of time within which to act on the Club's

offer is supplied by their later conduct. For example, defendant van der Steen, on a check he sent to Bergin after the close of the 1941 meet, wrote on the accompanying voucher: "Happy to send you this check—you have an interest at Del Mar—why not help us to keep Hotel Del Mar open during the winter months—this will help your interest—in time to come. * * *" From that occurrence it is a reasonable inference that van der Steen apparently believed that the time had not yet expired for him to exercise the option and that Bergin would still be entitled to a share of gross sales under the 1940 contract. Furthermore, the act of the Turf Club in insisting upon waivers by van der Steen and Mr. Anderson's estate is likewise further evidence that the Club considered the option right as still subsisting. If the officials of the club communicated to appellants the idea that the club could not grant a concession to Beulah Anderson by reason of the fact that an option to continue the concession granted to respondent in 1937 was still available to respondent's assignees, appellants' knowledge thus gained was basis sufficient to warrant the inference that they both knew that they should exercise the option for renewal which would have entitled respondent to his share of the earnings for the additional five years. It is reasonable to infer from this act that the Club did not consider it could grant a concession to Beulah Anderson since an option existed by which others could continue concession operations. It follows that the trial court's determination that appellants knew that they were holders of the option being based upon substantial evidence cannot be disturbed.

[7,8] The second assignment urged by appellants is that the trial court erred in finding that the "waivers" of October 27, 1941, were actually an assignment to Beulah Anderson of all the optional concession rights granted in the 1937 contract, and that it was intended by appellants thereby to make her an assignee and a "new or substituted concessionaire" within the meaning of the 1940 agreement. Appellants argue that van der Steen as surviving partner could not create new partnership ob-

ligations; that to assign or exercise the five-year option would be inconsistent with his duties to wind up and settle the partnership business and therefore his waiver transferred nothing and was meaningless. The answer to such contention is that the power to exercise the option in the 1937 contract was an extremely valuable partnership asset; the profits realized by the concessionaires from their operations during the 1941 season alone totaled over \$28,000. For such an asset van der Steen was in duty bound to account to Mrs. Anderson. Therefore, it was presumptively his intention, in whatever he did, to dispose of the asset in the regular course of the settlement of the partnership affairs.

[9, 10] Also, appellants contend that the waiver executed at the instance of the Turf Club cannot possibly be construed to be an assignment inasmuch as it does not purport to transfer any right from van der Steen and the estate to any one. It is true that on the face of neither instrument does the conventional language of an assignment appear, but when the circumstances surrounding their execution are viewed in a realistic light it is apparent that by use of a "waiver and relinquishment" it was sought to assign valuable contractual rights to Mrs. Anderson disguised in an innocent terminology. Looking behind the trappings of the transaction, keeping in mind the advantages to be gained by appellants by obtaining a new contract without any obligation to pay respondent a portion of their profits and considering the benefits to be derived by the Turf Club in effecting its release from the terms of its original concession, no doubt remains that the right to renew the valuable concession privileges was legally lodged in van der Steen with some equitable ownership in the beneficiaries of the estate of Mr. Anderson, and it is clear that the Turf Club recognized this fact and for an additional reason required the way to be cleared in order to grant new rights to the widow. The waivers were the means adopted for transferring to her these rights previously owned by the partnership. As the trial judge pointedly observed, it is the substance and not the form of a transaction which deter-

mines whether an assignment was intended. Appellant van der Steen cannot avoid his obligation under the 1940 contract with Del Mar Caterers to "pay or cause to be paid" 2½ per cent of gross sales for the five-year-option period in the event of a renewal agreement by him or his assignees merely by a roundabout method which seeks to avoid calling the transaction an "assignment" or "transfer." It would be unreasonable to assume that van der Steen relinquished his interest in this valuable concession contract merely out of the goodness of his heart. Yet, that is the interpretation he would seem impliedly to urge upon this court since he failed to appear at the trial where he might have given his explanation under oath. From all of the circumstances the trial court's determination is entirely reasonable and in accord with lofty ethical concepts.

[11] It is contended that, even assuming that the trial court was correct on other points, respondent is not entitled to recover for any years subsequent to 1946. They argue that this was the last year of the five-year term granted to Mrs. Anderson by the Turf Club contract and that the later agreement between them extending operations over the 1947-49 period cannot inure to respondent's benefit inasmuch as the original contractual obligations to him had been discharged. Unquestionably, the temporary frustration of the concessionaire occasioned by the war did not thereby discharge his duty to render performance for the balance of the five-year period which, after the war, included 1945 and 1946. Where performance of a contract after a temporary suspension does not impose a substantially greater burden upon such promisor his duty is suspended only during the period his performance was hindered and he must thereafter perform. *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 149, 180 P.2d 888; *United States Trading Corp. v. Newmark Grain Co.*, 56 Cal.App. 176, 187, 205 P. 29; *Rest. Contracts*, sec. 462.

[12, 13] The problem presented here is whether the period of the contract was ultimately extended beyond its normal ter-

mination date for an additional period equal to the period during which performance was suspended. Absent any agreement of the parties as to their intent, the rule would seem to be that no extension results. Rest. Contracts, sec. 462, illustrations 3 and 5. But the instant situation is not devoid of guidance. Mrs. Anderson's clarifying agreement of July, 1945, indicates that it was intended that any suspension of performance pursuant to the contract should also act to extend the overall period of the agreement. This subsequent contract specifically recites that "the parties hereto desire to clarify * * * said agreement of September 30, 1941 * * *". Thereby is an admission on her part that such was the meaning of the ambiguous clause in the original contract. Accordingly, the court's finding that it was intended that the contract should remain in existence for five racing meets is supported by the evidence.

[14] However, this 1945 clarification was not admitted as evidence against van der Steen since he was in no way a party to it. The record is thus barren of any evidence binding him. Therefore, in the absence of a showing of a contrary intent it must be held that his liability terminated with the end of the 1946 meet.

Mrs. Anderson argues also that as to her the respondent's complaint fails to state a cause of action in that only legal conclusions are alleged. The complaint charges that defendants obtained the concession agreement pursuant to the provisions of paragraph 2(a) of the 1940 agreement which with the 1937 contract is incorporated in the pleading, and provides for the payment of $2\frac{1}{2}$ per cent of the gross dollar sales which defendants have received ever since the 1942 racing season. The complaint further alleges that the defendants construed the phrase, to wit, "the term of five years, commencing with the 1937 season and ending with the season of the year 1941" to mean a term comprising a total of five racing-meet seasons and that the

meets of 1942, 1943, and 1944 were held in the years 1945, 1946, and 1947.

[15, 16] Construed liberally in favor of plaintiff the complaint when read in conjunction with the incorporated exhibits alleges that appellant Anderson obtained, and still retained, the concession rights for the optional five-year period; that after having operated the concessions and collected the receipts she was a new or substituted concessionaire and assignee of van der Steen and decedent Anderson and as such would pay plaintiff the $2\frac{1}{2}$ per cent of gross sales. While the complaint may not be celebrated as a model declaration of ultimate facts yet, inasmuch as appellants are making their criticisms for the first time, an interpretation as favorable as possible will be given with a view to upholding the judgment. 21 Cal.Jur., Pleading, sec. 31, p. 55.

[17] Mrs. Anderson demands reversal on the further ground that the record does not support the finding that she impliedly assumed the obligation under the 1940 contract to pay Bergin a percentage of gross proceeds from her concession operations. However, the record reveals that Mrs. Anderson had full knowledge of her husband's contract with Bergin; that she knew from her position as executrix of the great value of the concession agreement; that she thereafter received an assignment of the contract from van der Steen whereby she received the benefit of the valuable option for renewal and further gained the advantage of Bergin's fidelity to his promise to refrain from entering a competitive bid at the time for renewal. In pursuance of Civil Code section 1589² the court could correctly hold Mrs. Anderson impliedly to have assumed the obligations as well as expressly to have received the rights under the assigned contract. The California rule appears somewhat narrower than the provision of the Restatement of Contracts, section 164(2) that an assignee is held impliedly to undertake performance of the duties imposed by a contract merely by

2. Section 1589, Civil Code. "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the

obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

virtue of an assignment thereof. It is here held in conformance with section 1589, *supra*, that acceptance of the benefits of a transaction is equivalent to a consent to all the obligations thereby imposed. *Weidner v. Ziegler*, 218 Cal. 345, 350, 23 P.2d 515; *Brady v. Fowler*, 45 Cal.App. 592, 595, 188 P. 320.

[18] Moreover, the fact that no consideration was shown for the assignment from van der Steen to Beulah Anderson is also of significance. From this fact it is a reasonable inference that it was contemplated that the assignee would assume the obligations then resting upon the assignor. See *Jegen v. Berger*, 77 Cal.App.2d 1, 6, 174 P.2d 489.

[19] There is no merit in appellant Anderson's argument that respondent's claim is barred by the statute of frauds in that it comes within section 1624(1) of the Civil Code, the one-year section.³ The answer to this contention is that Bergin has completely performed his promises under the 1940 contract, having assigned his rights under the original agreement and having thereafter refrained from bidding for concession privileges at the end of the 1941 season. Such agreement is thereby taken out of the operation of the statute. *Dutton v. Interstate Inv. Corp.*, 19 Cal.2d 65, 70, 119 P.2d 138; *Rest. Contracts*, sec. 198.

Neither can reversal be predicated upon the ground that respondent Bergin was under a legal disability to maintain this action as assignee of Del Mar Caterers because the formal assignment of July 28, 1948, was made when the corporation's rights, powers and privileges had been suspended for failure to pay its franchise taxes. It is not necessary to consider the merits of this defense inasmuch as, pursuant to respondent's motion to reopen the case, additional evidence was introduced of a prior assignment to Bergin between April 24, 1940, and June of that year. This evidence established that at a meeting of the corporation's board

of directors held during that period all corporate assets were transferred to respondent in consideration of his relinquishment of his stock.

[20] The last assignment made on behalf of appellant van der Steen is that he cannot properly be held liable under the 1940 contract since the evidence shows the concessions to have been sold to, and operated by, Dunham and others and not by Mrs. Anderson. Without going into an interpretation of the contract between van der Steen and Del Mar Caterers to determine whether he was to be liable *only* in the event his immediate assignee were holder of the concession rights (a somewhat unreasonable construction) it is sufficient answer to appellant's contention to point out that the court below found that Mrs. Anderson did not part with all rights under her contract. Respondent's testimony that Dunham informed him as late as 1947 that he only worked for Mrs. Anderson and that she was in charge supports the court's finding that she enjoyed full benefits of her contract, never having assigned such contract itself. Indeed, her contract barred assignment without consent of the Turf Club.

The judgment in its entirety will be affirmed as to appellant Anderson but will be modified as to appellant van der Steen as follows: (1) Strike from the judgment to wit: "that plaintiff have and recover from defendants Barney van der Steen and Beulah Anderson and each of them the following sums of money" and also strike paragraphs (a) through (e), and substitute in lieu thereof the following, to wit: "that plaintiff have and recover from defendant Beulah Anderson the following sums of money:

(a) The sum of \$10,906.59, with interest thereon at 7% per annum from September 3, 1945;

(b) The sum of \$10,214.52, with interest thereon at 7% per annum from September 14, 1946;

3. Section 1624, Civil Code. "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by

the party to be charged or by his agent:

"1. An agreement that by its terms is not to be performed within a year from the making thereof;"

(c) The sum of \$10,803.73, with interest thereon at 7% per annum from September 20, 1947;

(d) The sum of \$10,841.01, with interest thereon at 7% per annum from September 11, 1948;

(e) The sum of \$12,103.56, with interest thereon at 7% per annum from September 10, 1949.

It Is Further Ordered, Adjudged and Decreed that plaintiff have and recover from defendant Barney van der Steen the following sums of money:

(a) The sum of \$10,906.59, with interest thereon at 7% per annum from September 3, 1945;

(b) The sum of \$10,214.52, with interest thereon at 7% per annum from September 14, 1946; which said sums when paid shall constitute a payment on the sums to be paid by defendant Anderson."

As so modified the judgment is affirmed.

McCOMB, J., concurs.

Hearing denied; SHENK and CARTER, JJ., dissenting.



107 Cal.App.2d 200

BILES v. BILES.

Civ. 4177.

District Court of Appeal, Fourth District,
California.

Oct. 30, 1951.

William Marvin Biles brought action against Nell Jane Biles for divorce. The Superior Court of San Bernardino County, Carl B. Hilliard, J., awarded custody of children to wife by interlocutory divorce decree. The plaintiff thereafter sought an order for change of custody, and upon denial thereof, plaintiff appealed. The District Court of Appeal, Barnard, J., held that evidence was sufficient to sustain order refusing to grant change of custody.

Order affirmed.

1. Marriage

Marriage was not rendered invalid by fact that wife had another husband living at time thereof when annulment of such other marriage was procured a few days later.

2. Divorce

In divorce proceeding in which court had awarded custody to wife, and husband thereafter sought order changing custody on ground that wife had thereafter entered into bigamous marriage, and it appeared that marriage of wife was not in fact invalid in view of annulment of prior marriage, evidence as to welfare of children involved was sufficient to sustain order refusing to change custody.

3. Divorce

Where husband from whom wife had procured divorce sought order changing previous order granting custody of children to wife, and report of probation officer as to conditions under which children were at present residing was considered on question of custody, and evidence as to such issue was also introduced by both husband and wife, court was entitled to consider report of probation officer along with other evidence in deciding issue, and when record showed that judge had acted not only on report, but upon evidence as well, there was neither error nor prejudice.

Taylor F. Peterson, San Bernardino, for appellant.

Swing & Gillespie, San Bernardino, for respondent.

BARNARD, Presiding Judge.

This is an appeal from an order refusing to change the custody of two children, aged 2½ years old and a boy nearly 5. The custody of these children was awarded to the respondent by an interlocutory decree of divorce entered on April 18, 1949. On April 3, 1950, the appellant applied for a modification of that decree, giving such custody to him. The respondent filed an answering affidavit with the request that the existing order remain unchanged. A final decree of divorce was entered on

April 19, 1950, and later that day the respondent was married to one Earl F. Gettle at Santa Ana.

A hearing on the application for change of custody was held on April 21, 1950, at which both of the parties and three other witnesses testified. The evidence disclosed that the children were being well cared for by the respondent in a nearly new 3-bedroom home; that the appellant was employed at the Patton State Hospital with board and room furnished; and that he intended, if given the children, to place them in the home of some friends. There was also evidence that on May 9, 1949, the respondent and Gettle had gone through a marriage ceremony at Tijuana, Mexico, and that since that date they had lived together in the home where the children were being kept. The appellant called a witness who testified that she had married Gettle in 1944, and they had not been divorced. On cross-examination, she admitted that when she married Gettle she already had a husband who was still living and from whom she had never been divorced. The appellant testified that he had observed the conditions in respondent's home, and that they were "just like you find them in most homes." The only objection he raised was that the respondent had lived with Gettle without being properly married to him, and that he did not think it was right to "bring up children under conditions like that." It was brought out that a final decree had been entered, and that the respondent and Gettle had since been remarried. The court suggested that he would like to continue the matter and obtain a report from the probation officer as to whether "the conditions under which the children are presently residing are fit and proper for them insofar as the physical and mental health of the children are concerned," and further remarked that any order permitting the respondent to continue to have custody of the children should be dependent upon her clearing up her marital status, with respect to whether or not Gettle had been free to marry her. The court asked counsel for the appellant if this was satisfactory to him. He replied that it was and the matter was continued.

Sometime between the first and second hearings a decree was entered annulling the marriage of Gettle to the woman who testified she had married him in 1944. At the second hearing, on May 26, 1950, this fact was brought out, two witnesses were called by the appellant, and his attorney announced that he had no further testimony to offer. The court then denied appellant's request for a modification of the custody order. A formal order was later entered, and this appeal followed.

[1,2] The first point raised, that the evidence is insufficient to sustain the order, is based solely on the contention that the evidence shows that the respondent admittedly contracted a bigamous marriage with Gettle, and is living "in open defiance of the law" in the presence of the children. It is argued that this bigamous relationship not only existed from May 9, 1949, to April 19, 1950, but that it still exists, since they did not again remarry after Gettle obtained an annulment of his 1944 marriage. The respondent's marriage to Gettle on April 19, 1950, was not rendered invalid by the fact that Gettle's annulment was not procured until a few days later. *In re Eichhoff*, 101 Cal. 600, 36 P. 11. While the situation existing between May 9, 1949 and April 19, 1950, is one not to be especially commended, it had no conclusive or compelling effect on the question before the trial court. Any doubt as to whether this Mexican marriage was legal was removed by the subsequent marriage after respondent's divorce became final and before the first of these hearings. The good faith of the respondent and any possible effect on these young children were, at best, factual questions. The order made is supported by the record, and nothing appears which requires its reversal.

[3] The only other point raised is that the court erred in "admitting and adopting the report of the probation officer." The appellant relies on *Fewel v. Fewel*, 23 Cal. 2d 431, 144 P.2d 592; *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96; *Moon v. Moon*, 62 Cal.App.2d 185, 144 P.2d 596; and *Wilkinson v. Wilkinson*, 105 Cal. App.2d 392, 233 P.2d 639, and argues that the probation officer's report was the only

thing that the judge considered in deciding this question of custody. Those cases are not controlling under the facts which here appear. The only thing referred to the probation officer, and that with appellant's consent, was whether the conditions under which the children were presently residing were fit and proper insofar as their physical and mental health was concerned. The report of the probation officer covered these matters, including the result of interviews with persons to whom the officer had been referred by the appellant, and made no recommendation whatever. The remarks of the court at the second hearing very clearly show that he acted upon the evidence, and not solely on the report. After stating that he would adopt and consider the report, he referred to the evidence concerning respondent's "marital entanglements" and said he was convinced she had acted in good faith, and that "such situation has not affected the children." Neither error nor prejudice appears in connection with such use as was made of the probation officer's report.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



107 Cal.App.2d 75

SEVEN UP BOTTLING CO. OF LOS ANGELES et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 18705.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1951.

The Seven Up Bottling Company of Los Angeles, a corporation, and B. S. Lunt, filed a petition for a writ of prohibition to restrain the Superior Court of Los Angeles County from taking the deposition of petitioner Lunt, who was Secretary of the Seven Up Bottling Company of Los Angeles. The

District Court of Appeal, McComb, J., held that statutory provision requiring applications before trial for subpoena duces tecum to be accompanied by affidavit specifying exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues, and stating that witness has desired matters or things in his possession, was not complied with.

Writ issued as prayed.

1. Prohibition ⚡5(3)

An order of Superior Court denying motion to quash service of subpoena and subpoena duces tecum served upon person and corporation who were not parties to divorce action pending in superior court could be reviewed by District Court of Appeal on writ of prohibition.

2. Prohibition ⚡5(3)

An order of superior court denying a motion to quash service of process may be reviewed on a writ of prohibition.

3. Depositions ⚡36, 58

Under statutory provision requiring applications before trial for subpoena duces tecum to be accompanied by affidavit specifying exact matters or things desired to be produced, and setting forth materiality thereof, and stating that witness has desired matters or things in his possession, it is not sufficient merely to state that documents produced were material, and facts must be shown upon which court can see that books and records sought to be produced contain material entries, and a mere conclusion that records are material in absence of facts supporting such allegation, constitutes a conclusion of law which does not meet requirements of such provision. Code Civ.Proc. § 1985.

4. Depositions ⚡36, 58

Where no facts were shown in affidavit upon which subpoena duces tecum was sought, and only pertinent allegations were conclusions of law, statutory provision requiring applications before trial for subpoena duces tecum to be accompanied by affidavit specifying exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to issue, and stating that witness has desired matters or things in his possession, was not complied with. Code Civ.Proc. § 1985.

Thomas P. Menzies, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

McCOMB, Justice.

This is an application for a writ of prohibition to restrain the superior court from taking the deposition of petitioner Lunt, secretary of the Seven Up Bottling Company of Los Angeles.

Facts: In a divorce action entitled Washburn v. Washburn, Los Angeles Superior Court, No. Pasadena D-8011, defendant seeks to take the deposition of petitioner Lunt, secretary of the Seven Up Bottling Company, on the ground that the witness is the only one who can establish facts material to the issues involved in the above action, pursuant to the provisions of section 2021, subdivision 6, of the Code of Civil Procedure.

A motion to quash the service of the subpoena and subpoena duces tecum was denied by the superior court, and the present alternative writ was issued by this court.

Respondent has filed a general demurrer to the petition.

[1,2] *Questions:* First: *Is prohibition a proper remedy?*

Yes. An order of the superior court denying a motion to quash service of process may be reviewed on a writ of prohibition. (Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 402[1], 55 P.2d 203. Cf. Southern Pac. Co. v. Superior Court, 15 Cal.2d 206, 210, 100 P.2d 302, 130 A.L.R. 323.)

Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 487, 171 P.2d 21, 166 A.L.R. 701 and C. S. Smith Metropolitan Market Co. v. Superior Court, 16 Cal.2d 226, 228 et seq., 105 P.2d 587, are not here in point. In such cases the court refused to issue writs of prohibition to prevent the enforcement of further proceedings based upon the claim that the subpoena duces tecum was predicated upon alleged defective affidavits. Such is not the case here.

The allegations of the present petition fall squarely within the ruling of Frey & Horgan Corp. v. Superior Court, supra, the intent of the instant writ being to test the correctness of the ruling of the trial court in denying a motion to quash service of process.

It is obvious that since petitioners are not a party to the divorce action they do not have any plain, speedy and adequate remedy or even right to appeal from any judgment rendered in the proceeding.

In such case a party is entitled to relief where he is beneficially interested in the litigation and his legal rights are being injuriously affected. (Monterey Club v. Superior Court, 48 Cal.App.2d 131, 143[2], 119 P.2d 349.)

Second: Did the trial court err in denying petitioners' motion to quash the service of process (subpoena and subpoena duces tecum)?

Yes. Section 1985 of the Code of Civil Procedure reads in part as follows: "Subpoena duces tecum. All applications before trial for subpoenas duces tecum shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control."

[3] The foregoing provisions have been construed by the Supreme Court of this state in Nelson v. Superior Court, 9 Cal.2d 729, 731[1], 73 P.2d 232. In this case the court held that in order to comply with the quoted provisions of section 1985, Code of Civil Procedure, the exact things to be produced should be described and there should be set forth in full detail the materiality thereof to the issues involved in the case. It was held that it was not sufficient merely to state that the documents produced were material. Facts must be shown upon which the court can see that the books and records sought to be produced contain material entries. A mere allegation that the records are material, in the absence of any facts supporting such

allegation, constitutes a conclusion of law which does not meet the requirements of the quoted section.

[4] No facts were shown in the affidavit upon which the subpoena duces tecum was sought. The only pertinent allegations were conclusions of law, such as, "Said B. S. Lunt has in his possession the records and minutes of the regular and special meetings of the Board of Directors of Seven Up Bottling Company of Los Angeles," which "will disclose the activities of the plaintiff and Cross-defendant in the operation of the business of Seven Up Bottling Company of Los Angeles." Also "that the Secretary of the Seven Up Bottling Company of Los Angeles is the only one who can establish the fact pertaining to the activities of the plaintiff and cross-defendant, which fact is material to the issues involved in the above entitled action."

Clearly under the above rule the affidavit failed to show sufficient facts to support the issuance of a subpoena duces tecum and the trial court erred in denying petitioners' motion to quash the service of process.

The demurrer is overruled. Let the peremptory writ issue as prayed.

MOORE, P. J., concurs.



107 Cal.App.2d 161

OLSTAD v. OLSTAD.

Civ. 18246.

District Court of Appeal, Second District,
Division 1, California.

Oct. 29, 1951.

Harold P. Olstad, administrator of the estate of Helmine Olstad, deceased, and Harold P. Olstad, individually, brought action against Arthur Olstad for partition and to quiet title to realty, on ground that when deceased conveyed realty to defendant without

consideration she was incompetent to do so. The Superior Court of Los Angeles County, Otto J. Emme, J., entered a judgment for the defendant and an order denying plaintiffs' motion for new trial, and plaintiffs appealed. A District Court of Appeal, Hanson, J. pro tem., held that evidence sustained judgment for defendant.

Judgment affirmed.

Deeds 6211(1)

In action by administrator against his brother, who was son of deceased, for partition and to quiet title to realty, on ground that deceased was incompetent when she conveyed her interest in realty to the brother during her lifetime without consideration, evidence sustained judgment for the brother.

R. C. W. Friday, Los Angeles, for appellants.

Clarence L. Belt, Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an appeal from a judgment in an action for partition and to quiet title to a parcel of realty.

Appellant's complaint below charged that the deceased mother of the plaintiff and the defendant died intestate and that during her lifetime had conveyed her interest in the family home to the defendant without consideration and that plaintiff as a consequence was vested with an interest in the property.

Upon the trial the defendant testified that the interest which his mother had in the property was purchased by him from appellant and conveyed by appellant, at the request of defendant, to the mother to hold in trust for the defendant. The trial court believed the testimony of the defendant and rendered judgment in his favor.

At the trial below, appellant, evidently realizing that he could not sustain his cause of action as pleaded, endeavored, without seeking leave to amend his complaint, to introduce evidence tending to show that the decedent was incompetent at the time she executed the deed conveying her interest of record in the property to the defendant.

Assuming, for the sake of argument only, that evidence was admissible as to her incompetency under the issues as made, it is yet apparent that the defendant was entitled to the judgment rendered, if the court believed, as it did, that the testimony of the defendant represented the true fact and that the decedent was not incompetent as charged by the plaintiff.

As there is no challenge and, indeed, there could not be, to the sufficiency of the evidence to sustain the only issue tendered by the pleadings the judgment is affirmed and the appeal from the order denying a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.



107 Cal.App.2d 55

BOBAK v. MACKEY et al.

Civ. 18213.

District Court of Appeal, Second District,
Division 1, California.

Oct. 24, 1951.

Joseph Bobak sued Ray Mackey and others for deceit in making factual misrepresentations on which plaintiff relied in purchasing real estate from defendants. From a judgment of the Superior Court of Los Angeles County, William S. Baird, J., for plaintiff, named defendant appealed. The District Court of Appeal, Hanson, J., pro tem., held that appellant's alleged misrepresentations that plaintiff could lawfully carry on light manufacturing business on the premises involved and that such premises were in a city zone wherein light manufacturing could be lawfully carried on were misrepresentations of fact, not merely of law.

Judgment affirmed.

1. Fraud ⚡28

Misrepresentations by vendor of realty that purchaser could lawfully carry on light manufacturing business on premises and

that premises were located in city zone wherein light manufacturing could be lawfully carried on were misrepresentations of fact, not merely of law, so as to entitle purchaser to recover damages from vendor for deceit.

2. Fraud ⚡43

A complaint, alleging that defendant falsely represented that plaintiff could lawfully carry on light manufacturing business on certain premises and that such premises were located in city zone wherein light manufacturing could be lawfully carried on for purpose of inducing plaintiff to purchase premises and that he purchased them in reliance on such misrepresentations stated cause of action in deceit for misrepresentations of fact on which plaintiff relied in purchasing realty.

Leo A. Freeman, Los Angeles, for appellant.

Victor Ford Collins, and Hyman Smith, Los Angeles, Frank J. Kanne, Jr., Los Angeles, for respondent.

HANSON, Justice pro tem.

The only question presented by appellant is whether the complaint of the respondent vendee states a cause of action in deceit against appellant as his vendor. The appellant as defendant below did not demur to the complaint nor did he in his answer aver by way of defense that the complaint did not state a cause of action. At the conclusion of the trial upon the issues which had been joined the trial court entered a judgment for damages based upon findings that the defendant had made certain misrepresentations of fact upon which the plaintiff had relied in the purchase of the real estate which gave rise to the lawsuit. The defendant below is here with an appeal based alone on the judgment roll.

The complaint alleged that plaintiff informed the defendant that he was looking for a piece of property suitable for a dwelling and with separate facilities wherein he could also carry on his business of manufacturing and selling a malted food drink powder. It was further alleged that the defend-

ant falsely represented to the plaintiff as matters of fact:

(1) That the plaintiff could lawfully carry on his business of manufacturing and selling a malted food drink powder on said premises,

(2) That said premises were as a matter of fact located in a City of Los Angeles C-2 zone, in which type of zone light manufacturing activities could be lawfully carried on, including the plaintiff's business of manufacturing and selling a malted food drink powder.

And it was alleged:

(3) That said representations were false and fraudulent in that said premises were located in a City of Los Angeles R-3 zone, in which type of zone manufacturing of any sort whatsoever was unlawful.

(4) That the defendant knew that the representations were false, that they were made for the purpose of inducing the plaintiff to purchase the property, and that the plaintiff purchased the property in reliance on said misrepresentations.

[1] Appellant contends that the misrepresentations charged against him in the complaint, which we have briefly summarized above, are at most representations of law and not of fact and hence no cause of action was stated upon which a judgment could legally have been rendered. For reasons presently to be stated we see no merit in the contention.

The complaint alleges that the premises which were the subject of a purchase and sales agreement between the parties were represented to the plaintiff by the defendant as being located within a certain territory of the City of Los Angeles which the City had zoned as C-2 when in fact the premises were located in a territory of the city which had been zoned not as C-2, but as R-3, in which type of zone the plaintiff, as defendant well knew, could not use the premises for the purpose for which alone he purchased them.

Such a statement, if made, and relied upon by the purchaser is as much a representation of fact as would be a statement that the premises involved were within the corporate limits of Los Angeles, when they were not, or that they abutted on a certain named thoroughfare in Los Angeles, when they did not. In each of these examples the facts represented come about by reason of law. But the facts as stated are not for that reason misrepresentations of law, but on the contrary of facts. The same is true here. The territory in which the premises were located was by reason of law classified as being in zone R-3, rather than in zone C-2. For aught that appears the law could have classified the premises as C-2 rather than R-3, but it did not do so.

The representation was not a mere misrepresentation of law, i. e., the classification made by the law, but of the fact that the property lay within a zone of a particular character, i. e., which the law had classified as R-3 rather than C-2. Manifestly, the representation was of a fact and not merely one of law. Cf. Rest., Torts, secs. 525 and 545. Compare *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291, and *Barder v. McClung*, 93 Cal.App.2d 692, 209 P.2d 808. In the *Seeger* case the court said with respect to a representation which had been made in that case as follows: "The representation that a levy of execution and sale of the property had occurred was a false statement of fact and is not rendered less actionable because it also contained legal conclusions." [18 Cal.2d 409, 115 P.2d 981.]

[2] Without detailing further the additional allegations of the complaint, it suffices to say that it stated a cause of action and consequently there is not the slightest merit in the appeal.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

107 Cal.App.2d 188

**JUHL v. JOHN HANCOCK MUT.
LIFE INS. CO.**

Civ. 18451.

District Court of Appeal, Second District,
Division 2, California.

Oct. 30, 1951.

Action by Ada Evelyn Juhl against the John Hancock Mutual Life Insurance Company to recover death benefits under a certificate of insurance on the life of her husband. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for the plaintiff and the defendant appealed. The District Court of Appeal, Wilson, J., held that the privilege of conversion within 31 days after termination of employment and termination of the insurance did not of itself operate to keep the insurance in force but constituted an option, of which the employee might avail himself.

Reversed with instructions.

Insurance — 177

Where employee had certificate of life insurance, which was issued under and subject to terms of group policy issued to his employer, and certificate and group policy provided that insurance automatically ceased with termination of employment and that, in event of termination of employment, employee could have issued, upon

application within 31 days from termination of employment, and upon payment of premium, a life policy, and certificate and group policy were in force on date of termination of employment, and employee died within conversion period without exercising option, the conversion privilege did not of itself operate to keep insurance in force during period of option.

Meserve, Mumper & Hughes, Los Angeles, for appellant.

Erb, French & Picone, Beverly Hills, for respondent.

WILSON, Justice.

From a judgment in favor of plaintiff in an action to recover death benefits under a certificate of insurance defendant appeals.

There is no dispute as to the facts. The certificate of insurance was on the life of George Juhl and was issued under and subject to the terms of a group insurance policy issued to Walter B. Bowie, his employer. Juhl's wife, plaintiff herein, was named as beneficiary. The certificate and the group insurance policy were both in effect on December 31, 1946, at which time Juhl terminated his employment with Walter Bowie. Both the certificate¹ and the group policy² specified that the insurance

1. The pertinent provisions of the certificate of insurance are as follows:

"Termination of Insurance

"The insurance provided for by said Group Life Policy automatically terminates upon the discontinuance of the said policy by the Employer, or with the termination of employment with the said Employer * * *

"Conversion Privilege

"In the event of termination of employment for any reason whatsoever of an Employee insured under said Group Policy, the Employee shall be entitled to have issued to him by the Company without evidence of insurability, and upon application made to the Company within thirty-one days after such termination and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the Company, except term insurance, in an amount not greater

than the amount of his insurance under said Group Policy at the time of such termination; insurance under the converted policy to be in force and effective upon delivery of the policy and payment of the premium, but in no event prior to the discontinuance under said Group Policy of the insurance of the Employee so applying."

2. The Group Life Policy provides in part:

"Discontinuance of Individual Insurance. The insurance of an Employee shall automatically cease when he fails to make the required contribution for his insurance to the Employer, or when his employment with the Employer shall terminate * * *

"Conversion Privilege. In the event of termination of employment of any employee insured hereunder for any reason whatsoever, the employee shall be entitled to have issued to him by the Company without evidence of insurability, and upon application made to the Company within

of the employee automatically ceased with the termination of employment. Each of them also provided that in the event of termination of employment the employee was entitled to have issued to him, without evidence of insurability, upon application made to the company within 31 days after termination of employment, and upon the payment of the premium, a life insurance policy, the converted policy to be in force and effective upon delivery of the policy and payment of the premium.

Juhl had not made application for the issuance of a life insurance policy pursuant to the conversion privileges provided for in the group policy and the certificate prior to his death on January 28, 1947, as the result of injuries sustained in an automobile accident.

On the date of Juhl's death the group insurance policy was in full force and effect. The only question to be determined is whether by virtue of the conversion clause the insurance coverage as to Juhl continued for a period of 31 days beyond the date of the termination of employment and was in effect at the time of his death.

We have not been cited any cases in California construing like or similar provisions in insurance policies and our research has disclosed none. The question has, however, been determined in a number of other jurisdictions and with the exception of Oklahoma the courts have uniformly held that the privilege of conversion within 31 days after termination of the insurance does not of itself operate to keep the insurance in force but constitutes an option, of which the employee may or may not avail himself, to obtain individual insurance without evidence of insurability upon application time-

thirty-one days after termination of employment as defined herein, and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the Company, except term insurance, in an amount not greater than the amount of his insurance under this policy at the time of such termination; insurance under the converted policy to be in force and effective upon delivery

ly made. *Cutledge v. Aetna Life Ins. Co.*, 53 Ga.App. 473, 186 S.E. 208; *Aetna Life Ins. Co. v. Catchings*, 5 Cir., 75 F.2d 628; *Schooley v. Metropolitan Life Ins. Co.*, Tex.Civ.App., 77 S.W.2d 886; *Aetna Life Ins. Co. v. Carroll*, 188 Ark. 154, 65 S.W. 2d 25; *Missouri State Life Ins. Co. v. Hinkle*, 18 Tenn.App. 228, 74 S.W.2d 1082; *English v. Metropolitan Life Ins. Co.*, 300 Mass. 482, 15 N.E.2d 804; *Szymanski v. John Hancock Mutual Life Ins. Co.*, 304 Mich. 483, 8 N.W.2d 146, 145 A.L.R. 947; *Roy v. Aetna Life Ins. Co.*, Tex.Civ.App., 191 S.W.2d 498; *Fearon v. Metropolitan Life Ins. Co.*, 138 Misc. 710, 246 N.Y.S. 701; *Equitable Life Assurance Soc. v. Yates*, 288 Ky. 309, 156 S.W.2d 128; *Young v. General American Life Ins. Co.*, Ohio App., 41 N.E.2d 895; *Crutchfield v. Continental Assurance Co.*, 336 Ill.App. 411, 84 N.E.2d 333; *Adkins v. Aetna Life Ins. Co.*, 130 W.Va. 362, 43 S.E.2d 372.

In the instant case the certificate expressly provides that it is issued "under and subject to the terms and conditions of" the group policy. Each provides that the insurance shall automatically cease with the termination of employment and each contains the conversion clause which provides that the converted policy is "to be in force and effective upon delivery of the policy and payment of the premium, but in no event prior to the discontinuance under this policy of the insurance of the employee so applying." The group policy further provides: "The Company shall, upon the discontinuance of the insurance hereunder on any employee because of termination of employment be released from all liability on account of such employee unless and until such an individual policy is issued * * *." Plaintiff asserts there is no

of the policy and payment of the premium, but in no event prior to the discontinuance under this policy of the insurance of the employee so applying. The Company shall, upon the discontinuance of the insurance hereunder on any employee because of termination of employment be released from all liability on account of such employee unless and until such an individual policy is issued, except as provided hereunder under the heading 'Discontinuance of Individual Insurance.'"

evidence that Juhl had any knowledge of this latter clause which does not appear in the certificate which he had in his possession. This contention is without merit since the certificate does provide that it is issued under and subject to the terms of the group policy. Moreover, although the additional clause makes more explicit the intention of the parties, taking into consideration only the provisions which are common to both the certificate and the group policy, there is no language in either which could be construed as extending the insurance coverage 31 days or until such time as the converted policy becomes effective.

It is undoubtedly true, as pointed out by plaintiff, that through no fault of his own an employee will be uninsured for the period of time between the termination of his employment and the time in which he can make application for and have a new policy in effect but, as the court stated in *Cutledge v. Aetna Life Ins. Co.*, 53 Ga.App. 473, 186 S.E. 208, 210, *supra*: "If it had been the intention of the parties to extend the coverage of insurance during the thirty-one days in which the insured might apply for an individual certificate, such language as is commonly used with reference to grace period of thirty-one days for payment of premiums that, during such time 'the policy will remain in full force and effect,' could have been easily employed. As the contract stands, it is apparent that upon termination of employment, the insurance coverage ceased."

In addition to three Oklahoma cases, which are contrary to the weight of authority, respondent has cited *Powell v. Equitable Life Assurance Soc.*, 173 S.C. 50, 174 S.E. 649, and *Emerick v. Connecticut General Life Ins. Co.*, 120 Conn. 60, 179 A. 335, 105 A.L.R. 413, in support of his contention that the 31-day period constitutes a "grace period" during which the insurance coverage is continued. In the *Powell* case the only issue was whether there had been a termination of employment, the court holding that there had not been. In the *Emerick* case the employee was temporarily laid off. The employer subsequently terminated the employment, notifying the in-

surance company but failing to notify the employee either of the termination of employment or of the cancellation of his insurance. The court held that "termination of employment" as it was used in the policy meant termination of which the employee had knowledge and that therefore there had been no termination of employment prior to the employee's death.

Judgment reversed with instructions to enter judgment for defendant.

MOORE, P. J., and McCOMB, J., concur.



107 Cal.App.2d 179

VIERA v. VIERA.

Civ. 18196.

District Court of Appeal, Second District,
Division 1, California.

Oct. 30, 1951.

Effie M. Viera brought suit for divorce against Frank R. Viera. From that portion of an interlocutory judgment of the Superior Court of Los Angeles County, Frederick F. Houser, J., decreeing that defendant be restrained from annoying or molesting plaintiff and from appearing at plaintiff's place of employment or at the family home of the parties, the defendant appealed. The District Court of Appeal, Drapeau, J., held that portion of interlocutory decree appealed from should be reversed because amended complaint of plaintiff did not request such relief.

Portion of interlocutory decree appealed from reversed.

See also, 236 P.2d 632.

1. Pleading ⚡252(2)

An amended complaint supersedes the original complaint and thereafter the original complaint performs no function as a pleading.

2. Divorce ⚡160

Relief granted to plaintiff in a divorce action, if no answer be filed, cannot exceed

that which is demanded in the complaint. Code Civ.Proc. § 580.

3. Divorce ☞87

Where original complaint, to which demurrer was sustained with leave to amend, prayed for an order restraining husband from molesting wife and from appearing at her place of employment, and ordering him to remove from family home and restraining him from entering thereon, but amended complaint prayed only for dissolution of marriage ties, for approval of property settlement, and for "such other and further relief as is meet in the premises," court had no authority to provide in divorce decree that husband be restrained from annoying or molesting wife and from appearing in or near her place of employment and their family home. Code Civ.Proc. § 580.

Rinehart, Merriam, Parker & Berg and Jay D. Rinehart, all of Pasadena, for appellant.

No appearance for respondent.

DRAPEAU, Justice.

This appeal is from that portion of an interlocutory decree of divorce entered on July 7, 1950, to-wit:

"It is further ordered, adjudged and decreed that, until plaintiff and defendant shall have effected a sale of the real property located at 845 North Valencia Street, Glendora, California, plaintiff is hereby granted the sole possession of said real property, and defendant be and he is hereby restrained from residing in or entering the family home and/or appearing upon the premises surrounding said building.

"It is further ordered, adjudged and decreed that defendant be and he is hereby restrained from annoying or molesting plaintiff and also from appearing in or near plaintiff's place of employment."

No appeal is taken from the balance of the said judgment which awarded a divorce to plaintiff wife; directed a sale of the family home; ordered defendant husband to pay (1) all bills for household

expenses contracted prior to April 13, 1950, the date of separation; and (2) \$140 directly to plaintiff's attorney to cover attorney's fees and costs.

By her amended complaint respondent prayed: (a) For dissolution of the marriage ties; (b) For approval of a property settlement theretofore executed by the parties, and for a declaration that both were bound thereby; and (c) For "such other and further relief as is meet in the premises."

Appellant filed no answer and his default was duly entered.

It is here contended that the portion of the judgment from which this appeal is taken is erroneous, because the relief thereby accorded to respondent was in excess of and beyond the relief prayed for in the amended complaint.

Section 580, Code of Civil Procedure, provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint * * *."

In her original complaint, to which a demurrer was sustained with leave to amend, respondent prayed for an order pendente lite restraining appellant from molesting her, from appearing at her place of employment, ordering him to remove from the family home and restraining him from entering thereon.

Respondent's amended complaint contains neither allegations nor prayers regarding these particular matters.

[1] As stated in *Darsie v. Darsie*, 49 Cal.App.2d 491, 493, 122 P.2d 64, 65: "The law is established in California that an amended complaint supersedes the original complaint and thereafter the original complaint performs no function as a pleading. (*Bray v. Lowery*, 163 Cal. 256, 260, 124 P. 1004; *Collins v. Scott*, 100 Cal. 446, 453, 34 P. 1085.) * * *

[2] "The relief granted to a plaintiff in a divorce action, if no answer be filed, cannot exceed that which is demanded in the complaint. (Sec. 580, Code Civ.Proc; *Bennett v. Bennett*, 50 Cal.App. 48, 49, 194 P. 503; *Lang v. Lang*, 182 Cal. 765,

769, 190 P. 181; see *Horton v. Horton*, 18 Cal.2d 579, 116 P.2d 605.)"

See, also, *Foley v. Foley*, 120 Cal. 33, 42, 52 P. 122, and *Majors v. Majors*, 70 Cal. App.2d 619, 623, 161 P.2d 694.

[3] In the circumstances here presented, it is clear that the relief accorded respondent was in excess of that demanded.

That portion of the judgment appealed from is reversed.

WHITE, P. J., and DORAN, J., concur.



107 Cal.App.2d 181

VIERA v. VIERA.

Civ. 18373.

District Court of Appeal, Second District,
Division 1, California.

Oct. 30, 1951.

Effie M. Viera brought suit for divorce against Frank R. Viera, and decree of divorce was awarded to plaintiff. The Superior Court of Los Angeles County, Mildred L. Lillie, J., entered an order awarding to plaintiff attorney's fees and costs on appeal, and the defendant appealed. The District Court of Appeal, Drapeau, J., held that order was erroneous in view of property settlement agreement entered into by the parties.

Order reversed.

1. Divorce ☞182

The power of court in divorce action to compel husband to pay wife any money necessary to prosecute or defend the cause, is not exhausted on rendition of the judgment in the trial court, but continues during the pendency of the appeal. Civ.Code, § 137.

2. Husband and Wife ☞278(1)

Property settlement agreements of husband and wife occupy a favored position in the law and are sanctioned by the Civil Code. Civ.Code, §§ 158, 159.

3. Husband and Wife ☞278(1)

Courts are loath to disturb property settlements between husband and wife except for equitable considerations, and hence such agreements that are not tainted by fraud or compulsion or that are not in violation of confidential relationship of parties are valid. Civ.Code, §§ 158, 159.

4. Divorce ☞182

Where husband and wife entered into property settlement agreement providing that husband should pay to wife's attorney the sum of \$140 to cover attorney's fees and costs in pending divorce suit, and that wife should never make or assert against the husband any claims or demands for support or maintenance, alimony, counsel fees or court costs, except as otherwise expressly provided, and interlocutory divorce decree provided that husband should pay directly to attorney for wife the sum of \$140 to cover attorney's fees and costs, court order requiring husband to pay wife counsel fees and costs on appeal was erroneous. Civ.Code, §§ 137, 158, 159; Code Civ.Proc. § 1049.

Rinehart, Merriam, Parker & Berg and Jay D. Rinehart, all of Pasadena, for appellant.

No appearance for respondent.

DRAPEAU, Justice.

The record discloses that on May 11, 1950, the parties hereto entered into a property settlement agreement which provided among other things that (a) defendant husband "shall pay all bills contracted for household expenses prior to the separation of the parties on the 13th day of April, 1950; and shall also pay to the wife's attorney the sum of \$140 to cover attorney's fees and costs in the pending divorce action No. D-396963, in accordance with the order heretofore made by the Superior Court of Los Angeles County in said cause on the 21st day of April, 1950"; (b) that "each of the parties hereto shall, respectively, pay and discharge all bills and indebtedness of every character which they or either of them may have contracted subsequent to

the 13th day April, 1950"; and (c) that "the wife shall never make or assert against the husband any claims or demands for support or maintenance, alimony, *counsel fees or court costs, except as herein otherwise expressly provided*, and the husband herein shall never at any time make or assert, as against the wife herein, any claims or demands for support or maintenance, it being expressly understood between the parties hereto that each is releasing the other from any and all such claims for support or maintenance." (Emphasis added.)

On July 7, 1950, plaintiff was granted a default divorce from defendant, and on July 20, 1950, defendant husband appealed from a portion of the interlocutory judgment of divorce. See *Viera v. Viera*, Cal. App., 236 P.2d 630.

On September 22, 1950, defendant husband was ordered to pay to plaintiff wife counsel fees and costs on appeal, pursuant to motion of plaintiff theretofore made for that purpose.

Defendant here appeals from that order on the ground that it is in direct violation of the terms of the property settlement agreement hereinbefore referred to.

[1] It is true, as stated in *McCahan v. McCahan*, 47 Cal.App. 173, 175, 190 P. 458, 459, that "Our statute provides that during the pendency of a divorce action the court may, in its discretion, compel the husband to pay the wife any money necessary to prosecute or defend the cause. Civ. Code, sec. 137. This power is not exhausted upon the rendition of the judgment in the trial court but continues during the pendency of the appeal. *Bruce v. Bruce*, 160 Cal. 28, 30, 116 P. 66."

Also, section 1049, Code of Civil Procedure, provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

[2,3] On the other hand, it is also well-established that "Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the

Civil Code. *Hill v. Hill*, 23 Cal.2d 82, 89, 142 P.2d 417; *Hensley v. Hensley*, 179 Cal. 284, 287, 183 P. 445; Civ.Code, §§ 158, 159. Such agreements are usually made with the advice of counsel after careful negotiations, and the courts, in accord with legislative sanction, prefer agreement rather than litigation. *Hill v. Hill*, supra, 23 Cal.2d at page 89, 142 P.2d at page 417. When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court. (Citation of authorities.)" *Adams v. Adams*, 29 Cal.2d 621, 624, 177 P.2d 265, 267.

In the instant cause, respondent wife relied upon the property settlement agreement by pleading it in her amended complaint and praying that the court approve it. In addition to agreeing that the sum of \$140 was to cover attorney's fees and costs in the pending divorce action, in accordance with an order made by the Superior Court on April 21, 1950; she also agreed that she would "never make or assert against the husband any claims or demands for support or maintenance, alimony, counsel fees or court costs, except as herein otherwise expressly provided."

While the property settlement agreement was not approved in toto, the interlocutory decree of divorce provided that "defendant pay directly to Benjamin D. Mathon, attorney for plaintiff, the sum of \$140 to cover attorney's fees and costs herein."

[4] In the circumstances, since the trial judge put his stamp of approval on those particular provisions of the property agreement relating to attorney's fees and costs by incorporating them in the judgment, and respondent expressly waived her right to further counsel fees or court costs, the order here in question was erroneous.

The order appealed from is reversed.

WHITE, P. J., and DORAN, J., concur.

SHAFF et al. v. BALDWIN et al.

Civ. 14629.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1951.

Hearing Denied Dec. 20, 1951.

Action by Walter A. Shaff, a minor, by and through his guardian ad litem, Leon K. Shaff, against Donald H. Baldwin, and others, as driver, owner, and special employer of driver of truck, for personal injuries sustained by plaintiff in collision between automobile driven by plaintiff with such truck when both vehicles were attempting to pass third vehicle. The Superior Court, City and County of San Francisco, William F. Traverso, J., granted motion to render nonsuit as to defendant special employer, and entered judgment on verdict in favor of driver and owner of truck, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that despite fact that defense counsel was guilty of misconduct when he stated facts not in evidence in argument to jury, in view of fact that such misconduct did not work miscarriage of justice and because verdict was supported by evidence, there was no prejudicial error.

Judgment and order affirmed.

1. Trial ⇨133(6)

Where counsel states in argument facts not in evidence, there is misconduct, which, when deliberate and uncalled for, may be a ground for reversal even though court has admonished jury to disregard remarks.

2. Trial ⇨115(5)

Reading by counsel in argument to jury of evidence taken at former trial or hearing of same case is improper.

3. Appeal and Error ⇨1060(1)

Where no reversal is required to prevent miscarriage of justice, no reversal ought to be granted for sole purpose of punishing counsel who has been guilty of misconduct.

4. Appeal and Error ⇨1060(1)

Where counsel for defense read portions of deposition of plaintiff in argument to jury, and exact portions of depositions read had not been previously read or shown to plaintiff, although such reading of facts not in evidence, especially when

coupled with assurance to court that such matter was in record, was misconduct, there was no reversible error when portion read was merely one of many instances shown for purpose of establishing that plaintiff had changed his testimony to strengthen his case and when result arrived at was supported by evidence.

5. Automobiles ⇨244(36)

In action for personal injuries sustained by driver of automobile against driver and owner of truck and special employer of driver wherein it appeared that truck had collided with automobile when both vehicles were attempting to pass third slow moving vehicle, evidence sustained finding that injuries of driver of automobile had not been caused by negligence of driver of truck.

6. Automobiles ⇨245(26)

Where verdict of jury in action by driver of automobile against driver, owner, and special employer of driver of truck exonerated driver from liability for personal injuries of driver of automobile, nonsuit against alleged special employer could not have been erroneous, since there could be no derivative liability of special employer without liability of employee.

7. Automobiles ⇨197(1)

Where driver of truck involved in collision with automobile of plaintiff was in general employment of licensed highway carrier who made his truck available to another carrier for hauls contracted for by latter, and general employer was in control of conduct of driver in operation of truck and gave instructions as to route, speed, and maintenance, and other carrier merely directed what to haul and where and when to go and paid for each haul at going rates, ruling as matter of law that latter carrier was not liable as special employer for negligence of driver, if any, was proper.

8. Automobiles ⇨197(1)

Where driver of automobile brought action for personal injuries against driver of truck, owner of truck and special employer of driver of truck, and it was contended that special employer could have been found negligent because he loaded

truck excessively and because truck had been traveling 45 miles per hour at time of collision when maximum speed was 40 miles per hour at such weight, in absence of evidence that truck loaded to weight alleged was necessarily dangerous, or contention that weight was illegal, special employer who had no control over operation of truck could not have been liable. Vehicle Code § 731.

Ricksen, Freeman & Johnson, Oakland, Belli, Ashe & Pinney, San Francisco, for appellant.

Donald H. Baldwin & Joseph M. Hissong, Hoge, Pelton & Gunther, San Francisco (Reginald M. Watt, San Francisco, of counsel), for respondents.

Clark & Heafey and Edwin A. Heafey, all of Oakland, for respondents, E. J. Willig and E. J. Willig Truck Transp. Co.

NOURSE, Presiding Justice.

This is an appeal by the plaintiff in a negligence action. Walter A. Shaff, the minor plaintiff, was seriously injured in a collision between the automobile he was driving and a tractor owned by defendant Baldwin and driven by defendant Hissong, which tractor was pulling a trailer owned by defendant E. J. Willig Truck Transportation Co. Near the end of the trial a motion to render a nonsuit as to the defendant E. J. Willig personally was granted on stipulation and a motion to the same effect made on behalf of E. J. Willig Truck Transportation Co., on the ground that that company was not an employer of Hissong but that between the company and Hissong's employer Baldwin there was a relationship of independent contractor, was granted on November 16, 1949, after opposition by plaintiff. The verdict was in favor of defendants Baldwin and Hissong. Plaintiff moved for a new trial but dismissed his motion giving as ground that he had failed to file the required affidavits. He appealed both from the judgment and order of November 16, 1949, granting the nonsuit as to defendant E. J. Willig Truck Transportation Co. and from the judgment

on the verdict in favor of the two remaining defendants.

The appeal from the judgment on the verdict is based solely on alleged misconduct of the attorney of defendant, Mr. Hoge, in stating in his closing argument to the jury certain parts of the deposition of plaintiff not read into evidence at the trial. For the consideration of the greater or lesser importance of said grievance some knowledge of the facts and evidence is required.

The accident happened on June 22, 1948, at about 6:30 A.M. on State Highway 50 between Livermore and Tracy about a mile east of the crest of the Livermore Pass. Highway 50 is there a four lane highway going east-west. Plaintiff and his friend Krenkel were going in an easterly direction (to Yosemite) in plaintiff's car, a 1931 Chrysler convertible with a 1938 Ford V-8 motor and a Buick steering wheel larger than the original one; it had no front fenders or running boards. Plaintiff was driving. The tractor and trailer, a large van trailer loaded with beer, were also going in an easterly direction. Plaintiff passed it when it was going very slowly up hill in the outside lane before or at the crest. Plaintiff whose speed was probably between 35 and 40 miles went back to the outside lane after passing it. After passing the crest he saw before him in the same outside lane a slow moving automobile on which he gained. The evidence is in so far without conflict that when the Shaff car and the truck had left Livermore Pass and were going downhill all three vehicles involved were in the outside lane, lowest down the slow car (later found to be the one of Mr. and Mrs. Zumbrun) behind that the Shaff car, gaining on the Zumbrun car, and behind that the tractor and trailer, now that it was going downhill gaining on the Shaff car. It is also undisputed that plaintiff wished to pass the slow car in front of him and that Hissong, the driver of the tractor, also wished to pass. The essential difference between the position of the parties relates to who first left the outside lane for the middle lane for the purpose of passing and to the giving

of signals in that respect. Hisson testified that he saw the Shaff car drive downhill up to the Zumbrun car and remain behind it at a distance of 15 to 20 feet. He himself was then 200 to 300 feet behind the Shaff car. At that time he gradually went over to the inside lane giving two blasts on the horn when he started to change lanes. When he was completely in the inside lane he was still 50 to 100 feet behind the Shaff car, but when he had neared it to 3 to 15 feet, it shot out in front of him. Hisson pulled a chain to blow the horn and the impact followed immediately. Walter Shaff testified, corroborated by his friend Krenkel, that when he wished to pass the car in front of him and to turn into the inside lane he looked into his rear vision mirror and saw the truck about a hundred feet or so behind him in the same lane. Shaff then signalled with his arm extended straight and proceeded to pull out. He got completely in the left hand (inside) lane and had driven 100 to 150 feet in it when he heard the blast of the horn and while he gave a hard yank to the right the collision happened instantaneously.

The evidence further showed that the gouge marks of the accident were on the southerly one-third of the inside lane and a few on the outside lane, and that the right front wheel of the tractor was broken off but that otherwise the front of the tractor was scarcely damaged with even the bumper and fog lights intact. There was evidence of an expert that the fracture of the bearing of the front wheel of the tractor could only have happened the way it had if it was hit from behind by an object travelling faster than the tractor. Not only were Shaff and Krenkel hurt in the accident, Shaff seriously, but the Zumbruns who were in the slow car were killed. A trial concerning the death of the Zumbruns in which Shaff testified had preceded the present case. A few hours after the accident Krenkel made a statement to the police officer, Krause, in the first aid room of the hospital to which he had been brought in which he said that he thought they were in the inner lane, but that they may have been in the other lane; that a truck was trying to pass them, that he blew his horn just

as he was upon them, "I looked around and the truck was *to our left* right upon us." At the trial Krenkel testified that he did not remember having spoken to Officer Krause.

In cross-examining Walter Shaff, Mr. Hoge repeatedly tried to impeach him by reading earlier statements made in his deposition and at the Zumbrun trial. In his final argument he reverted to the parts read. Appellant complains of three instances in which Mr. Hoge during the argument read to the jury portions of the deposition allegedly not read before.

One of the three instances complained of was abandoned at the oral argument as it was shown to have been read into evidence. In a second instance there was a slight deviation but wholly without importance. The essential part on which the argument was based had been duly read to plaintiff, but in reading it again to the jury Mr. Hoge started a few lines too early. The extra lines so read contained only completely uncontroversial matter. No misconduct was assigned and clearly there was neither misconduct nor prejudice.

The third point, the only one requiring consideration, is as follows: During the argument Mr. Hoge read from the deposition: "Q. When you pulled the wheel, which way did you pull it? A. To my right. Q. And at that time, was any portion of your car in the passing lane, the inside lane or not? A. That I don't know." Here Mr. Ricksen, attorney for plaintiff, remarked that this was not covered and that it read in the corrected deposition: "After I pulled the wheel, I don't know." Mr. Hoge read the uncorrected version for the second time and Mr. Ricksen repeated the correction, which Mr. Hoge said was made after consultation with Mr. Ricksen. Mr. Ricksen said that he would answer that in argument. Mr. Hoge contended that he was entitled to bring to the attention of the jury the testimony as given before correction and declared that he was going to read it again. Mr. Ricksen then said that if Mr. Hoge would pursue covering testimony that was not in the record of the case he was going to assign it as misconduct, ask the court to instruct the jury to disregard it. Mr. Hoge contended that it

was in the record, that he had read it to Shaff and that Shaff had said that he gave that testimony. The judge stated that his problem was whether that had been done. Mr. Hoge repeated that it had. The court pointed out that Mr. Hoge was aware of the rule against comment on evidence that is not in the record. "Mr. Ricksen: All right, Mr. Hoge does so at his own peril. Mr. Hoge: All right, don't worry. Peril doesn't bother me in that regard." He read the passage again and commented on the fact that at that time, two months after the accident occurred, Shaff did not know whether any portion of his car was in that lane, and that now he had him not only come into the lane but run two hundred feet in it before the truck ran into his rear.

It is now conceded by respondent that the exact portion of the deposition here complained of had *not* been read or shown to the plaintiff. Respondent contends that the essential point then being treated in the argument was that appellant had testified at the trial that his car was hit from behind whereas in the deposition he had said repeatedly that he did not know where the impact came from or what part of his car was hit. The deposition as to that point had been read and the point had been referred to immediately before the reading of the passus attacked, but, certainly when respondent's comment is considered it is clear that the part of the car hit and the direction of the impact are a matter different from the place of appellant's car with respect to the inside lane. In this part of his argument Mr. Hoge was bringing up a discrepancy not in evidence and the jury was not instructed to disregard it because Mr. Hoge had assured the court that it had been read and had taken the risk of it being in evidence.

[1,2] Stating in the argument facts not in evidence is a misconduct, which when deliberate and uncalled for may be a ground for reversal even when the court had admonished the jury to disregard the remarks, *Deibler v. Wright*, 119 Cal.App. 277, 283, 6 P.2d 344. See also 53 Am.Jur. 385 et seq., sec. 480; 66 C.J.S. New Trial, § 36, page 128. Reading in argument to the jury of evidence taken at a former

trial or hearing of the same case is also condemned as improper, 53 Am.Jur. 394-95, § 489. The conduct of Mr. Hoge comes in the same category and the misconduct is aggravated by his unwarranted assurance to the court and his defying and provoking attitude.

Nevertheless the arguments against reversal must prevail.

[3-5] When no reversal is required to prevent miscarriage of justice, no reversal ought to be granted for the sole purpose of punishing counsel, *Hulburt v. Worthington*, 57 Cal.App.2d 477, 479, 134 P.2d 832; *Jonte v. Key System*, 89 Cal.App.2d 654, 659, 201 P.2d 562. Appellant's only argument with respect to prejudice and miscarriage of justice is that the case was bitterly contested and that the attempted impeachment of plaintiff related to the essence of the case—the facts relating to the happening of the accident. However plaintiff's attorney himself does not appear to have considered the matter important, for he permitted the passus to be read twice to the jury without assigning misconduct or urging admonition to disregard. He requested such admonition only in case of further persistence, which could not then do much harm. This attitude seems in harmony with the true importance of the matter. The passus argued without prior reading was only one of many adduced to show that plaintiff was changing his testimony so as to strengthen his case. The other examples pointed out to the jury had actually been read to the plaintiff and acknowledged by him. Some of them related to nearly the same question and were more essential than the one which was incorrectly mentioned. For instance when asked whether he was not uncertain whether he had fully gotten into the inner lane when the accident happened plaintiff had answered at the trial in this case that he had fully gotten into it. Then prior testimony of his was read in which appellant had said that he *believed* he did and further: "Well, I mean I wouldn't guarantee it, but I am almost positive of it." The question whether appellant was already completely in the inner lane when the accident happened is closely related to the

one whether there was still part of his car in the inner lane when he turned back to the right, and is more important with respect to the essential problem who first turned into the inner lane and therefore had the right to be there. Another example of change of testimony for the same reason of greater importance than the one under attack is the following: During his cross-examination in this case plaintiff had denied that the accident happened when he turned to pass the car in front; his earlier testimony read to him and argued to the jury was: "Well, I would say when I was, I was about one hundred feet behind it when I started to pass it and that is when the accident happened." Under these circumstances there is no reason to assume that one more minor example of change of testimony can have had such influence on the jury as to require reversal. Moreover a reading of all the evidence of which part has been stated convinces us that the jury came to the correct result and that there is no miscarriage of justice in that respect.

Appellant argues that the above misconduct during the argument was the culmination of a generally reprehensible attitude consisting in badgering of counsel and an attempt to create prejudice. However the only actual example stated is the use of the word "hot rod" to indicate plaintiff's car and at no time except during the repeated reading of the one passus treated before had there been any assignment of misconduct. It may be conceded that the tone of Mr. Hoge was sometimes unduly aggressive and demonstrative with respect to opposing counsel, but under the circumstances of the case there seems no ground to take that demeanor into consideration. The use of the word "hot rod", which had been used by defendant Hissong in his report to the police and was explained by him as relating solely to the looks of the car and not to the manner in which it was driven seems unprejudicial.

Our conclusion is that there is no ground for reversal of the judgment in favor of Hissong and Baldwin on the ground of misconduct of counsel.

[6,7] With respect to the appeal from the order granting a nonsuit as to the defendant E. J. Willig Truck Transportation Co., appellant argues in the first place that the nonsuit was erroneous because there was evidence sufficient to go to the jury that although Baldwin was Hissong's general employer E. J. Willig Truck Transportation Co., herein further called Willig, also exercised part control over him sufficient to make him liable as his special employer. It is clear that as the judgment in favor of Hissong will be upheld this point has lost all importance because there can be no derivative liability of the special employer without liability of the employee. Nevertheless it may be stated succinctly that the holding that Willig as a matter of law was not liable as special employer of Hissong was correct, where the evidence showed without conflict that Hissong was in the pay and general employment of Baldwin, that Baldwin as well as Willig was in the general trucking business as a licensed highway carrier, that Baldwin made his tractor with driver (and also a trailer) available to Willig for hauls for which Willig had contracted, that Willig paid for each haul at the rates established by the Public Utilities Commission less certain deductions, that Baldwin had not relinquished to Willig the power to discharge the driver and that, although Willig directed what to haul and where and when to go, not Willig but Baldwin was in control of the conduct of Hissong in his operation of the truck while in transit as it was Baldwin who gave the instructions as to route to be followed, speed to be maintained and maintenance of equipment. *Billog v. Southern Pacific Co.*, 189 Cal. 477, 209 P. 241; *McComas v. Al. G. Barnes Shows Co.*, 215 Cal. 685, 12 P.2d 630; *Lowell v. Harris*, 24 Cal.App.2d 70, 81, 74 P.2d 551; *Restatement, Agency*, § 227; 16 Cal. Jur. 1109.

[8] Appellant further contends that Willig himself could have been found negligent and his negligence proximately contributing to the accident because he loaded the truck so that the total weight according to some evidence was approxi-

mately 69,800 pounds and brought it on the road where according to some evidence it may have had a speed of 45 miles per hour at the time of the collision, whereas section 515, Vehicle Code, prescribes a maximum speed of 40 miles for a truck of 25,000 pounds or more. The point is wholly devoid of merit. There is no contention that it is in any way illegal to bring on the road a truck loaded to that weight; there is no evidence whatever that the truck in question loaded to that weight was necessarily dangerous. For the speed of the truck even if driven 45 miles per hour Willig was not responsible. He was not the owner of the vehicle or the person employing or directing the driver and he did not require the operation of the vehicle at said speed. (See § 731, Vehicle Code.)

Judgments and order affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.



TUTTLE v. TUTTLE

Civ. 14758.

District Court of Appeal, First District,
Division 1, California.

Oct. 25, 1951.

Hearing Granted Dec. 20, 1951.*

Emmett Norton Tuttle brought a suit for divorce against Lillie Alma Tuttle, and the defendant filed a cross-complaint for divorce. The defendant was awarded a divorce decree. Thereafter the defendant filed a motion for modification of amount of payments due her under divorce decree. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered an order denying defendant's motion, and the defendant appealed. The District Court of Appeal, Peters, P. J., held that payments ordered by divorce decree were in the nature of alimony, and therefore subject to modification.

Order reversed.

* Subsequent opinion 240 P.2d 587.

1. Divorce ⇨245(1)

Generally a provision for payment of alimony to wife in a divorce decree, granted to wife for offense of her husband, may be modified by court under appropriate circumstances. Civ.Code, § 139.

2. Husband and Wife ⇨278(1)

A husband and wife may contract with each other with respect to the support of each other and their property rights. Civ.Code, §§ 158, 159.

3. Divorce ⇨254

A divorce decree adjusting property rights is not subject to modification regardless of whether it is based on agreement of the parties. Civ.Code, §§ 158, 159.

4. Divorce ⇨254

Where there is a property settlement agreement providing as a part thereof for periodic payments to be made to wife by husband, and agreement is approved by court in divorce suit, and payments are ordered by divorce decree to be paid pursuant to the agreement, that order will not be subsequently modified, except by the consent of the parties. Civ.Code, §§ 158, 159.

5. Divorce ⇨245(1)

Where alimony is payable to wife for a limited period, court may, on a proper showing, modify award and extend the time of payment, and fact that court failed to reserve power to modify is immaterial.

6. Divorce ⇨245(1), 254

If divorce decree provides for alimony payments limited or unlimited as to time, court has power to modify, but if payments are part of a property division, then the power to modify does not exist. Civ. Code, § 139.

7. Divorce ⇨245(3), 254

On motion by divorced wife to modify amount of payments provided for by divorce decree, whether payments were part of a property division, so as not to be subject to modification, or whether alimony, is normally a question of fact.

8. Divorce ⇨286

If finding of trial court, on motion by divorced wife to modify amount of pay-

ments provided for by divorce decree, that payments were part of a property division, so as not to be subject to modification, were adequately supported by the record, such finding would not be disturbed on appeal.

9. Divorce ☞245(3), 254

On motion by divorced wife to modify amount of payments provided for by divorce decree, interpretation of the decree, if no admissible extrinsic evidence as to intent is admitted, is a question of law.

10. Divorce ☞254

If court by divorce decree is approving a property division based on a property settlement, divorce decree should so recite.

11. Divorce ☞255

If there was a property settlement agreement between husband and wife, the terms of the agreement became merged with provisions of divorce decree and were superseded by the decree.

12. Divorce ☞245(1)

Where divorce decree in favor of wife, on ground of husband's desertion, recited that allegations of wife's cross-complaint and amendment to it were true, and cross-complaint alleged existence of certain community property and prayed for equal division of such property and for alimony, and court divided community property equally and provided that husband should pay wife \$150 a month for one year, \$135 a month for the next year, and \$125 a month for the next year, and \$100 a month for the next five years, payments were for "alimony" rather than for "property division" and hence decree was subject to modification with respect to payments. Civ.Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Property Division" and "Alimony".

13. Divorce ☞245(2)

Fact that husband, in reliance on terms of property settlement agreement which included provisions for limited payments of alimony to wife, changed his position and abstained from presenting any evidence in divorce suit in support of his

complaint for divorce, did not estop wife from seeking modification of divorce decree with respect to alimony payments.

Albert M. Hardie, Robert A. Kaiser, Oakland, for appellant.

Gardiner Johnson, Samuel C. Shenk, San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant, based upon her cross-complaint, was granted a divorce from plaintiff on the ground of his desertion. The interlocutory decree divided the community property of the parties and provided for the payment to the wife of certain sums of money for a limited period. Neither the interlocutory nor the final decree (which incorporates the provisions of the interlocutory) mentions any property settlement agreement. Within the period that payments to the wife were still payable, she moved to modify the amount of such payments on the ground that conditions had changed since the entry of the final decree. The trial court denied her motion on the ground that it had no jurisdiction to grant it. The wife appeals.

The record shows the following: In September, 1946, the husband instituted an action for divorce on the ground of cruelty. The wife cross-complained for separate maintenance on the grounds of cruelty and desertion, asking for a division of the community property, and \$350 per month for her maintenance and support. Later she amended her cross-complaint to ask for a divorce. The trial court granted an interlocutory decree to the wife on the ground of the husband's desertion. The decree contains provisions in reference to a division of the community property of the parties and for payments to be made to the wife. In this connection this portion of the decree starts off as follows: "It Is Further Ordered, Adjudged and Decreed that the hereinafter designated property which is found to be community property be, and the same is divided and apportioned in the following manner, to-wit:—"

There then follow nine numbered subparagraphs. These subparagraphs accomplished the following:

1—divided the community cash totalling \$2,800 equally between the parties, except that the husband was required to pay certain community debts, and the wife was required to redeem certain jewelry and tools awarded to the husband.

2—divided equally between the parties forty United States Savings Bonds.

3—awarded the furniture and household furnishings to the wife.

4—awarded certain clothing and trunks in the possession of the wife to the husband, and required the husband to pay the storage charges thereon.

5—made the wife the beneficiary of a certificate in the Navy Mutual Aid Association of the cash value of \$1,600, the husband to pay the premiums.

6—awarded to the husband a life policy also of the cash value of \$1,600.

7—this is the paragraph that provided for limited payments to the wife. It did so in the following language:

"That plaintiff pay to cross-complainant, as and for her support and maintenance the sum of One Hundred Fifty (\$150.00) Dollars per month for a period of one year commencing April 10, 1947; the sum of One Hundred Thirty-five (\$135.00) Dollars per month for the next year; the sum of One Hundred Twenty-five (\$125.00) Dollars per month for the next year; and the sum of One Hundred (\$100.00) Dollars per month for the next five (5) years, at which time all payments shall cease and determine."

8—required the husband to pay certain designated accrued income taxes.

9—required the husband to pay \$100 additional fees to the wife's attorney.

On March 10, 1950, which was well within the period that the wife was entitled to payments from her husband, she moved to modify the final decree by increasing the amount of the payments to her. In her supporting affidavit she avers that circumstances have changed since the entry of the final decree in that her hus-

band's income has increased from \$360 to \$635 per month, and her health has become so impaired that she can no longer work. The husband's counter-affidavit avers that the money payments awarded the wife were not alimony; that the provisions of the final decree awarding his wife limited support were an integral part of a property settlement agreement; that his wife is estopped from now seeking an increase in the payments because, at the divorce trial, in reliance upon the property settlement agreement, he abstained from presenting evidence in support of his complaint; that there was an agreement between the parties settling all of their property rights, and that the limited payments for support were part of this agreement; that the court was without jurisdiction to modify the decree. In support of his contentions of estoppel and lack of jurisdiction the husband includes as part of the affidavit a portion of the reporter's transcript of the divorce action, claiming that such transcript demonstrates the correctness of his contentions. The wife filed a counter-affidavit in which she claims that the use of the reporter's transcript constitutes a collateral attack on the decree, and in which she avers that the award was for alimony and not an integral part of any property settlement. The reporter's transcript of the divorce proceeding incorporated into the affidavit of the husband, shows that the trial court, at the beginning of the trial, asked for a statement of the community property of the parties. After receiving this statement the judge expressed his view that if the things each of the parties charged the other were true "they should be divorced * * * and the property adjusted." Thereupon, an unreported discussion was had in chambers. The cause was then continued to the afternoon session. At that session the attorney for the wife announced that, pursuant to the court's suggestion, she was amending her cross-complaint to pray for a divorce. After some discussion, immaterial here, the wife put in her evidence in support of her allegations of desertion. This evidence was properly corroborated. Thereupon the attorney for the husband, in response-

to a question from the court, stated that he was offering no evidence in support of his complaint. Then the court asked: "Have the parties agreed on a settlement of their property rights?" Then the following occurred: "Mr. Clark: [Attorney for the husband.] Pursuant to the discussion had with your Honor this morning and the suggestions as made in connection with that discussion and as made by your Honor, these have been discussed by the parties and there was the additional feature of the paying of these bills that have been contracted and there has been the suggestion that they be taken off the \$2800." The court and counsel then discussed the manner of awarding the property, concluding in this manner: "The Court: The plaintiff and cross-defendant, as I understand by your agreement, is to pay to the defendant and cross-complainant the sum of \$150 per month for twelve months; the sum of \$135 a month for twelve months; the sum of \$125 a month for twelve months, and the sum of \$100 a month for sixty months, as and for her support and maintenance. At the end of the 96 months the payments are to terminate."

The trial court on May 9, 1950, entered its order denying the wife's motion to modify the decree. The pertinent portions of that order read as follows:

"(1) That the provision for the limited payments to the defendant and cross-complainant wife which was incorporated into and made a part of the Interlocutory and Final Decrees of Divorce herein, was not permanent alimony, but was an unqualified disposition of property rights resulting in full satisfaction of any and all claims by the defendant and cross-complainant wife for her support and maintenance;

"(2) That in reliance upon the terms of the agreement settling the property rights of the parties herein, which included the limited payments to the defendant and cross-complainant, plaintiff and cross-defendant changed his position and abstained from presenting any evidence in support of his Complaint for Divorce; that the defendant and cross-complainant wife is

hereby estopped from making any attempt to modify the terms of said decree;

"(3) That the Court, at the time of the granting of the Interlocutory and Final Decrees of Divorce herein, did not reserve any power to subsequently modify the agreement or the decree;

"(4) That this Court is without jurisdiction to modify the terms of the Final Decree of Divorce entered herein on the 16th day of April, 1948.

"Therefore, It Is Hereby Ordered, Adjudged and Decreed that the notion of defendant and cross-complainant, Lillie Alma Tuttle, to modify the terms of said Final Decree of Divorce herein be, and the same is hereby denied."

The basic question presented is whether or not the trial court properly interpreted the nature and effect of the divorce decree—that is, did it correctly rule that the payments to the wife were part of her share of the community property, or were such payments in the nature of alimony.

This problem as to the nature of money payments awarded to the wife in a divorce action has frequently been before the courts. The applicable principles are not substantially in dispute. It is in the application of these principles to the facts of a particular case that grave difficulties arise.

[1-4] The general applicable principles are stated as follows in *Puckett v. Puckett*, 21 Cal.2d 833, 840, 136 P.2d 1, 5: "With certain exceptions [citing two cases], a provision for the payment of alimony to the wife in a divorce decree, granted to the wife for the offense of the husband, may be modified by the court under appropriate circumstances. Civ.Code, sec. 139. A husband and wife may contract with each other with respect to the support of each other and their property rights. Civ.Code, secs. 158, 159. A divorce decree adjusting the property rights of the parties is not subject to modification regardless of whether or not it is based upon the agreement of the parties. [Citing cases.] It necessarily follows therefore, that, whatever may be the effect upon that power of modification of an agreement of the parties for alimony alone incorporated into the

decree [citing authorities], if there is a property settlement agreement providing as a part thereof for periodical payments to be made to the wife by the husband and the agreement is approved by the court and the payments ordered by the decree to be paid pursuant to the agreement, that order will not be subsequently modified, except by the consent of the parties. [Citing authorities.]”

[5,6] Thus, where alimony is payable to a wife for a limited period the court may, upon a proper showing, modify the award and extend the time of payment. *Smith v. Superior Court of Yuba County*, 89 Cal.App. 177, 264 P. 573; *Bechtel v. Bechtel*, 124 Cal.App. 617, 12 P.2d 970; *Soule v. Soule*, 4 Cal.App. 97, 87 P. 205. The fact that the trial court failed to reserve the power to modify is immaterial. Such power is conferred by section 139 of the Civil Code and is impliedly part and parcel of every order for alimony. Respondent concedes that this is the law where the alimony provision is unlimited, but contends that when, as here, the payments are limited as to time, the failure of the trial court to reserve the power to modify deprives the court of that power. There are apparently conflicting declarations of the courts on this problem. *Bechtel v. Bechtel*, 124 Cal.App. 617, 12 P.2d 970; *Tolle v. Superior Court of Los Angeles County*, 10 Cal.2d 95, 73 P.2d 607; *Puckett v. Puckett*, 21 Cal.2d 833, 136 P.2d 1. An analysis of these cases and of the legal principles involved, indicates that the entire problem turns upon the determination of the legal nature of the payments involved. If the decree provides for alimony payments, limited or unlimited as to time, the court has the power to modify by virtue of section 139 of the Civil Code. But if the payments are part of a property division, then the power to modify does not exist. In determining that question, the fact that the payments are limited as to time and that no power to modify is expressly reserved is a factor, a very minor and certainly not a conclusive factor, to be considered. That factor alone cannot support a finding that the payments

were not intended as alimony when all other factors indicate to the contrary.

[7-9] The trial court has found that the payments here involved were part of a property division. This is normally a question of fact. If adequately supported by the record such a finding will not be disturbed by an appellate court. *Pearman v. Pearman*, 104 Cal.App.2d 250, 231 P.2d 101; *Weedon v. Weedon*, 92 Cal.App.2d 367, 207 P.2d 78; *Wallace v. Wallace*, 136 Cal.App. 488, 29 P.2d 314; *Hough v. Hough*, 26 Cal.2d 605, 160 P.2d 15. Of course, the interpretation of the final decree, if no admissible extrinsic evidence as to intent is admitted, is a question of law. *Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825.

In support of her position, the wife places her main reliance on three cases. The first of these is *Ross v. Ross*, 1 Cal. 2d 368, 35 P.2d 316. In that case it was perfectly apparent from the provisions of the decree that the trial court made no attempt to adjudicate the property rights of the parties. The award was clearly an award of alimony, the trial court expressly reserving the power to modify the award.

The second case cited *Robertson v. Robertson*, 34 Cal.App.2d 113, 93 P.2d 175, is an opinion by this court and is of some help in arriving at the correct decision of the instant case. In the *Robertson* case the parties informed the court, at the divorce trial, that a property settlement agreement had been approved, subject to the approval of the court. The decree provided that the husband should pay \$300 a month for the wife's support, the amount agreed upon by the parties, but no mention was made in the decree of the property settlement agreement, although a formal contract had been entered into prior to the signing of the decree. Several years after the entry of the decree, the payments, on motion of the husband, were reduced to \$250 per month. The wife brought an action to recover on the contract. The precise holding of the court was that the wife, by accepting the smaller payments tendered, was estopped from claiming the

larger amount, and that such acceptance amounted to an accord and satisfaction. The opinion contains this language, 34 Cal.App.2d at page 115, 93 P.2d at page 177: "The agreement may have been used as the general basis for the decree, but it was not merged in the decree and the latter document did not formally approve or disapprove the agreement; hence in this proceeding the power to modify the decree, without consideration of the terms of the agreement, cannot be questioned."

The third case relied upon is *Armstrong v. Armstrong*, 132 Cal.App. 609, 23 P.2d 50. Here the divorce complaint had a property settlement agreement attached. The divorce decree, secured by default, awarded the wife \$50 a month until she remarried, and \$50 a month for the support of the couple's minor child. On subsequent motion of the husband the decree was modified as to both items. The opinion contains this language, 132 Cal.App. at page 611, 23 P.2d at page 51: "The power of the court to modify decrees of this character is statutory (sec. 139, Civ. Code) and cannot be controlled by the parties [citing a case]; if, by the terms of the property agreement, the rights of the parties are contractual, that is a matter which can be determined only in an action based upon the contract [citing a case]; as it does not appear from the face of either decree that the property settlement was adopted by the trial court, the statutory power of the court to modify cannot be denied."

[10] The *Robertson* and *Armstrong* cases strongly suggest that, unless the decree expressly provides that the payments are, pursuant to agreement, in lieu of community property, the court retains the power to modify even where a formal contract is entered into and made a part of the decree. It would seem that these two cases stand for the proposition, which to us appears sound, that if the court by its decree is approving a property division based upon a property settlement, the divorce decree should so recite. Otherwise, great confusion is bound to result.

[11] Here the husband strenuously contends that the reporter's transcript

demonstrates that the award of limited payments to the wife was based on a property settlement agreement. Both parties argue the appeal as if it depended upon whether the husband and wife had entered into a property settlement agreement. For the purposes of interpretation it makes little difference whether or not the payments to the wife were or were not based upon an agreement. Certainly, that is not the decisive question presented. The real question is the nature of the payments. *Gosnell v. Webb*, 60 Cal.App.2d 1, 139 P.2d 985. Moreover, if there were an agreement, the terms of that agreement became merged with the provisions of the decree and are superseded by it. *Hough v. Hough*, 26 Cal.2d 605, 160 P.2d 15.

It thus appears that the decree determines the rights of the parties. We must look to that decree to determine the nature of the payments.

One of the leading cases on this subject is *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265. In that case the Supreme Court attempted to classify the various types of property settlement agreements so far as payments to the wife are concerned. It listed three types of agreement:

1. Where the support and maintenance provisions are clearly alimony. Such provisions may, of course, be modified.
2. Where the support and maintenance provisions are a part of the division of property, that is, the payments are in lieu of community property. Such agreements cannot be modified.

3. Contracts where the wife waives all support and maintenance except as provided in the agreement in consideration of a favorable division of the property. Such agreements cannot be modified.

Another classification is suggested in a note in 39 Cal.Law Rev. 250, at p. 255. This note classifies agreements into:

- a. Pure alimony agreements—those providing for support and maintenance of the wife but not for a division of the community property.
- b. Pure property division agreements—those providing for a division of the com-

munity property, but not for alimony. These agreements may or may not include a non-alimony support provision, i. e., they may allocate the property to the husband and provide for payments to the wife in lieu of her community share.

c. Severable combination agreements—providing for a division of property and for alimony but severable as to each.

d. Integrated bargain agreements—providing for both alimony and a division of the property, but the entire provision for one spouse is in consideration for the entire provision for the other. Here there may be a waiver by the wife of alimony, in whole or in part, in consideration of a more favorable division of the property; or a waiver by her of her property rights, in whole or in part, in consideration of a more favorable alimony settlement.

The question here presented is whether the trial court properly placed this decree in the category of a "pure property agreement," or an "integrated bargain agreement," neither of which can be modified by the court, or whether it should have placed the decree in some other category that can be modified.

One of the most recent cases on this subject is *Pearman v. Pearman*, 104 Cal.App. 2d 250, 231 P.2d 314, where this court had occasion to review the various factors that determine the nature of payments provided for in a divorce decree. That opinion points out, 104 Cal.App.2d at page 254, 231 P.2d 314, that one of the basic factors to be considered is the nature of the division of the property. If that test be applied here, it is first discovered that the decree recites that the allegations of the cross-complaint and the amendment to it are true. The cross-complaint alleges the existence of certain community property—certain cash, certain bonds, the two insurance policies and the furniture. The cross-complaint prays for an equal division of this property and for alimony. If these allegations are true it is obvious that the payments to the wife could not be a part of her share of the community property, because the trial court divided the community property equally between the parties and, in addition, gave the wife

maintenance and support. The payments could not be "in lieu" of her property rights. The decree also found as true the allegations as to the husband's ability to pay, and the wife's needs. These allegations and findings are totally irrelevant to a division of property and are relevant only if the payments are alimony.

Turning to the provisions of the decree itself, it would appear that the payments must have been intended as alimony. The decree makes no reference to a property settlement agreement. It describes the payments as being for the "support and maintenance" of the wife. The decree then provides for a division of the "community property." In the first six subparagraphs, already summarized, the court divided the community property almost equally between the parties. This, as disclosed by the reporter's transcript, was undoubtedly done pursuant to the oral agreement of the parties. But the payments to the wife provided in subparagraph 7 are in addition to the wife's share of the community property. In other words, this is not a case where the husband was given more than his share of the community property, and the wife given certain "in lieu" payments to compensate her for the difference. There was no waiver by the wife of her share of the community in consideration of payments to be made to her.

It is also to be noted that the equal division of the community property is in precise conformity with the provisions of section 146 of the Civil Code requiring the trial court, where the divorce is granted, as here, on the ground of desertion, to divide the property equally between the parties. To hold that the payments to the wife constituted an award to her of a portion of the community property would be to hold that the parties agreed, and the court approved, an award giving the wife a share of the community property thousands of dollars in excess of the share awarded the husband. To so hold would be to conclude that the trial court made an award directly contrary to the provisions of section 146. That should not be presumed.

The Pearman case also suggests that the appellate court should consider whether the payments would terminate upon the wife's death or remarriage, or upon the death of the husband, in determining whether the payments are a division of property or alimony. The decree and the reporter's transcript of the divorce proceedings are silent on this issue. The determination of those questions in the instant case depends on the solution of the very problem here involved. These factors, therefore, cannot be used as tests in the present case.

[12] Thus, whether the decree be considered alone or with the reporter's transcript of the divorce proceeding there is not one bit of evidence, other than the fact that the payments are limited in time, that supports the interpretation of the trial court that these payments represent a division of community property. Quite to the contrary, the language of the decree and the nature of its provisions demonstrate that the payments are in the nature of alimony. This being so, the judgment of the trial court reaching a contrary interpretation must be reversed.

[13] The trial court also based its refusal to consider the merits of the wife's application for modification on a second ground, namely, that the husband, in reliance upon the terms of the agreement (which included the provision for the limited payments), changed his position, and abstained from presenting any evidence in support of his complaint for divorce. It is urged that this created an estoppel against the wife that now prevents her from seeking a modification. It seems too clear to require extended discussion that, if the payments were alimony, as we have held they were, no estoppel could exist. If the agreement between the parties was for a division of the community property and for the payment of alimony, the husband knew or should have known that the provision in reference to alimony was subject to change. There could not be such reasonable reliance on such an agreement that would create an estoppel. Nor could the making of the alimony payments by the husband, and their retention

by the wife, create an estoppel. Otherwise, all alimony payments predicated upon an agreement would be immutable and not subject to change. The fact, if it be a fact, that the husband refrained, because of the agreement, from introducing evidence in support of his complaint, could not change the nature of the agreement.

The order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



EDMONDS v. BOARD OF SUP'RS, LOS ANGELES COUNTY.

Civ. 18316.

District Court of Appeal, Second District,
Division 1, California.

Oct. 30, 1951.

Rehearing Denied Nov. 19, 1951.

Hearing Granted Dec. 20, 1951.*

Francis Edmonds, operator of a trailer park, filed a petition against the Board of Supervisors, County of Los Angeles, State of California, to review and annul an order of the board revoking his license to operate the trailer park. The Superior Court of Los Angeles County, W. Turney Fox, J., denied the peremptory writ, and sustained the board's order and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that where plaintiff did not accept exception granted by the board permitting the plaintiff to add thirty trailers in addition to number existing at time ordinance was adopted if at the end of three years he would abandon the entire nonconforming use, the board improperly revoked his license pursuant to the three-year limitation.

Reversed with directions.

I. Counties ⚡21½

In proceeding to annul order of county board of supervisors whereby plaintiff's license to operate a trailer park had been revoked on ground that plaintiff's nonconforming use of land within restricted area was limited by exception granted by board

* Subsequent opinion 255 P.2d 781.

authorizing use of 30 trailers in addition to those allowed under the nonconforming use if after three years the nonconforming use would be abandoned, evidence was insufficient to show that plaintiff had accepted the limitation.

2. Counties $\S$ 211½

Where plaintiff operated trailer park and 20 trailers as a lawful nonconforming use in a residential zone, and county board of supervisors granted an exception permitting plaintiff to add thirty trailers if after three years he would abandon the entire nonconforming use, which exception was not to be effective unless accepted in writing and with a bond filed, plaintiff's statement at hearing before board that he would reconsider the proposition on his attorney's advice and fact that he operated over 20 trailers was not acceptance of the limitation where he had not accepted in writing and filed bond, and board improperly revoked plaintiff's license pursuant to the three year limitation.

3. Municipal Corporations $\S$ 601(23)

Provision exempting existing nonconforming uses is ordinarily included in zoning ordinances because of hardship and doubtful constitutionality of compelling immediate discontinuance, and with object of gradually eliminating the nonconforming use by obsolescence or destruction by fire or the elements, and usually the exemption provides for liquidation of the nonconforming use within a prescribed period to guard against their indefinite continuance.

4. Municipal Corporations $\S$ 601(23)

In determining whether a nonconforming use was the same before and after passage of a zoning ordinance so as to be permissible, each case must stand on its own facts.

5. Counties $\S$ 211½

Operator of a trailer park which contained 20 trailers at time of adoption of zoning ordinance making the area residential and exempting existing nonconforming uses, was limited to operation of twenty trailers.

6. Municipal Corporations $\S$ 601(23)

Character and location of a nonconforming use should be limited to that exist-

ing at time ordinance containing exemption for the nonconforming use was adopted.

Richard Richards, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondent.

DRAPEAU, Justice.

By a petition for a writ of review, plaintiff sought to annul an order of defendant board revoking his license to operate a trailer park. From the judgment sustaining such order, plaintiff appeals.

From an agreed statement now before this court, it appears that appellant commenced operating the trailer court in 1941, and by July 5, 1945, he was using all of the five lots here involved. On November 9, 1945, the property was rezoned from C-3 to R-4, and the lots restricted to residential use. By the terms of the ordinance, the rezoning had no retroactive effect upon appellant's business or property. Under the schedule set out in the ordinance, appellant "was entitled to a twenty-year period to liquidate the valid pre-existing use. That is twenty years from November 9, 1945."

On November 9, 1945 when the property was rezoned, appellant was operating 20 trailers under permits from the State of California and licenses from the county. The business was operated as an entity and its facilities were available to all guests.

On July 9, 1946, appellant applied for a zone exception, the stated purpose of which was to bring within the scope of the ordinance "an existing nonconforming installation." On September 5, 1946, this exception was approved by the County Regional Planning Commission, subject to a one-year limitation. Upon appeal to respondent Board, the exception was sustained on October 15, 1946, subject to a three-year limitation, to wit:

"5. That after a period of three (3) years from the time the exception was granted by the Board of Supervisors, the use of the entire property including the present nonconforming trailer court shall

be abandoned, and the use of the property shall revert to the use permitted in the zone existing at that time."

By its terms the zone exception was not to be effective unless and until it was accepted by appellant in writing and a bond filed by him. These conditions have never been complied with by appellant.

On December 12, 1946, the State of California granted appellant a permit to operate 30 additional trailers on the property, making a total of fifty. All state permits and county licenses were paid for and in full force and effect on May 2, 1950, when respondent revoked appellant's license to operate the trailer park pursuant to the three-year limitation hereinbefore recited.

At the time the instant judgment was rendered, the trial judge filed the following memorandum opinion:

"An examination of the record makes it clear that Petitioner was entitled to operate a trailer park of only 20 units on the theory of nonconforming use, prior to October, 1946. The Board granted petitioner an exception for 30 additional trailers at the hearing of October 15, 1946, on condition the entire trailer park, including the nonconforming use, be abandoned at the end of three years. (The Regional Planning Commission had recommended one year, and petitioner had appealed to the Board.) Petitioner now says he did not accept the exception voted him at the hearing. True, he did not accept it in writing. But he verbally accepted it at the hearing, and by his subsequent acts in establishing the additional accommodations he unmistakably demonstrated his acceptance *in fact* of the exception voted him by the Board with the conditions attached. (Emphasis included.)

"If, however, petitioner claims no benefit from the aforesaid exception, then he is clearly violating the zoning ordinance in maintaining forty-odd trailers on the premises.

"In either view of the case there is ample support for the Board's action and its order revoking petitioner's license is sustained."

It is here contended (a) that appellant's pre-existing nonconforming use was not affected by the action of the respondent on

October 15, 1946; and (b) that such pre-existing nonconforming use was not limited to twenty units.

In connection with his first point, appellant argues that it is undisputed that he "did have a pre-existing nonconforming use"; that since he did not accept respondent's three-year limitation in writing, as required, the exception never attached, and he continued to operate the trailer park pursuant to his pre-existing legal rights, i. e., by operation of law.

It was stipulated by the parties hereto that prior to August 2, 1946, section 15 of Ordinance No. 1494 read as follows:

"Section 15. *Existing Uses*. Nothing contained in this ordinance shall be deemed or construed to prohibit a continuation of the particular existing use or uses of any building, structure, improvement or premises existing in the respective zones at the time this ordinance becomes effective in the event that such existing use is not in violation of any other ordinance or law; provided, that if such use is changed to a different use such different use shall conform to the provisions of this ordinance regulating the particular zone in which the premises are located." Some time after its passage, this section was renumbered to read 125.

Effective August 2, 1946, section 125 was repealed and section 165 was substituted therefor, and was in effect on October 15, 1946 when respondent board passed upon appellant's exception, to wit:

"Section 165. *Existing Uses*. An exception is hereby automatically granted so as to permit the continuation of the particular existing uses of any building, structure, improvement, or premises existing in the respective zones at the time this ordinance or any amendment thereof becomes effective if such existing use is not in violation of any other ordinance or law. Such exception shall remain in force and effect for the following lengths of time, except that it may be extended or revoked as provided in this article. * * *

"(c) * * * twenty years, and for such longer time so that the total life of the improvement from date of construction will be:"

It was further stipulated that "from July 17, 1946 until December 12, 1946, there was, upon the five lots above described, an excess of trailers above the twenty authorized under the State permits. However, such number did at no time exceed forty-eight trailers."

At the hearing before respondent board on October 15, 1946, the following took place:

"Mr. Richerson: Mr. Chairman, I might clarify the fact that if Mr. Edmonds does not agree to abandon this use on the two southerly lots, he cannot be forced off of there until twenty years. If he agrees to the exception under these terms, then he can.

"Mr. Darby: He can be forced off the north three immediately.

"Mr. Jessup: We are going to drive a bargain with you right now. You are going to agree to this three years or I am going to change my motion.

"Mr. Edmonds: No.

"Mr. Jessup: I am going to change my motion right now.

"Mr. Ford: And make it one year?

"Mr. Darby: Make it nothing, out right now.

"Mr. Jessup: Or nothing and out completely.

"Mr. Edmonds: That is a considerable investment and I would rather take the consequences.

"Mr. Ford: What is your income? You get \$12 a month on how many trailers?

"Mr. Edmonds: There are 49 trailers, 48 of which are paying.

"Mr. Jessup: You have the right on two lots?

"Mr. Edmonds: That is right.

"Mr. Jessup: How many trailers on the two lots?

"Mr. Edmonds: Approximately 30 lots (trailers). * * *

"Mr. Ford: Are you sure you don't want to consider that proposition on the three years? * * *

"Mr. Edmonds: I would reconsider on my attorney's advice. * * *

"Mr. Ford: Mr. Edmonds has said on advice of his attorney he would reconsider and comply with the provisions as we have made them. Is that right, Mr. Edmonds?

"Mr. Edmonds: That is right."

This is an exemplar of what Mr. Justice Carter meant, when he said in his dissenting opinion on denial of hearing by the Supreme Court in *People v. Rochin*, 101 Cal.App.2d 140, 148, 225 P.2d 1, 913, 916.

"Every student of history recognizes that the abuse of official power has been the source of the major ills inflicted upon mankind since the existence of organized governments."

[1,2] Since it was stipulated that on July 5, 1945, several months prior to the rezoning, appellant was using all five lots in the operation of his trailer park, it can readily be seen why he was so reluctant to accept the three-year limitation imposed by the Board on October 15, 1946. Moreover, there is no evidence that he did accept such limitation. At the hearing he merely stated he would reconsider on his attorney's advice. At no time did he meet the conditions imposed: (1) that he accept the zoning exception *in writing*; (2) that he file a bond of \$2,000. Instead, he was content to "take the consequences" of his reliance on the automatic exception provided for in section 165 of the zoning ordinance.

[3] A provision exempting nonconforming uses existing at the time of their adoption "is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses. See *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14. 'The object of such a provision is the gradual elimination of the nonconforming use by obsolescence or destruction by fire or the elements, and it has been frequently upheld by the courts.' *Rehfeld v. City and County of San Francisco*, 218 Cal. 83, 84, 21 P.2d 419, 420." *County of San Diego v. McClurken*, 37 Cal. 2d 683, 234 P.2d 972, 975. As stated in the cited case: "There is a growing tendency to guard against the indefinite continuance of nonconforming uses by pro-

viding for their liquidation within a prescribed period." In the instant case, twenty years.

[4] With respect to appellant's second point that his nonconforming use is not limited to twenty trailers, it was held in *Dobbins v. City of Los Angeles*, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169: "In determining whether a nonconforming use was the same before and after passage of a zoning ordinance so as to be permissible, each case must stand on its own facts."

In support of his continuing use, appellant throughout has relied on the automatic exception granted by section 165 of the zoning ordinance, and not upon the additional use permitted by the exception given by respondent board.

[5, 6] Section 165, *supra*, allows the continuation of the particular nonconforming uses in existence on the date it became effective, i. e., November 9, 1945. And it is agreed herein that appellant was at that time operating twenty trailers on his property, accordingly, it would appear that appellant is not entitled to extend or enlarge his existing nonconforming use beyond that number. Because, as stated in *City of Yuba City v. Cherniavsky*, 117 Cal.App. 568, 573, 4 P.2d 299, 301: "If there is no limitation upon the character or location of a nonconforming business, so long as it is located on the same lot where it formerly existed, then one may abandon an inexpensive notions counter which was maintained prior to the adoption of a zoning ordinance, and construct in lieu thereof an elaborate mercantile establishment at the opposite end of the same lot, at an unlimited expense, and thus circumvent and destroy the very purpose of the ordinance. We are satisfied this may not be done under the provisions of the present ordinance."

The Yuba City case, *supra*, was cited by the court in its comments made at the end of the trial in the companion case of *Edmonds v. County of Los Angeles*, Cal.App., 236 P.2d 650.

It was also cited with approval in *Pisicchio v. Board of Appeals of Village of Freeport*, 165 Misc. 156, 300 N.Y.S. 368, 369, wherein it was stated: "Unless

owners of nonconforming uses in zoning areas are required to adhere to the excepted use in volume of trade as well as character of business, zoning laws will be rendered ineffectual and such favored parcels of property will assume great values based not upon a natural growth, but upon the right of the owner to extend and enlarge the existing nonconforming use."

For the reasons stated, the judgment is reversed with directions to the trial court to annul the order of respondent board revoking appellant's business license and to enter a new judgment in accordance with the views herein expressed.

WHITE, P. J., and DORAN, J., concur.



Francis EDMONDS and Charlotte F. Edmonds, plaintiffs and respondents, v. COUNTY OF LOS ANGELES, et al., defendants, County of Los Angeles, Leonard J. Roach, John Anson Ford, Raymond V. Darby and Roger W. Jessup, sued as Roger W. Jessop, appellants.

Civ. 18476.

District Court of Appeal, Second District,
Division 1, California.
Oct. 30, 1951.

Hearing Granted Dec. 20, 1951.*

Appeal from Superior Court, Los Angeles County, Joseph W. Vickers, Judge.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellants.

Richard Richards, Los Angeles, for respondents.

DRAPEAU, Justice.

This is an appeal from a judgment in favor of plaintiffs insofar as it gives to them the right to maintain a trailer court of twenty units on property residentially zoned in unincorporated territory of Los Angeles County.

The instant action is a companion case to *Edmonds v. Board of Supervisors of the*

* Subsequent opinion 255 P.2d 772.

County of Los Angeles, Cal.App., 236 P.2d 646. Upon the authority of and for the reasons stated therein, the judgment herein is affirmed.

WHITE, P. J., and DORAN, J., concur.



107 Cal.App.2d 155

**SWEENEY v. INDUSTRIAL ACC.
COMMISSION.**

No. 14982.

District Court of Appeal, First District,
Division 1, California.

Oct. 29, 1951.

As Amended Nov. 2, 1951.

Aurelio Sweeney, claimant, brought proceedings under the compensation act to recover compensation for permanent disability resulting from claimant's sensitivity to cinnamon. The Industrial Accident Commission of the State of California entered orders denying claimant a permanent disability rating and petition for rehearing, and he brought certiorari. The District Court of Appeal, Bray, J., held that evidence sustained commission's finding that disability of claimant was not shown to be permanent.

Orders affirmed.

1. Workmen's Compensation ☞1910

If decision of Industrial Accident Commission in compensation proceeding can be supported on any ground, it becomes immaterial that other grounds are improper.

2. Workmen's Compensation ☞1939

In determining whether decision of the Industrial Accident Commission on evidence in compensation proceedings is proper, District Court of Appeal cannot determine the weight, effect and sufficiency of the evidence, but merely whether there is substantial evidence to support the Commission's ruling.

3. Workmen's Compensation ☞1375

In proceeding by baker under the compensation act to recover compensation for permanent disability from dermatitis due to sensitivity to cinnamon, burden of proof was on claimant to show that his sensitivity to cinnamon was permanent.

4. Workmen's Compensation ☞863

The term "permanent" when applied to personal injuries for which compensation is sought under the compensation act, means lasting during the future life of the claimant.

See publication Words and Phrases, for other judicial constructions and definitions of "Permanent".

5. Workmen's Compensation ☞1648

Where there was evidence that claimant, who was a baker, developed dermatitis because of his sensitivity to cinnamon, and all doctors agreed that he was at the present time sensitive to cinnamon and that exposure to it would at the present time result in dermatitis, and claimant's physician testified that such sensitivity would "probably" remain for "indefinite period of time" but that it was impossible to know how long sensitivity would remain, the Industrial Accident Commission was justified in finding that claimant was not suffering from "permanent" disability.

6. Workmen's Compensation ☞1939

Conclusion of Industrial Accident Commission on question of permanency of injury in compensation proceeding, is a determination of a question of fact and is not subject to review by courts, unless palpably contrary to undisputed evidence.

Richard M. Siegel, San Francisco, Allen Spivock, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, and Robert Ball, Industrial Accident Commission, all of San Francisco, for respondent.

BRAY, Justice.

Petition for a writ of certiorari to review orders of the Industrial Accident Commission denying (1) petitioner a per-

manent disability rating and (2) petition for rehearing.

Questions Presented.

1. Is the commission's denial of permanent disability rating based on the assumption that petitioner's sensitivity to cinnamon is non-ratable or on absence of proof of permanent disability? 2. If the latter, does the evidence support the commission's finding?

Record.

Petitioner filed with the Industrial Accident Commission a claim against Masonic Homes of California, a corporation, and Employers Liability Assurance Corporation, as the employer's insurer, for permanent disability under the Workmen's Compensation Act. This claim was resisted. The commission held a hearing and thereafter denied the claim. Petitioner then petitioned for a rehearing. This, too, was denied.

Facts.

Petitioner had worked as a baker since 1922, during which time, he handled cinnamon without harmful results. In November, 1948, he was employed by Masonic Homes as a pastry baker. In February he developed a rash on his hands which became so acute that he quit work on March 10, 1949. The commission determined that he had contracted a disabling dermatitis due to sensitivity to cinnamon, and gave him temporary total compensation. The condition disappeared in April and he went to work as a baker for another employer. After three days the condition reappeared and a few days later he was forced to quit. After a short period of rest the condition disappeared. Twice later he went to work for other employers, and after extremely short periods of employment he again broke out with dermatitis due to his sensitivity to and contact with cinnamon. Each time he received total compensation. Each time his dermatitis cleared up on cessation of contact with cinnamon and reappeared upon subsequent exposure. He then filed his petition for a permanent disability rating.

Medical Evidence.

Petitioner submitted the reports of five medical doctors, one of whom, Dr. Ep-

stein, was his personal physician. They all agreed substantially that at the present time he is sensitive to cinnamon and that exposure to it produces dermatitis. None of the doctors other than Dr. Epstein reported that this sensitivity either is or is not permanent. The only medical evidence in the record is the following in Dr. Epstein's report: "Because this skin test is still positive to cinnamon, the patient would still be unable to work as a baker without having a recurrence of his skin eruption as long as he contacts cinnamon. This skin sensitivity to cinnamon will probably remain for an indefinite period of time, *but it is impossible to know how long such a sensitivity will remain.*" (Emphasis added.)

Findings.

The report of the referee recommending denial of the petition for permanent disability rating, states: "His own report, that of Dr. Epstein, indicates that the cinnamon sensitivity remains an indefinite period of time, but that it is impossible to know how long such sensitivity will remain. It would seem that the condition is not permanent. Aside from this statement it has been pretty well established that a sensitivity which may have come on from such substance is not a ratable factor.

"Findings of Fact:

"That the employee has suffered no permanent disability as a result of the injury herein."

The order denying the petition for permanent disability rating has as findings of fact: "That the injury herein caused no permanent disability."

In the report of the referee on the order denying applicant's petition for rehearing appears the following: "According to the report of Dr. Epstein, the applicant's report, cinnamon sensitivity remains an indefinite period of time, and it is impossible to know how long such a sensitivity will remain. The condition was found to be not permanent."

Commission's Decision.

[1-6] Petitioner contends that the decision of the commission was based (1) upon the referee's statement, "Aside from this statement it has been pretty well established that a sensitivity which may have

come on from such substance is not a ratable factor," and (2) his finding that the employee had suffered no permanent disability. Respondent contends that the decision was solely based on ground (2). Assuming, without deciding, that it was based on ground (1) as well as ground (2), it becomes unnecessary for us to determine the validity of ground (1) for the reason that we are satisfied that ground (2) fully supports the decision. In a review of a proceeding before the commission the rule is that if its decision can be supported on any ground it becomes immaterial that other grounds are improper. Also in determining whether the decision on the evidence is proper we cannot determine the weight, effect and sufficiency of the evidence, but merely whether there is substantial evidence to support the commission's ruling. *State Comp. Ins. Fund v. Industrial Acc. Comm.*, 195 Cal. 174, 231 P. 996. "The determination of the question as to whether petitioner's injury was permanent at a particular time was purely a question of fact to be ascertained by the evidence." *Hart v. Industrial Acc. Comm.*, 119 Cal.App. 200, 202, 6 P.2d 348, 349. One other principle must be borne in mind in examining the evidence here, namely, that the burden of proof was on the petitioner to show that his sensitivity to cinnamon is permanent. *Campbell, Workmen's Compensation*, vol. I, § 1069, p. 930; *Cadotte v. Industrial Acc. Comm.*, 86 Cal.App.2d 754, 194 P.2d 563; *William Simpson Const. Co. v. Industrial Acc. Comm.*, 74 Cal.App. 239, 240 P. 58. It is a fact that on four different occasions since February, 1949, when exposed to cinnamon, he developed dermatitis and all the doctors agree that he is now sensitive to cinnamon and exposure to it at present will result in dermatitis. Those facts alone, however, do not establish that such condition will continue for the balance of his life or meet the test of permanent disability. "* * * a disability is generally regarded as 'permanent' where further change—for better or worse—is not reasonably to be anticipated under usual medical standards. It may be that no further treatment is possible, or that the only treatment suggested is so problematical of success as to warrant the em-

ployee's refusal to undergo it. In such an event, it is permanent within the meaning of the Act. In practical legal results, the healing period is over and a permanent aftermath of disability exists. * * * Ordinarily the term permanent, when applied to a personal injury means 'lasting during the future life of the injured party.'" (*Campbell, Workmen's Compensation*, vol. 1, § 813, p. 719.) The evidence upon which petitioner relies is the statement of Dr. Epstein that the "sensitivity to cinnamon will probably remain for an indefinite period of time but it is impossible to know how long such a sensitivity will remain." This is not a prognosis that it will remain all his life or will be permanent. The most that can be said of the statement is that it is susceptible of two reasonable inferences, one that it might continue for his lifetime, the other that it may not so continue. The commission adopted the second inference and we are bound by their selection. Dr. Epstein's statement in no wise compels the adoption of the first inference. Certainly the statement of the doctor that it is impossible to know how long the sensitivity will continue is not sufficient to *compel* the conclusion that it is a permanent condition. See *Owings v. Industrial Acc. Comm.*, 31 Cal.2d 689, 192 P.2d 1. "* * * the subject of inquiry, concerning the probable future history of the disease of the patient, is one which belongs entirely within the scope of expert opinion. This being so, the court is bound by the evidence given by the physicians, even if it is contradicted by nonexpert witnesses. *William Simpson Const. Co. v. Industrial Acc. Comm.*, 74 Cal.App. 239, 243, 240 P. 58." *General Accident Assurance Corp. v. Industrial Acc. Comm.*, 106 Cal. App. 39, 42, 288 P. 692, 694. The subject matter is not one of those situations referred to in *County of Los Angeles v. Industrial Acc. Comm.*, 14 Cal.App.2d 134, 57 P.2d 1341, as being ones, such as the loss of sight or limbs, where a layman can determine the injury's permanency. There being, then, no evidence in the case which compels a finding that the sensitivity is permanent, the finding of the commission that there is no permanent disability is supported. It

is not a question of how we might decide the matter but merely one of whether we can say as a matter of law that the commission's conclusion is unsupported. This we cannot do, "* * * the conclusion of the commission upon questions of this character [permanency of injury] is a determination of a question of fact, and is not subject to review by courts, unless palpably contrary to the undisputed evidence." *Hart v. Industrial Acc. Comm.*, supra, 119 Cal.App. 200, 202, 6 P.2d 348, 349.

It may be that if petitioner's sensitivity to cinnamon occurs on a new exposure the doctors may be able to determine whether or not such sensitivity constitutes a permanent disability. *General Acc., etc., Corp. v. Industrial Acc. Comm.*, 77 Cal.App. 314, 246 P. 570, 572, holds that a "permanent disability" is a "new and further disability" within the meaning of the statute. Section 5410 of the Labor Code permits an application where the original injury has caused new and further disability provided the application is made within the time prescribed by law. In the event that such an application is made and the sensitivity shown to be permanent, the question of whether such sensitivity is ratable would be placed squarely for decision.

The orders are affirmed.

PETERS, P. J., and FRED B. WOOD, JJ., concur.



107 Cal.App.2d 192

PEOPLE v. CHANNELL.

Cr. 4665.

District Court of Appeal, Second District,
Division 2, California.

Oct. 30, 1951.

Ray C. Channell was convicted in the Superior Court, Los Angeles County, William B. Neeley, J., of robbery in the first degree

and he appealed. The District Court of Appeal, Wilson, J., held that the evidence sustained the conviction for the offense of robbery in the first degree.

Affirmed.

1. Robbery ☞24(1)

Evidence was sufficient to sustain conviction for offense of robbery in the first degree.

2. Criminal Law ☞260(1)

Judgment of trial court upon conflicting evidence is binding on appellate court.

3. Criminal Law ☞511(2)

Corroborating evidence to support testimony of accomplice is not sufficient if it merely raises a suspicion of defendant's guilt yet it is sufficient if it of itself tends to connect defendant with commission of the offense, although it is slight, and entitled when standing by itself to but little consideration. Pen.Code, § 1111.

4. Criminal Law ☞511(1)

If evidence of accomplice is eliminated and that of other witnesses is examined with view to ascertaining whether there be inculpatory evidence, and if there is inculpatory evidence, the accomplice is corroborated. Pen. Code, § 1111.

5. Criminal Law ☞511(3)

Corroborating evidence may consist of testimony of the defendant himself and inferences therefrom as well as inferences from circumstances surrounding the criminal transaction. Pen.Code, § 1111.

6. Criminal Law ☞511(4)

Possession of a gun similar to that used in the commission of a crime is competent corroborative evidence to support testimony of accomplice. Pen.Code, § 1111.

7. Criminal Law ☞511(1)

In prosecution for robbery in first degree, evidence of the accomplice was sufficiently corroborated by other evidence to sustain conviction. Pen. Code, § 1111.

8. Criminal Law ☞394

Federal rule as to admissibility of evidence of conversations obtained by tapping telephones and by use of microphones is not controlling upon the admission of such evidence in state courts. Pen.Code, §§

640, 653h; Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

9. Criminal Law ¶394

Where competent evidence is produced and offered in criminal prosecution the court will not inquire into or investigate its source or the means by which it was obtained.

10. Criminal Law ¶394

Fact that evidence was obtained by illegal search and seizure does not affect its admissibility.

11. Criminal Law ¶394

Although defendant in criminal prosecution may have civil or criminal remedies against officers by reason of their unlawful acts in obtaining evidence the state may nevertheless use the evidence so illegally obtained.

12. Criminal Law ¶394

Evidence of contents of telephone messages intercepted without consent of sender is admissible notwithstanding such interception was in violation of Federal Communications Act. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

Russell E. Parsons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was found guilty of robbery of the first degree. His motion for a new trial was denied and he has appealed from the judgment of conviction and the order denying a new trial.

Statement of the Evidence.

In the morning of July 15, 1950, the victim, Rutherford, was driving his car in the city of Maywood. He was stopped by another automobile in which were defendant and Frick Wills. Wills, who had a gun, got into the back seat of Rutherford's car and compelled him to drive two or three blocks when Wills took Rutherford's money, ordered him to get out of the automobile

and drove away. In a few minutes Rutherford was picked up by police officers and after driving about a half mile they discovered Rutherford's car. Wills was about 20 or 30 feet distant from it. The officers arrested him and found in his possession a gun which was similar to one that had been purchased by defendant a few days previously from one Koopman.

On July 19 or 20 Allen Wills, Frick's brother, told defendant his brother wanted to know where his (Frick's) car was and had said defendant should know where it was located. Defendant said he thought it was on Eastern Avenue just north of Florence. Also he said if he knew somebody he could trust he would like to get his fingerprints off the car because they were there. Allen Wills asked about the keys to the car and defendant replied: "The keys are gone." Allen Wills found his brother's car in the location indicated by defendant. Later a police officer found the car at the same location. The certificate in it showed it was registered to Frick Wills and Viola Wills. There were no keys in it.

On July 26 a deputy from the sheriff's office was in Frick Wills' home where he had made connection with the telephone line. He heard Wills dial the telephone and say, "Hello Ray?" Another voice said, "Yes." Wills said, "This is Frick * * * I am at home. I would like to talk to you. I don't think we should talk over the phone, can you come over?" In a few minutes a car stopped in front of Wills' home and defendant and a woman came into the house. The same officer with others were in the bedroom of the Wills house with a listening device connected with a concealed microphone in the living room. Defendant asked Wills, "When did you get out?" Wills replied, "This morning. I am out on bond." Defendant asked Wills, "How do you stand on the thing?" Wills said, "Well, I am a dead duck. They got me cold. Whatever happened that you didn't pick me up?" Defendant answered, "Well, I couldn't; there was cops all over the place. Some were right across in front of me." Wills asked, "Where is my car?" and defend-

ant answered he had told Allen where it was. Wills said, "Are your prints on it?" and defendant answered, "I suppose they are."

At the trial Frick Wills, who had previously been charged with first degree robbery, testified that defendant told him Rutherford was a bookmaker who owed him (defendant) money and did not want to pay him so they would have to take it by force. Wills told defendant he knew Rutherford's movements and they could follow him Saturday morning. Wills asked defendant if he was going to take his gun and defendant said he would do so. Defendant said he would rather have some one else go with Wills than go himself and Wills said, "If it is your money and I am supposed to get half for getting it I am surely not going to take anyone else along. If it is your gun I will just have to go with you." Defendant said Wills would have to use his car because defendant's automobile was known to Rutherford. They arranged that when they stopped Rutherford, Wills was to get the money and defendant would drive, after which he would go around the block and meet Wills when the latter had abandoned Rutherford's car.

In the morning of the robbery Wills went to defendant's house and asked where the gun was. Defendant said it was under the coffee table. Wills got the gun and put it in the car. Wills and defendant then went to Maywood where the robbery was accomplished in the manner above related.

Prior to the conversation overheard by the officers in Wills' house defendant had been arrested for the crime and released. About ten days later he was rearrested at which time the police officer told him he knew he (defendant) owned the gun which was involved in the robbery. Defendant did not deny ownership and did not tell the officer his gun was missing or that he had

shown the gun to Wills, and never reported to the police that the gun was gone.

[1,2] The foregoing evidence shows beyond question defendant's participation in the crime and sustains the judgment of conviction. The evidence given by an attorney who related a conversation he had had in jail with defendant and Frick Wills, and defendant's testimony which is contradictory of much of the evidence given against him merely creates a conflict which has been determined by the trial court. The judgment of that court upon conflicting evidence is binding on us.

Corroboration of the Accomplice.

[3,4] Frick Wills was admittedly an accomplice of defendant in the commission of the crime. Defendant contends that the testimony given by the accomplice was not corroborated as required by section 1111 of the Penal Code¹ and for that reason the evidence is insufficient to sustain the conviction. Corroborating evidence is not sufficient if it merely raises a suspicion of defendant's guilt yet it is sufficient if it of itself tends to connect defendant with the commission of the offense, although it is slight, and entitled when standing by itself to but little consideration. *People v. Kemp-ley*, 205 Cal. 441, 456, 271 P. 478. Within a few months after the *Kemp-ley* case was decided the Supreme Court in *People v. Negra*, 208 Cal. 64, 69-70, 280 P. 354, said that a defendant's own statements and admissions in connection with other testimony may afford corroborative proof sufficient to sustain a verdict and it is not necessary that the corroboration should go so far as to establish by itself and without the aid of the testimony of the accomplice that the defendant committed the crime. To be sufficient the corroborative evidence in itself must be of an inculpatory character and must tend without the aid of evidence of

1. Section 1111 reads: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the com-

mission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

accomplices to implicate defendant in the commission of the crime. *People v. Garrison*, 80 Cal.App.2d 458, 461, 181 P.2d 738. If the evidence of the accomplice is eliminated and that of other witnesses is examined with a view to ascertaining whether there be inculpatory evidence—evidence tending to connect the defendant with the offense—and if such be the case the accomplice is corroborated. *People v. Kazatsky*, 18 Cal.App.2d 105, 110, 63 P.2d 299; *People v. Shaw*, 17 Cal.2d 778, 803, 112 P.2d 241.

[5, 6] Corroborating evidence may consist of testimony of the defendant himself and inferences therefrom as well as inferences from the circumstances surrounding the criminal transaction. *People v. Wilson*, 25 Cal.2d 341, 347, 153 P.2d 720; *People v. Malone*, 82 Cal.App.2d 54, 63, 185 P.2d 870. The possession of a gun similar to that used in the commission of the crime is competent corroborative evidence. *People v. Henderson*, 34 Cal.2d 340, 343, 209 P.2d 785.

[7] The evidence of Frick Wills, the accomplice, is corroborated by the evidence that a few days before the commission of the crime defendant purchased a gun similar to that used by Wills in the robbery and hid it under a table; the use of a similar gun by Wills in the robbery; defendant's failure to reply when a police officer said he knew the gun belonged to defendant, al-

though he knew the police were endeavoring to ascertain whether he owned the gun that had been used in the robbery; defendant's failure to report to the police at that time or at all that his gun was missing; his failure to mention the absence of the gun to Frick Wills, who was being held for the robbery; his expressed wish to Allen Wills that his fingerprints might be removed from the car if he knew some one he could trust; his knowledge of the location of Frick Wills' car and that the keys were not in it; his statements which were overheard by the officers at Frick Wills' house.

Defendant's statements and admissions made during the conversation at Frick Wills' home which were overheard by the officers and his statements to Allen Wills are sufficient to corroborate the accomplice, and coupled with the other evidence warranted the judgment of conviction. *People v. Negra*, 208 Cal. 64, 69-70, 280 P. 354, *supra*.

Admissibility of Evidence of Conversations over Telephone and Dictaphone.

[8] Defendant contends that the court erred in admitting the testimony of the officer relating to the intercepted telephone message as being in violation of section 640 of the Penal Code² and of the Federal Communications Act, 47 U.S.C.A. § 605,³

2. Section 640 reads: "Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who willfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line or cable, or is being sent from, or received at any place within the state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or

cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639."

3. Section 605 reads: "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other

and the evidence obtained by the use of the microphone which he asserts was obtained contrary to section 653h of the Penal Code.⁴ With reference to tapping telephone wires defendant cites *United States v. Bernava*, 2 Cir., 95 F.2d 310; *Nardone v. United States*, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314, and *Weiss v. United States*, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298. These cases set forth the federal rule but they are not authority upon the admission of evidence in state courts.

[9-11] A casual glance at the digests would have demonstrated the futility of raising such questions at this late day when there are scores of decisions adverse to the points presented by defendant. The rule adopted by the United States courts is not followed in California. In this jurisdiction it is established and universally recognized that where competent evidence is produced and offered the court will not inquire into or investigate its source or the means by which it was obtained. *People v. Mayen*, 188 Cal. 237, 243 ff., 205 P. 435, 24 A.L.R. 1383. Evidence obtained by illegal search and seizure does not affect its admissibility. *People v. Gonzales*, 20 Cal. 2d 165, 169, 124 P.2d 44, certiorari denied 317 U.S. 657, 63 S.Ct. 55, 87 L.Ed. 528, rehearing denied 317 U.S. 708, 63 S.Ct. 155,

87 L.Ed. 564; *People v. Beilfuss*, 59 Cal. App.2d 83, 88, 138 P.2d 332, certiorari denied 321 U.S. 746, 64 S.Ct. 529, 88 L.Ed. 1048; *People v. Harmon*, 89 Cal.App.2d 55, 58, 200 P.2d 32. Although the defendant may have civil or criminal remedies against the officers by reason of their unlawful acts the state may nevertheless use the evidence so illegally obtained. *People v. Gonzales*, supra, 20 Cal.2d at page 169, 124 P.2d 44.

[12] Evidence of the contents of telephone messages intercepted without the consent of the sender is admissible notwithstanding such interception was in violation of the Federal Communications Act. *People v. Kelley*, 22 Cal.2d 169, 173 ff., 137 P. 2d 1, appeal dismissed 320 U.S. 715, 64 S. Ct. 264, 88 L.Ed. 420, rehearing denied 321 U.S. 802, 64 S.Ct. 527, 88 L.Ed. 1089; *People v. Vertlieb*, 22 Cal.2d 193, 196, 137 P. 2d 437; *People v. Onofrio*, 65 Cal.App.2d 584, 585-588, 151 P.2d 158. Furthermore, section 640 of the Penal Code denounces the clandestine or unauthorized tapping or connection with a telephone wire. Since Frick Wills knew the officer had made the connection and was listening the latter's act was neither clandestine nor unauthorized. Section 653h declares it to be a misdemeanor for any person to install or use a dictograph in any office or room without

lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Pro-*

vided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

4. Section 653h reads: "Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; provided, that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals."

the consent of the owner, lessee or occupant. The microphone was placed in Frick Wills' home and since he was a party both to the telephone conversation and to that which occurred in his home it will be presumed that he consented to and authorized both the wire tapping and the installation of the microphone.

Judgment and order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.



Ex parte ANDERSON.

Cr. 2318.

District Court of Appeal, Third District,
California.

Oct. 29, 1951.

Rehearing Granted Nov. 5, 1951.

See 237 P.2d 720.

Proceeding in the matter of the application of William F. Anderson for a writ of habeas corpus, alleging that petitioner's parole had been unlawfully revoked. The District Court of Appeal, Van Dyke, J., held that acquittal of parolee on criminal charge of having in his possession a gun capable of being concealed upon his person was not binding upon Adult Authority in proceeding for revocation of parole on charges, based on the same incident, that parolee had in fact been in possession of a gun and that his conduct and attitude on parole did not justify that privilege.

Writ denied.

1. Judgment ☞751

Acquittal of parolee on charge of having in his possession a gun capable of being concealed upon his person was not binding on Adult Authority in proceeding for revocation of parole on charges, based on the same incident, that parolee had in fact been in possession of a gun and that his conduct and attitude on parole did not justify that

privilege, and acquittal did not preclude revocation of parole on such grounds. Gen. Laws, Act 1970; Pen.Code, § 3063.

2. Judgment ☞559

A judgment in criminal prosecution is not a bar to subsequent civil proceedings founded upon the same facts or proof of anything in such civil proceedings.

3. Judgment ☞559

Even where the same acts or transactions allegedly constitute a crime and also give a right of action in a civil proceeding, acquittal of defendant when tried for the criminal offense is not a bar to prosecution of the civil action against him or evidence of his innocence in such action.

William F. Anderson, in pro per.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

On May 1, 1948, the petitioner was committed to the State prison upon conviction of the crimes of kidnaping and robbery. On May 1, 1950, he was granted parole by the Adult Authority. On March 6, 1951, his parole was suspended for the reason that he had been arrested and charged with having had in his possession a gun capable of being concealed upon his person in violation of the Deadly Weapons Control Act. 1 Deering's Gen.Laws, p. 864, Act 1970. It appears that he was tried upon this charge in the Superior Court of Los Angeles County and was acquitted, the trial being before the court sitting without a jury. Notwithstanding the acquittal, the Adult Authority proceeded upon charges that he had in fact been in possession of a gun and additionally that his conduct and attitude on parole did not justify that privilege. After a hearing the Authority revoked his parole upon both grounds. Thereafter petitioner filed in this Court his petition for a writ of habeas corpus, claiming that his parole had been unlawfully revoked contrary to the provisions of Penal Code Section 3063, which provides that no parole shall be revoked without cause,

which cause must be stated in the order of revocation. This Court issued an order to show cause why the writ prayed for should not issue and there has been produced before us the record of the proceedings for revocation of parole. It therefrom appears that the charge of possession of a gun considered by the Adult Authority involved the same facts as were involved in the criminal prosecution in Los Angeles County, and it is fair to say that it further appears as to the second ground that it was based upon the same incident. It is the contention of petitioner that since he was acquitted in the criminal proceeding the acquittal was binding upon the Adult Authority in the proceedings for revocation and that for that reason there was no just cause for revoking his parole.

[1-3] We think that the contentions of petitioner cannot be sustained. It is a general rule that judgments in criminal prosecutions are neither bars to subsequent civil proceedings founded upon the same facts nor proof of anything in such civil proceedings, 50 C.J.S., Judgments, § 754, p. 269, and that even where the same acts or transactions constitute a crime and also give a right of action in a civil proceeding the acquittal of the defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him nor evidence of his innocence in such action. *Id.*, § 754, p. 272. The reasons generally given are that the parties to the proceedings are not the same and that with respect to the rule on acquittal the degree of proof required in the criminal proceeding, due to the doctrine of reasonable doubt, is so different from that required in the civil proceeding that no reason exists for a rule that the acquittal in the criminal proceeding should be a bar in the civil proceeding or should establish the fact of innocence.

In *Helvering v. Mitchell*, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917, 920, in holding that an acquittal in criminal proceedings was no evidence of non guilt in civil actions arising out of the same facts the court said: "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doc-

trine of *res judicata*. The acquittal was 'merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' *Lewis v. Frick*, 233 U.S. 291, 302, 34 S.Ct. 488, 492, 58 L.Ed. 967 [1913]. It did not determine that Mitchell had not willfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."

In *Roberson v. City of Rome*, 72 Ga.App. 55, 33 S.E.2d 33, it was held that revocation of parole under the Georgia statutes was not prevented by acquittal of the parolee on a criminal charge involving the same incidents and that the revocation could be based upon an opposite finding by the authority in charge of paroles. The court quotes the rule as stated in *Helvering v. Mitchell*, *supra*, and further declares that proceedings for revocation of parole are civil in nature and that parole boards are not bound by adjudication of criminal proceedings involving the same questions of fact. In *People v. Kuduk*, 320 Ill.App. 610, 51 N.E.2d 997, 1000, which involved revocation of probation based upon a charge of driving a car while intoxicated, upon which same charge, in a criminal proceeding, the probationer had been held not guilty, the court declared: "The issues tried before Judge Ward were criminal and the People were required to prove the charge beyond a reasonable doubt while the matter before Judge Dunne was whether Kuduk had violated the terms of his probation, which did not require such a degree of proof."

The criminal proceedings in Los Angeles County aptly illustrate the soundness of the rules discussed. When arrested, petitioner was driving a car and had been stopped by a patrol officer because of defective headlights. He was accompanied by a woman companion. During a discussion with the officer and in order to prove some point he was making in his argument as to why he should not be given a citation he opened his glove compartment and the officer noted that there was a gun in the com-

partment. His arrest for violation of the Deadly Weapons Control Act followed. At his preliminary examination his companion testified that the gun belonged to him, and that when she entered the car it had been lying on the seat beside him. At the trial this witness was unavailable. The prosecution endeavored to have admitted her testimony on preliminary examination, but the trial court rejected the offer. Petitioner's testimony was that the gun belonged to the woman, that he had no knowledge that she had it with her and did not know how it got into the glove compartment of his car. Without the contradictory testimony of his companion it is easy to see that the trial court, applying the doctrine of reasonable doubt, felt well justified in acquitting accused of the charge. On the other hand the Adult Authority in matters of parole accepts a heavy responsibility in permitting convicts to be at large and if they believed after a hearing that the preponderance of evidence was to the effect that petitioner had in fact had a gun in his possession their action in revoking his parole ought not to be interfered with notwithstanding in the criminal proceeding in Los Angeles County he had been acquitted of the same charge.

We are referred to the case of *In re Payton*, 28 Cal.2d 194, 169 P.2d 361, 363, wherein the Supreme Court in discussing a proceeding for revocation of parole where a criminal charge had been made against a parolee and his parole had on that ground been suspended and he had been later acquitted on the criminal charge said: "The order [of suspension] is preliminary in nature, 'pending investigation' and the outcome of the prosecution of the charge. Its finality is determined by the appropriate board or authority when the truth of the charge is shown by conviction and an order of affirmance is made. If the prosecution culminate in acquittal, and no other charges support the suspension, it is to be assumed that the proper authority will vacate the preliminary order suspending parole." We do not think that by the foregoing language the Supreme Court intended to depart from the general rules we have herein discussed nor to hold that by such an

acquittal the Adult Authority is bound and barred from proceeding themselves to determine the facts of the charge.

The writ is denied.

ADAMS, P. J., and PEEK, J., concur.



107 Cal.App.2d 90

In re MONTICELLI'S ESTATE.

KUENZI v. NOCIARO et al.

Civ. 14647.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1951.

Rehearing Denied Nov. 24, 1951.

Hearing Denied Dec. 20, 1951.

Proceeding in the matter of the estate of Oreste Monticelli for a declaratory judgment, to determine heirship and for final distribution of the estate. Mae Kuenzi opposed the claim of Giovanni Nociaro and others to a bequest made to their mother who had predeceased the testator. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., allowed the bequest and Mae Kuenzi appealed. The District Court of Appeal, Goodell, J., held that substantial evidence supported finding that legatee referred to as mother in will was the mother of the testator.

Affirmed.

1. Evidence Ⓒ297

Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registry books, are admitted in evidence as proof of relationship upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.

2. Descent and Distribution Ⓒ71(7)

In proceeding for a declaratory judgment, to determine the heirship and for final distribution of an estate, whether

word "mother" written under name of legatee was same as declaration that she was testator's mother was question for trial court.

3. Descent and Distribution ↪71(6)

In proceeding for declaratory judgment, to determine heirship and for final distribution of an estate, substantial evidence supported finding that legatee with word "mother" written under her name in will was mother of the testator.

4. Wills ↪552(1)

Where testator's mother, who was given bequest, predeceased testator, her death did not cause her legacy to lapse in view of fact that she was survived by her other children. Probate Code, § 92.

5. Wills ↪467

Testator's use of word "wish" in expressing a bequest in his will would be as effective in making an outright bequest, if used in direct reference to estate, as if he had used "I give and bequeath."

6. Wills ↪467

When words of recommendation, request and the like are used in will in direct reference to the estate, they are prima facie testamentary and imperative, and are not precatory.

7. Wills ↪639

While desire of testator for disposal of his estate is mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor.

8. Wills ↪639

Where words are used which dispose of property or impose a condition upon a bequest given elsewhere in a will, words need not be addressed to anyone, and, if such words show the intent and will of the testator, court and the law will carry out purpose by probating the will and distributing the estate as provided in will.

9. Wills ↪467

If it be assumed that testator who devised all his property to one person, merely stated in second paragraph, "I wish" \$5,000 to be sent to woman who was identified in will as testator's mother, language of bequest to mother was used in direct refer-

ence to the estate, was mandatory and effected a testamentary disposition.

10. Wills ↪639

Where testator in first paragraph of will bequeathed all his property to one person, failure to name executor in will did not affect the mandatory nature of bequest, in second paragraph stating "with" \$5,000 to be sent to testator's mother.

11. Wills ↪487(1)

In proceeding for a declaratory judgment, to determine heirship and for final distribution of estate, substantial evidence supported finding that word used in bequest stating "with" \$5,000 to be sent to woman identified as testator's mother, was "with" rather than "wish".

Abraham Setzer, San Francisco, for appellant.

Louis Ferrari, San Francisco, for respondent.

GOODELL, Justice.

In proceedings for a declaratory judgment and to determine heirship, also on final distribution, the court found that a bequest of \$5,000 to Antonia Cataldi, then deceased, was distributable to her seven children, six of whom are respondents herein. The appeal is from the judgment and decree which so determined.

Oreste Monticelli died on September 16, 1946, leaving a holographic will which, as closely as it can be reproduced in print, reads as follows:

"(Will)

"8-30-33

"In case of my Death all my Property and cash go to Mrs Mae Kuenzi 124 Pope St San Francisco California

"Wit[?]h 5.000.00 Dolas to be sent to Antonia Cataldi her maden name. Offida (Mother)
Prov di Ascoli Piceno Italy.

"Oreste Monticelli"

It will be noted that the words "San Francisco", "dollars" and "maiden" are misspelled. And in the first word of the second paragraph we have inserted a ques-

tion mark between the letters "t" and "h" to indicate pen strokes difficult to decipher. Appellant claims that the word was meant to be "wish", misspelled "witsch", but the court made a finding that it was meant to be "with".

The court found that Antonia Cataldi was the mother of the testator. Had the finding been to the contrary there would have been no ground for an appeal since she predeceased the testator and the legacy would have lapsed in the absence of kinship between him and her. Probate Code, § 92.

[1] The first question is whether that finding is supported by substantial evidence. Appellant contends that it is not. Respondents, claiming that it is, rely on the fact that the testator wrote "Mother" under the name Antonia Cataldi, and they cite *Pearson v. Pearson*, 46 Cal. 609, in support of their position that "(Mother)" in the will is competent evidence that Antonia was the testator's mother. In that case, 46 Cal. at page 628 et seq., the court discusses and quotes several English cases, including *Whitelocke v. Baker*, 13 Ves., 514 where Lord Eldon said: "Declarations in the family, *descriptions in wills*, descriptions upon monuments, descriptions in Bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." (The emphasis is the Supreme Court's.) It is interesting to note that in Vol. V of *Wigmore on Evidence* (3rd ed.) § 1482 the author quotes the same statement with the comment that "The sentence of Lord Eldon's in *Whitelocke v. Baker* has become the classical passage on this subject."

[2] Respondents cite other California cases on the same point but there is no need to discuss them since appellant in her closing brief has not questioned either the authorities or the rule which they announce. Her only comment is that the testator did not declare in so many words that Antonia was his mother, or write out "to my mother \$5000." The will was written in short

terms, and whether "(Mother)" written under Antonia's name was the same as a declaration that she was testator's mother, was a question for the trial court. The word, in the way in which it was written, certainly furnishes a substantial basis for the inference that the testator intended to so declare and it is to be presumed that the court gave it that weight.

There is another important piece of evidence respecting testator's maternity. Appellant and testator were in business together and she was leaving San Francisco on a trip and wanted to transfer to him a bank account which stood in her name. Her testimony on cross-examination was as follows:

"Q. Did you accompany him to that branch of the American Trust Company?
A. No.

"Q. You didn't go with him? A. No, I took the card and had him sign it for me.

"Q. You took the card? A. Yes.

"Q. On the card it asked for his mother's maiden name, did it not, as a method of identification. A. Yes, that is it.

"Q. And he wrote on that card the name of Antonia Cataldi as his mother's maiden name? A. Yes."

Further: "Q. And in his conversations with you, didn't he tell you that his mother's name was Antonia Cataldi? A. No, any more than the first—that was the first and only time I ever really knew what his mother's name was, so when I asked him for his mother's maiden name—when I asked him for his mother's name for the bank, that was the only time I knew what it was."

There is still further evidence on the question of maternity. Oreste was born on August 30, 1887 at a town near Rome. The next day he was "intrusted" to a foundling home by the office of the Department of Vital Statistics of the Commune. The record names him as Oreste Monticelli and characterizes him as illegitimate. Eleven days later "he was intrusted to a certain Antonia Cataldi, wife of Bernardino Nociaro, resident of Castorano". The documents do not show that the child was ever returned there.

The "family tree" of the Nociaro family (an official document entitled "Situazione di Famiglia") shows that Oreste lived in that family and household. It does not appear how long he lived there.

In a column headed "Father-Mother" it shows the Nociaro children as sons and daughters of Bernardino and Antonia, and Oreste Monticelli as "unknown" and, under "Relationship", it shows him as "boarder and roomer".

Respondents reply on these facts as evidence from which an inference could be drawn that Oreste was Antonia's son. They rely particularly on the fact that she took him from the home when he was eleven days old, into her own family, where according to the official "Situazione di Famiglia", he lived as one of them. They cite in that behalf *In re Estate of Connors*, 53 Cal.App.2d 484, 128 P.2d 200.

Appellant, on the other hand, relies on the following facts: the certificate of Oreste Monticelli's birth reads "father and mother unknown" and contains the recital "There does not appear any marginal notation relative to marriage" and the records of the foundling home show that he was enrolled or registered therein as illegitimate. When he was 19 he was called for service in the Italian army and his call describes him as "Oreste Monticelli, parents unknown". Three years later his honorable discharge recites "Son of, unknown". Appellant also relies on the fact that in the "family tree" he is described as merely a boarder and roomer in the Nociaro household.

The declaration in the will, as we have seen, is a well-recognized medium of proof of relationship. In itself it would seem to be sufficient to support the finding.

Appellant's testimony respecting the declaration on the bank's signature card that the maiden name of testator's mother was Antonia Cataldi, would likewise seem sufficient, without more, to sustain the finding.

Antonia's taking of the 11 day old child from the foundling home into her own family and keeping him there is evidence from which the inference could be drawn that she was reclaiming her own offspring.

All this evidence when taken in combination, makes a showing more than sufficient to support the finding.

The evidence relied on by appellant created a conflict in so far as the court could have drawn the inference that Antonia's act in taking the infant from the home might have been merely an act of charity toward the abandoned child of some other woman rather than an act inspired by a natural, maternal feeling for her own child. The evidence with respect to illegitimacy, however, creates no conflict, for notwithstanding the child might have been born out of wedlock he could of course still be Antonia's.

[3, 4] In our opinion there is substantial evidence to support the finding that Antonia Cataldi was Oreste's mother. In such event her death during his lifetime would not cause her legacy to lapse if she left lineal descendants. Probate Code sec. 92. And her children are named in the "Situazione di Famiglia" in evidence herein.

Appellant's principal contention is that the \$5,000 provision is not an outright bequest but merely a precatory recommendation which is not binding on her. This contention brings into the case the question whether the disputed word is "with" as found, or "wish" as claimed.

[5] The question presented for decision does not turn on the court's finding on that issue, but is much broader because even such words as "I wish", "I desire", "I request", are held to be mandatory and dispositive in certain circumstances. In other words, assuming that the testator wrote "wish", as appellant contends, it would be every bit as effective in making an outright bequest *if used in direct reference to the estate*, as if he had used "I give and bequeath".

[6, 7] In *Re Estate of Collias*, 1951, 37 Cal.2d 537, 233 P.2d 554, 556, the court says: "As a guide to the determination of the intent of the testator, the courts have stated certain general principles. Thus in *Re Estate of Lawrence*, 17 Cal.2d 1, 7, 108 P.2d 893, 896, it was said that '* * * when words of recommendation, request and the like are used in direct reference to

the estate, they are *prima facie* testamentary and imperative, and not precatory. While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor.' And again in *Re Estate of Miles*, 72 Cal.App.2d 336, 343, 164 P.2d 546, 550, it was said: 'A wish or request of the testator for the disposition of his estate directed to the executor is a command, but if addressed to the legatee it will not be construed as a limitation on the estate given in absolute terms. In *re Estate of Marti*, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071. * * *' To the same effect is *In re Estate of Tooley*, 170 Cal. 164, 149 P. 574 [Ann.Cas.1917B 516.]."

In the *Collias* case a clear-cut devise and bequest left the entire residue to *Collias'* nephew who was also named as executor. But when the testator came to considering his relatives in Greece he said "'It is my desire and wish that my nephew * * * will give half of my estate to my nearest relative heir in Greece'" for the latter to divide among all *Collias'* close relatives in Greece. The court points out that, while the nephew was both residuary legatee-devisee and executor, the direction to him was as nephew and devisee, not as executor. It was the devisee who was asked to give half of what had been willed to him. The *Collias* case is a perfect illustration of the rule which prevails when the direction is to the beneficiary respecting his devise or bequest, while in *In re Estate of Tooley*, supra [170 Cal. 164, 149 P. 575], illustrates the rule which prevails when the direction is to the executor (if one is named) or the language is "used in direct reference to the estate."

[8] In the present case, as in *Re Estate of Tooley* and *In re Estate of Mayne*, 28 Cal.App.2d 340, 82 P.2d 504, no executor was named, and, unlike *Estate of Collias*, no expression of a wish or desire was directed to the person to whom the bequest or devise had been made. In *Re Estate of Shirley*, 180 Cal. 400, 403, 181 P. 777, 778, the court said: "The fact that the clause here involved is not formally addressed or directed to any person as one by whom the be-

quest should be set aside is of no importance. Where words are used which dispose of property or impose a condition upon a bequest given elsewhere in the will, they need not be addressed to anyone. It is enough that they show the intent and will of the testatrix regarding the property or legacy. If they do this, the court and the law will carry it out by probating the will and distributing the estate as is provided therein."

If it be assumed, as appellant strenuously contends, that the \$5,000 provision opened with "wish" or, better still, "*I wish*", instead of "with", the second paragraph would read:

"I wish \$5000.00 dollars to be sent to Antonia Cataldi (Mother) her maiden name" etc. It would then parallel the will in *Estate of Tooley*, which in its entirety read: "I give all my property at my death to my daughter Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother." The two wills are parallel for several reasons. First, in each there was a clear and distinct bequest and devise in the first paragraph. Second, in each the second paragraph is not *in terms* addressed or directed to anyone. Third, in neither was an executor named. Fourth, the second paragraph in each contains no words such as "I bequeath" or "I give", but one says "I desire" and the other "I wish". Fifth, the *Tooley* will does not *in terms* specify who is to "divide", and the present will does not *in terms* specify who is to "send". The only difference between the *Tooley* and *Monticelli* wills is that in the former the division of the property (a) depends on conditions and (b) is postponed, while in the latter no condition is attached and there is no delay.

[9] On the authority of *In re Estate of Tooley*, 170 Cal. 164, 149 P. 574, and *In re Estate of Mayne*, 28 Cal.App.2d 340, 82 P.2d 504, which, also, is a parallel case, the language of the second paragraph of *Monticelli's* will must be held to have been "used in direct reference to the estate", hence it was mandatory and effected a testamentary disposition.

[10] Appellant points to the fact that Monticelli named no executor. From this premise it is argued, by process of elimination, that the provision that \$5,000 is "to be sent to Antonia Cataldi" must have meant that *she* was to send it—that the request was directed to her and not to the executor, or administrator, or the court, or estate. In *Estate of Shirley*, supra, 180 Cal. at pages 402-403, 181 P. at page 778 the court points out that the phrase "addressed to the executor" is used "only as a convenient form of expression" and as the equivalent of words of request "used in direct reference to the estate", citing *In re Estate of Tooley*. For this reason the fact that no executor was named is of no importance.

This brings us to the "wish" versus "with" controversy. In the findings the court quoted the will, underscored the disputed word, and then found: "That the fourth letter in the above underscored word 'wit-h' occurring between the 'T' and 'H' is illegible. That the deceased intended said word to denote 'with' and to make said bequest * * * to his mother whose maiden name was Antonia Cataldi, mandatory, and that said mandatory direction with regard to said legacy was a mandatory direction to the administrator with the will annexed and not to the residuary legatee."

Appellant contends that the finding is not supported by the evidence.

[11] Respondents in their brief quote at length the familiar language of *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, in support of their argument that the finding, based on substantial evidence, "is impervious to attack on appeal." Appellant in her closing brief does not attack this rule but does argue that the evidence was overwhelming that the testator not only knew how to spell the word "with" but could write it legibly. The testator worked in the drug and chemical business and had a formula book with numerous entries therein containing the word "with" in his own handwriting. This book was

in evidence and is before us. The argument that the entries in the book demonstrated that testator had a perfect command of "with", was one properly to be addressed to the trial court, but the fact remains that although the testator knew how to spell and write "with", he did not, in this important instance, write it legibly (whether because of an unsteady hand or what not—incidentally the numerals "8" and "30" in the date are none too steady or legible). We are satisfied that there was substantial evidence to support the finding. Moreover as said earlier the question whether the word is "with" or "wish" is not the turning point of this case.

In *Re Estate of Collias* the testator after giving the entire residue to his nephew expressed his wish and desire that the nephew "will give half of my estate to my nearest relative heir in Greece". This furnishes the key for distinguishing the authorities on which appellant relies, all of which are cases where the testator called on the beneficiary to do something for somebody out of property which the beneficiary has received. Thus in *Re Estate of Miles*, 72 Cal.App.2d 336, 164 P.2d 546, testator requested his wife to give his daughter \$500 and his son \$100. In *re Estate of Cook*, 58 Cal.App.2d 376, 136 P.2d 338, followed, *In re Estate of Marti*, 132 Cal. 666, 61 P. 964, 64 P. 1071 and *In re Estate of Goldthwaite*, 140 Cal.App. 551, 35 P.2d 1050. In the *Marti* case testator's wife and executrix was asked to make a will leaving to his relatives half of what she had received. See *In re Estate of Kearns*, 36 Cal.2d 531, 225 P.2d 218, and *In re Estate of Collias*, supra, for the rule where the request is made to one who is both executor and devisee. In the *Goldthwaite* case the testator asked his father to give to a third person half the proceeds of the sale of a piece of real estate which he had devised to the father. In *re Estate of Budd*, 166 Cal. 286, 135 P. 1131; *In re Estate of Farely*, 214 Cal. 199, 4 P.2d 948; *In re Estate of Sowash*, 62 Cal.App. 512, 217 P. 123 and *In re Estate of Lee*, 104 Cal.App. 15, 284 P. 948 are not in point.

The judgments and orders appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.



107 Cal.App.2d 163

FAEH v. UNION OIL CO. OF CALIFORNIA et al.

Civ. 18275.

District Court of Appeal, Second District,
Division 2, California.

Oct. 29, 1951.

Rehearing Denied Nov. 14, 1951.

Hearing Denied Dec. 20, 1951.

Edward D. Faeh brought an action against the Union Oil Company of California, a corporation, and James W. Coppage, for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile. The Superior Court of Los Angeles County, Henry M. Willis, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, McComb, J., held, inter alia, that plaintiff had duty to point out in his brief wherein the evidence was insufficient where plaintiff asserted that evidence failed to disclose any evidence upon which defendant could have prevailed.

Order in accordance with opinion.

1. Appeal and Error ⇨930(1)

On plaintiff's appeal from judgment for defendants in action for damages resulting from collision between auto-car tractor and trailer and plaintiff's automobile in intersection, evidence would be viewed in light most favorable to defendants.

2. Trial ⇨296(3)

In action for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile, giving of three instructions concerning whether tractor and trailer entered into intersection when plaintiff's vehicle was on a through highway and constituted an immediate hazard, was not error prejudicial to plaintiff where jury was instructed that neither repetition of instructions nor other behavior on part of judge on delivering charge was meant to indicate what he thought of controversy.

3. Appeal and Error ⇨1064(4)

In action for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile, use of word "possibility" rather than word "probability" in instruction stating that statute requiring driver of vehicle about to enter a through highway to yield right of way to vehicles on through highway which are in intersection or so close thereto as to constitute an immediate hazard, does not mean that such driver had no right to enter through highway when there is any possibility of accident happening, was not error requiring reversal of judgment for defendants.

4. Appeal and Error ⇨1064(1)

Alleged erroneous instruction given in action for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile, did not require reversal of judgment for defendants where criticisms of instruction were hypertechnical and there was no showing that plaintiff was prejudiced.

5. Automobiles ⇨246(57)

In action for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile, action of trial court in instructing jury on question of unavoidable accident was not error where there was a general denial by defendant of negligence.

6. Appeal and Error ⇨1067

In action for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile, refusal of trial court to give instruction that plaintiff was entitled to presumption that every reasonable person takes ordinary care of his own concern and that he obeys the law, was not error prejudicial to plaintiff when substance of instruction was covered by another instruction given at plaintiff's request.

7. Trial ☞261

In action for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile, refusal of trial court to give an instruction which was incomplete and was merely an explanation of a hypothetical instruction which was not given was not error.

8. New Trial ☞152

Plaintiff was not entitled after 10 days for filing of notice of intention to move for a new trial had elapsed, to amend such notice nunc pro tunc to include therein as a ground for his motion newly discovered evidence. Code Civ.Proc. § 473.

9. New Trial ☞152

A defective notice of intention to move for new trial cannot be amended after expiration of statutory time for its filing, such an order being beyond jurisdiction of trial court. Code Civ.Proc. § 473.

10. New Trial ☞152

Trial court is entitled, after jurisdiction is vested, to give relief for failure to perform subsequent steps relating to affidavits to be used on motion for new trial.

11. Appeal and Error ☞760(2)

On plaintiff's appeal from judgment for defendants in action for damages resulting from collision in intersection between auto-car tractor and trailer and plaintiff's automobile, plaintiff had duty to point out in his brief wherein the evidence was insufficient where plaintiff asserted that evidence failed to disclose any evidence upon which defendant could have prevailed.

Brennan & Cornell and Jerome L. Doff, all of Los Angeles, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from (1) a judgment in defendants' favor after trial before a jury in an action to recover damages for personal injuries resulting from an automobile accident, (2) an order denying his

motion to correct a notice of intention to move for a new trial nunc pro tunc, pursuant to the provisions of section 473 of the Code of Civil Procedure, and (3) a purported appeal from the order denying his motion for a new trial.

[1] *Facts:* Viewing the evidence in the light most favorable to defendants (respondents) and pursuant to the rules set forth in *Re Estate of Isenberg*, 63 Cal.App. 2d 214, 215, 217, 146 P.2d 424, the facts are:

Defendant corporation was the owner of an auto-car ten ton tractor and trailer. At about 11:00 p. m. on March 12, 1948, defendant Coppage was driving the tractor and trailer southerly on Valley Boulevard. At the same time plaintiff was driving a Buick sedan in a northerly direction on a through highway named Mission Road.

Defendant Coppage came to a complete stop at the intersection of the two highways in compliance with a stop sign on Valley Boulevard. He intended to make a left hand turn onto Mission Road and continue in a southerly direction. When he stopped he observed the lights of plaintiff's car about 300 feet easterly of the intersection and believing that he had ample opportunity to cross into the intersection before plaintiff's car entered it he proceeded at about 5 miles per hour.

He then glanced to the right and observed that the traffic was clear, and then looked to the left and saw plaintiff's automobile approximately 60 feet away and in the lane of traffic nearest the easterly curb. After observing plaintiff's car the second time defendant Coppage applied his brakes when he was about 10 feet into the intersection and stopped within 32 inches. The automobile which plaintiff was driving struck the inside front wheel of defendants' truck moving it 3 feet sideways. The impact caused plaintiff serious personal injuries.

A police officer testified that he wrote on the police report that the sobriety of plaintiff was unknown, but that he detected the odor of alcohol on plaintiff's breath.

Questions: First: *Did the trial court commit prejudicial error in giving three*

instructions concerning the same subject, to wit, whether defendants' vehicle entered the intersection when plaintiff's vehicle was on a through highway and constituted an immediate hazard?

No. The jury were properly instructed that even though the propositions governing defendant's conduct were stated in various ways that neither the repetition of instructions nor any other behavior on the part of the judge in delivering the charge was meant to indicate in one way or another what he thought of the controversy.

[2] Clearly the mere repetition of instructions upon the same subject in view of the trial judge's admonition did not constitute prejudicial error. (*Rios v. Bennett*, 88 Cal.App.2d 919, 925, 200 P.2d 73.)

Neither *Taha v. Finegold*, 81 Cal.App. 2d 536, 184 P.2d 533, nor *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25, reach a contrary conclusion. In the *Taha* case 16 instructions, almost duplicates, were given; 11 formula instructions, the cumulative effect of which, with other circumstances, induced the jury to return a verdict for plaintiff. Such is not the situation here.

In the *Treadwell* case it is said, "Instructions which are framed solely for the purpose of, and which simply have the effect, of emphasizing some particular portion of the evidence, are not to be commended, and are properly refused." (*Treadwell v. Nickel*, supra, 194 Cal. 262, 228 P. 33.)

Such proposition of law has no application to the facts of the instant case.

Second: *Did the trial court err in instructing the jury as hereinafter set forth?*

This question must be answered in the negative.

1. "You are instructed that while it is true that section 552 of the California Vehicle Code requires the driver of a vehicle about to enter a through highway to yield the right of way to vehicles on the through highway which are in the intersection or so close thereto as to constitute an immediate hazard, that this does not mean that such driver has no right to enter the through highway when there is any

possibility of an accident happening, nor does it mean that such driver about to enter such through highway is an insurer of the safety of motorists approaching on said highway. His obligation in that connection is to exercise such care and caution in entering the intersection as might be expected of the reasonably prudent person surrounded by the same or similar circumstances." (*Italics added.*)

[3] Plaintiff criticizes the use of the word "possibility" in lieu of the word "probability" in the foregoing instruction. Though it would have been better to use the word "probability" instead of "possibility" such artlessness in the framing of an instruction does not constitute ground for a reversal. (*Musante v. Guerrini*, 125 Cal.App. 556, 561[5], 13 P.2d 965.)

Galway v. Guggolz, 117 Cal.App. 639, 4 P.2d 290, and *Buttrick v. Pacific Electric Ry. Co.*, 86 Cal.App. 136, 260 P. 588, relied on by plaintiff, are not here applicable for the court in each of the cited cases did not criticize the instructions because they were inartfully drawn but because they were erroneous. The facts are different in the instant case.

2. "You are instructed in determining the question of whether or not the defendant Coppage entered the intersection when plaintiff's vehicle constituted an immediate hazard, that Coppage had the right to assume, until the contrary was apparent to a reasonable person, that vehicles on the through highway, including the plaintiff, would be driven at a reasonable and prudent rate of speed, and had a right to assume that motorists on the through highway, including the plaintiff, would operate their vehicles in a careful and prudent manner and that he had a further right to act and rely on such assumption."

Plaintiff makes certain criticisms of this instruction, principally, (1) that after the word "intersection" there should have been added the words "of the through highway," (2) that there should have been added to "plaintiff's vehicle" the words "was so near thereto," and (3) that the instruction refers to a "reasonable" person instead of to a "prudent" person.

[4] These criticisms are hypertechnical. There is no showing of any prejudice resulting to plaintiff which would justify the reversal of the judgment. (See cases cited in 3A McKinney's New California Digest, (1950), Appeal and Error, sections 1636-1637, page 217 et seq.) This is especially true since 5 instructions were given in which the judge used the term "prudent person."

3. "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it."

[5] Where, as in the instant case, there is a general denial by defendant of negligence it is not error for the trial court to instruct the jury on the doctrine of unavoidable accident. (Wertheim v. Mears, 104 Cal.App.2d 120, 121, 231 P.2d 89. See also cases cited in 17 McKinney's New Calif. Dig. (1950), Negligence, section 190, page 550.) There was no prejudice in such instruction.

Third: *Did the trial court commit prejudicial error in refusing at plaintiff's request to instruct the jury as hereinafter set forth?*

This question must be answered in the negative.

[6] 1. "Plaintiff Edward Fach under the evidence is entitled to a presumption of law that every person takes ordinary care of his own concerns and that he obeys the law. This presumption is a form of evidence and will support findings in accordance therewith. When there is evidence to the contrary which conflicts with that presumption it is your duty as jurors to weigh that evidence against the presumption and any evidence that may support the presumption to determine which, if either, preponderates."

The substance of such instruction was covered by the following instruction given at the request of plaintiff:

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of *prima facie* evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

2. "The words just quoted from the Vehicle Code, namely, that 'No person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety', do not mean that the driver of a motor vehicle, before making such a turn, must know that there is absolutely no possibility of accident. They mean that before starting to turn a vehicle on a public highway, and while making the turn, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn can be made safely."

[7] There was no error in refusing to give the foregoing instruction for the reason that the instruction commenced, "The words just quoted from the Vehicle Code". The quotation which then follows is a part of section 544 of the Vehicle Code and the instruction is an explanation of section 544. However plaintiff did not request that section 544 of the Vehicle Code be read to the jury nor did the court do so, hence no explanation of the section was required. The instruction being incomplete and merely an explanation of a hypothetical instruction which was not given the requested instruction was meaningless and properly refused by the

trial court. (*Bertolozzi v. Progressive Concrete Co.*, 95 Cal.App.2d 332, 337[7], 212 P.2d 910.)

Fourth: *Did the trial court commit prejudicial error in denying plaintiff's motion to correct the notice of intention to move for a new trial nunc pro tunc under the provisions of section 473 of the Code of Civil Procedure?*

[8] No. Plaintiff complains that he was not allowed after the ten days for the filing of a notice of intention to move for a new trial had elapsed, to amend that notice nunc pro tunc to include therein as a ground for his motion "newly discovered evidence."

[9] A defective notice of intention to move for new trial cannot be amended after expiration of the statutory time for its filing, such an order being beyond the jurisdiction of the trial court. (*Sitkei v. Frimel*, 85 Cal.App.2d 335, 337[2], 192 P.2d 820. See also cases cited in 18 McKinney's New Calif. Dig., (1932), New Trial, section 150, page 22.)

Cases such as *Pollitz v. Wickersham*, 150 Cal. 238, 88 P. 911, and *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 479, 82 P. 53, relied on by plaintiff, are no longer the law since such cases refer to the former practice on a motion for a new trial when the motion could be presented upon a statement or bill of exceptions. *They do not refer to the initiatory steps which vest the court with jurisdiction*, but to the preparation of a record which may be used to decide the new trial.

[10] The court is entitled, after jurisdiction is vested, to give relief for failure to perform subsequent steps relating to affidavits to be used on the motion for a new trial, but it has no power to enlarge its jurisdiction by relief under section 473 concerning the notice of intention to move

for a new trial after the lapse of the required time.

Fifth: *May the court on appeal correct a wrong accomplished by fraud due to untrue statements made at the time of trial by defendant?*

It is unnecessary for us to consider this question presented by plaintiff since in view of our answer to question Fourth, there is no evidence in the record that defendant made any false statements.

Sixth: *Was there sufficient evidence to support the judgment?*

Yes. Beyond the mere assertion by plaintiff that the evidence failed to disclose any evidence upon which the defendant could have prevailed he does not furnish us with either authorities or argument in support of such contention.

[11] Therefore plaintiff has not met the requirements of the established rule that it is the duty of an appellant, contending that the evidence does not support a finding, to point out in his brief wherein the evidence is insufficient. (*Metzenbaum v. Metzenbaum*, 96 Cal.App.2d 197, 201, 214 P.2d 603; *Lori Ltd. v. Wolfe*, 85 Cal. App.2d 54, 66, 192 P.2d 112.)

It is apparent from the facts above stated that the jury may have found either (1) that the accident was unavoidable, or (2) that plaintiff was intoxicated and driving at an excessive rate of speed which was the proximate cause of the accident. In either case he could not recover.

1. The judgment is affirmed.

2. The order denying the motion to correct the notice of intention to move for a new trial is affirmed.

3. The purported appeal from the order denying the motion for a new trial is dismissed.

MOORE, P. J., concurs.

Hearing denied; CARTER, J., dissenting.

38 Cal.2d 5

REYNOLDS v. FILOMEO et ux.**S. F. 18398.**

Supreme Court of California, in Bank.

Nov. 2, 1951.

Vernon Reynolds, a minor, by his guardian ad litem, Lon R. Reynolds, and others brought action against John Melvin Filomeo and others to recover for injuries sustained by guests in automobile when driver of automobile attempted to make a left turn at night to enter off-road parking area fronting cafe and was struck by another automobile coming from the opposite direction. The Superior Court of Alameda County, A. J. Woolsey, J., entered a judgment of nonsuit, and the plaintiffs appealed. The Supreme Court, Spence, J., held that question whether driver of automobile which struck automobile in which guests were riding was negligent was for jury.

Judgment reversed.

Prior opinion 228 P.2d 876.

1. Trial $\Rightarrow$ 165

A judgment of nonsuit can be supported only if, disregarding conflicting evidence, and giving to evidence of plaintiff all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Negligence $\Rightarrow$ 93(8)

In action by guests in automobile against driver of another automobile for injuries sustained when driver of automobile in which guests were riding at night attempted to make a left turn to enter off-road parking area fronting cafe and was struck by the other automobile coming from opposite direction, alleged negligence of driver of automobile in which guests were riding was not imputable to the guests.

3. Automobiles $\Rightarrow$ 245(38)

In action by guests in automobile against driver of another automobile for injuries sustained when driver of automobile in which guests were riding at night attempted to make a left turn to enter off-road parking area fronting cafe and was struck by the other automobile coming

from opposite direction, question whether headlights on other automobile were burning at all times pertinent to the happening of the accident, was for jury.

4. Automobiles $\Rightarrow$ 11

The Legislature intended that the prima facie speed limit for a business or residence district should not apply in any area unless signs are in place giving notice thereof. Vehicle Code, §§ 89, 465, 468, 468.1, 510, 511, 758.

5. Automobiles $\Rightarrow$ 245(40)

In action by guests in automobile against driver of another automobile for injuries sustained when driver of automobile in which guests were riding at night attempted to make a left turn to enter off-road parking area fronting cafe in rural area and was struck by the other automobile coming from opposite direction, in absence of any evidence showing signposting of area involved, there was no question to be submitted to jury with respect to any alleged violation of the prima facie speed limit prescribed for a business district. Vehicle Code, §§ 89, 465, 468, 468.1, 510, 511, 758.

6. Automobiles $\Rightarrow$ 245(14)

In action by guests in automobile against driver of another automobile for injuries sustained when driver of automobile in which guests were riding at night attempted to make a left turn to enter off-road parking area fronting cafe and was struck by the other automobile coming from opposite direction, whether or not, as a prudent person, driver of the other automobile should have anticipated the possibility that automobile in which guests were riding might turn to the left was a question for jury.

7. Automobiles $\Rightarrow$ 168(2)

The mere fact that a motorist is traveling at a lawful speed does not necessarily mean that he is free from negligence.

8. Automobiles $\Rightarrow$ 245(40)

In action by guests in automobile against driver of another automobile for injuries sustained when driver of automobile in which guests were riding at night attempted to make a left turn to enter off-

road parking area fronting cafe and was struck by the other automobile coming from opposite direction, whether driver of the other automobile was driving under speed limit was for jury.

9. Automobiles Ⓒ244(35)

In action by guests in automobile against driver of another automobile for injuries sustained when driver of automobile in which guests were riding at night attempted to make a left turn to enter off-road parking area fronting cafe and was struck by the other automobile coming from opposite direction, direct testimony was not necessary to overcome statement of the driver of the automobile that he was driving under speed limit, if indirect or circumstantial evidence did so.

10. Automobiles Ⓒ159

A motorist suddenly confronted with an unexpected peril is not to be held responsible for omitting precautions which hindsight might indicate would have avoided the accident, and he is required to do only what a reasonable and prudent person would do in a like situation.

11. Automobiles Ⓒ245(49)

In case of an emergency, it is a question for the trier of the fact to determine whether motorist acted with reasonable care under all the circumstances.

12. Automobiles Ⓒ245(49)

In action by guests in automobile against driver of another automobile for injuries sustained when driver of automobile in which guests were riding at night attempted to make a left turn to enter off-road parking area fronting cafe and was struck by the other automobile coming from opposite direction, question whether driver of automobile acted in emergency as a reasonable and prudent person was for jury.

Brown, Smith & Ferguson, Jacqueline Taber and Heber J. Brown, all of Oakland, for appellants.

Clark & Heafey, Richard Belcher, all of Oakland, and Gerald P. Martin, San Francisco, for respondents.

SPENCE, Justice.

[1] * This is an appeal by plaintiffs in a personal injury action, wherein a judgment of nonsuit was entered at the close of plaintiffs' case. In challenge of the propriety of such adverse ruling, plaintiffs rely on the settled principle that a judgment of nonsuit can be supported only if "disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." *Blumberg v. M. & T. Incorporated*, 34 Cal.2d 226, 229, 209 P.2d 1, 3; also *Andre v. Allyn*, 84 Cal.App.2d 347, 348, 190 P.2d 949; *Seaford v. Smith*, 86 Cal.App.2d 339, 343, 194 P.2d 792; *Kars- tensen v. Western Transportation Co.*, 93 Cal.App.2d 435, 438, 209 P.2d 47. An examination of the record sustains plaintiffs' position that the trial court was "not justified in taking the case from the jury." In *re Estate of Lances*, 216 Cal. 397, 400, 14 P.2d 768, 769.

Preliminarily, these observations should be made as to the identity of the parties. On November 5, 1948, plaintiffs Vernon and James Reynolds, aged nineteen and twenty-one years, respectively, were riding as guests in a Ford coupe, which was owned and operated by one Joseph Brenner, also twenty-one years of age. The Ford coupe collided with an oncoming Buick automobile, which was being driven by one John Melvin Filomeo. Originally the complaint herein included as a defendant said Joseph Brenner. Prior to the trial the action was dismissed as to him without prejudice, and he testified as a witness for plaintiffs. The trial proceeded against the remaining defendants, Mr. and Mrs. John Melvin Filomeo, the latter being so named as a party because of her alleged joint ownership of said Buick automobile. In the discussion which follows, the word "defendant" will be used with reference to John Melvin Filomeo, driver of the Buick car.

Pursuant to the settled rule for testing the propriety of a nonsuit, the facts will be set

forth in the light most favorable to plaintiffs; and the testimony of defendant, called as a witness by plaintiffs under Code of Civil Procedure, section 2055, will be included only where necessary for a full understanding of the case.

The accident occurred about 11:15 o'clock at night at a point approximately 108 feet west of the intersection of Highway 24 and Meadow Lane in Contra Costa County. Joseph Brenner, driver of the Ford coupe in which plaintiffs were riding, was proceeding easterly on Highway 24 towards Concord. Plaintiff James Reynolds was sitting in the front seat with Brenner, and plaintiff Vernon Reynolds was sleeping on the rear seat, with the result that the latter was unable to give any account of the circumstances of the accident. The highway was divided by a white line into two lanes, each twelve feet wide. The weather was clear and the road surface was dry. Brenner's Ford coupe was in good condition mechanically, the windshield was unobstructed, and the headlights were lighted. At the same time defendant, John Melvin Filomeo, was driving his Buick automobile westerly on Highway 24, at a speed which he estimated to be forty-five to fifty miles an hour. No other traffic was approaching from the east. There was a car ahead of the Ford which passed the Buick approximately at the intersection of Highway 24 and Meadow Lane.

At and westerly of the intersection, and on the north side of Highway 24 (the opposite side from that on which the Ford was traveling) was an area fronting the "Four Corners Cafe," where there was a lighted neon sign and a lighted billboard. On the south side of the highway there were three other commercial buildings, but none of these was open for business at that hour of the night. With the exception of these mentioned business establishments, the property both east and west of Meadow Lane is orchard and farm land, with occasional farm houses. Brenner was driving his Ford at the rate of forty-five to fifty miles per hour, but upon nearing the cafe and intending to turn left across the highway so as to enter the off-road parking area fronting the cafe, he slowed the Ford

to a speed of ten to fifteen miles per hour. Before making the turn, Brenner testified that he checked the highway to the east and James Reynolds testified that he looked upon the highway in both directions. Each testified that he did not see any vehicle approaching. Brenner then turned left and just as the front wheels of the Ford reached the northern border of the highway strip, the Buick struck it slightly to the rear of its right door. The force of the impact threw the occupants of the Ford out of the car, and plaintiffs James and Vernon Reynolds were severely injured.

Defendant was familiar with the intersection and the buildings in the vicinity, for he traveled the highway daily going to and from work. When he was about 125 yards east of the intersection, he saw the headlights of two cars approximately 100 feet apart, coming toward him in the eastbound lane. The first car passed him as he reached the intersection, and the Ford was then still 150 feet in front of him. He could not estimate its rate of travel nor did he slacken his own speed from the forty-five to fifty miles per hour at which he was driving as he approached the intersection. When he was 20 to 50 feet from the Ford, he claims that it abruptly turned in front of him. He neither sounded his horn nor attempted to pull to either side of the road. He applied his brakes and skidded 24 feet straight forward to the point of impact, approximately 108 feet west of the intersection. The headlights were lighted and his car was in good mechanical condition. The Ford was thrown forward and in a semi-circle by the force of the collision, coming to rest off the road and facing south. Brenner claims that he did not see the Buick at all before the crash; plaintiff James Reynolds testified that he did not see it until it was about "a foot away," when "all at once [he] noticed [a] light to [his] right." Upon conclusion of plaintiffs' case, the court granted a nonsuit upon the ground that there was no evidence of defendant's negligence.

In considering the propriety of the judgment of nonsuit, the record presents these evidentiary matters as questions of fact for the determination of the jury in resolving

the disputed claim of defendant's negligence: (1) whether or not defendant was driving the Buick car without its headlights burning; (2) whether or not defendant was driving his car at an excessive speed under the circumstances; and (3) whether or not defendant, admittedly familiar with the area, acted as a reasonable man in an attempt to avoid the accident.

[2,3] Plaintiffs first contend that defendant was chargeable with negligence in relation to the burning of the headlights as he drove the Buick down the highway. Preliminarily it must be noted that Brenner, by reason of evidence clearly showing that at a point approximately 108 feet from the intersection he made a left turn in the face of an approaching vehicle, was unquestionably negligent unless defendant was driving his car with the headlights unlighted. However, Brenner's negligence is not imputable to his guests, plaintiffs James and Vernon Reynolds. *Donat v. Dillon*, 192 Cal. 426, 428, 221 P. 193; *King v. City of Long Beach*, 67 Cal.App.2d 1, 6-7, 153 P.2d 445, and cases there cited. So pertinent is this testimony of the occupants of the Ford in checking the highway before the left turn was undertaken: plaintiff James Reynolds' statement that while he was "not particularly" looking for approaching vehicles, he "glanced up the road" and saw none; Brenner's claim that he too looked for oncoming traffic on the highway and saw none; and then the added assertion of plaintiff James Reynolds that practically at the instant of collision, when the Buick was but "a foot away," he saw its lights. Such evidence would sustain an inference that defendant, although he testified to the contrary, was driving the Buick without its headlights burning and then suddenly switched them on just before the impact. Similar evidentiary questions have arisen in railroad cases where despite positive testimony that a signal warning was given, witnesses at the scene testified that they did not hear it and their failure to hear was held to be "some evidence that no such signal was given," creating a conflict properly left to the jury to resolve. *Thompson v. Los Angeles & S. D. B. Ry. Co.*, 165 Cal. 748, 752, 134 P. 709; also *McKinley v.*

Southern Pacific Co., 80 Cal.App.2d 301, 307, 181 P.2d 899; *Saphire v. Los Angeles Transit Lines*, 99 Cal.App.2d 880, 884, 222 P.2d 956. Accordingly here the court should have permitted the jury to pass upon the question of whether defendant's headlights were burning at all times pertinent to the happening of the accident.

There next arises the matter of the speed at which defendant was driving on the stretch of highway here involved. There was some evidence to show that the number of commercial buildings in that vicinity was sufficient to satisfy the statutory definition of a business district, Vehicle Code, § 89, but the uncontradicted evidence showed that the area was not signposted as provided in section 468 of the Vehicle Code.

The permissible speeds at which vehicles lawfully may travel in various areas are covered by sections 510 and 511 of the Vehicle Code. Section 510 contains the basic speed law; namely, "No * * * speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Section 511 provides that the "speed of any vehicle * * * not in excess of the limits specified in this section * * * is lawful unless clearly proved to be in violation of the basic rule declared in Section 510", but that a speed in excess of the limits fixed by section 511 is *prima facie* unlawful. The section then fixes twenty-five miles per hour as the permissible speed in a business district, and, with certain other exceptions not here involved, fifty-five miles per hour in all other areas.

Plaintiffs contend that the *prima facie* speed limit of twenty-five miles per hour applies to any area in which the number of buildings is sufficient to bring it within the definition of a business district as defined in section 89 of the Vehicle Code; and that the question of the nature of the district and of the applicable *prima facie* speed limit therefore was a question of fact for the jury under the evidence, despite the fact that there was no evidence that the area was signposted. Defendant, on the other hand, contends that there was no such

question for the jury's determination in the absence of any showing that the area was signposted. *Cavalli v. Luckett*, 40 Cal. App.2d 250, 253-254, 104 P.2d 708; *Noble v. Kertz & Sons Feed & Fuel Co.*, 72 Cal. App.2d 153, 157-158, 164 P.2d 257. In reply, plaintiffs point out that the cases cited by defendant were decided prior to the 1947 amendment to section 758 of the Vehicle Code, Stats.1947, ch. 1256, § 5, p. 2770, and claim that they are no longer applicable. We have concluded, however, that said 1947 amendment made no change in the substantive law relating to prima facie speed limits but merely effected a procedural change in relation to the proof of the violation thereof.

[4] The substantive provisions relating to prima facie speed limits, both before and since the 1947 amendment to section 758 of the Vehicle Code, have been set forth in section 511 of that code. It is there provided, after excepting certain types of areas, that "fifty-five miles per hour" is the prima facie speed limit "under all other conditions unless a different speed is established as provided in this code *and signs are in place giving notice thereof.*" (Emphasis added.) Construing said section 511 with the sections relating to signposting, Veh.Code, §§ 465, 468, 468.1, it seems clear that the Legislature intended that the prima facie speed limit for a business or residence district should not apply in any area "unless * * * signs are in place giving notice thereof." This is a reasonable construction, for otherwise every motorist, without the aid of warning signs showing a lower prima facie speed limit, would be required to direct his attention to the surrounding area rather than to the highway, and to estimate the number of structures within given distances in order to determine at his peril what might be the prima facie speed limit in each particular area along his route of travel. Such a requirement would neither tend toward promoting safety nor the expedition of the flow of traffic upon our heavily traveled highways.

[5] In view of these substantive provisions relating to prima facie speed limits, the procedural change made by the 1947

amendment to section 758 of the Vehicle Code seems entirely clear. Prior thereto, any person who sought to charge another with a violation of the prima facie speed prescribed for a business or residence district was compelled to prove in the first instance that (1) the area in question fell within the definition of such a district, (2) speed restriction signs had been erected, and (3) the speed traveled was in excess of that prescribed. *Cavalli v. Luckett*, supra, 40 Cal.App.2d 250, 253-254, 104 P.2d 708; *McGough v. Hendrickson*, 58 Cal.App.2d 60, 66, 136 P.2d 110; *Noble v. Kertz & Sons Feed & Fuel Co.*, supra, 72 Cal.App.2d 153, 157, 164 P.2d 257. The prior provisions of section 758 declared that every highway should be "conclusively presumed" to be outside of a business or residence district unless its "nature" was clearly shown and it was "duly signposted when and as required by this code." The 1947 amendment eliminated the conclusive presumption as to what was outside of a business or residence district, and substituted therefor a rebuttal presumption as to what was included within a business or residence district. It read as follows: "In any action involving the question of unlawful speed of a vehicle upon a highway which has been signposted with speed restriction signs of a type complying with the requirements of this code, it shall be presumed that existing facts authorize the erection of such signs and that the prima facie speed limit on such highway is the limit stated on such signs. This presumption may be rebutted." This new rebuttable presumption did no more than to permit a person to make out a prima facie case of a violation of a prima facie speed limit for a business or residence district by showing (1) the erection of speed restriction signs and (2) speed in excess of that prescribed. It thus eliminated the necessity for proof in the first instance of the nature of the district, no doubt upon the theory that speed restriction signs would ordinarily be erected only in those districts which were of a nature as to permit of such restrictions. However, it expressly made the presumption a rebuttable one. But the amendment made no change in the substantive law relating to

speed restrictions and now, as before, no area has the prima facie speed limit of a business or residence district unless it is signposted. We therefore conclude that in the absence of any evidence showing the signposting of the area here involved, there was no question to be submitted to the jury with respect to any alleged violation of the prima facie speed limit prescribed for a business district.

[6,7] However, plaintiffs also argue that assuming the place of the accident to be a zone with a prima facie speed limit of fifty-five miles, it was not prudent and was a violation of the basic speed law, Veh.Code, § 510, for defendant to drive along the stretch of highway here involved at the time of night in question—11:15 p. m.—at the speed he testified he was traveling, forty-five to fifty miles per hour. He knew the conditions at the intersection of the highways: that on his right and adjoining the crossroads was an area of more than 100 feet, furnishing parking space as well as entrance and exit facilities for use in connection with the public's patronage of the Four Corners Cafe; that on his left and across from the restaurant were three other commercial establishments, though not then operating because of the late hour. He likewise knew that the restaurant was then open for business, for the electric sign over its entrance so indicated. Moreover, defendant admittedly saw two oncoming cars approaching the intersection from the west as he approached it from the east. Whether or not as a prudent person, defendant should have anticipated the possibility that one or the other vehicle might turn either at the intersection or into the cafe parking area was a question for the jury. The frontage space of the cafe was well lighted. Whether defendant should have observed that Brenner's approaching Ford had reduced its speed preparatory to making the left turn across the highway, if it did as plaintiffs maintain, was likewise a matter for the jury's determination. In this connection, it must be remembered that "the mere fact that one is traveling at a lawful speed does not necessarily mean that he is free from negli-

gence." *Inouye v. Gilboy Co.*, 115 Cal.App. 25, 28, 300 P. 835, 836.

[8,9] Furthermore, in assuming the place of the accident to be a fifty-five mile zone, there also remained for the jury's determination the matter of accrediting defendant's testimony as to his speed of travel. Having due regard for the appropriate reaction time to be allowed defendant for realization of the necessity for acting in the perilous situation, the skid of twenty-four feet, the force of the impact, the damage to both cars and all the attending circumstances, it cannot be said as a matter of law that defendant was not driving in excess of fifty-five miles per hour. Defendant unavailingly argues that there was no direct testimony that his speed was different than as he stated it in giving his account of the accident at the trial, and he cites *Corcoran v. Pacific Auto Stages, Inc.*, 116 Cal.App. 35, 38, 2 P.2d 225 for the proposition that "it will not be presumed that [he] was violating law". From the record it appears that neither Brenner, the driver of the Ford automobile, nor plaintiff James Reynolds could testify as to the speed of defendant's oncoming Buick, for they claimed not to have seen it approaching. It does not require direct testimony to overcome defendant's statement if the indirect or circumstantial evidence does so. Moreover, such circumstances might overcome the presumption that defendant was obeying the law; and, as the record here stands, the jury might have so concluded in determining the credence to attach to the testimony of the respective witnesses. *Spolter v. Four-Wheel Brake Service Company*, 99 Cal. App.2d 690, 696-697, 222 P.2d 307.

[10-12] Finally, there is the consideration of plaintiffs' claim as to defendant's failure to avoid the collision. Of course, no one suddenly confronted with an unexpected peril is to be held responsible for omitting precautions which hindsight might indicate would have avoided the accident. He is required to do only what a reasonable and prudent person would do in a like situation. "In every such emergency it is a question for the trier of

fact to determine whether the person acted with reasonable care under all the circumstances." *De la Motte v. Rucker*, 55 Cal.App.2d 226, 233, 130 P.2d 444, 448. Whether or not defendant could have avoided striking the Ford automobile would depend in part on how much of his version of the accident the jury might accredit. To this point plaintiffs urge that the shoulder area adjoining defendant's lane of traffic was shown, by photographs in evidence, to have been well surfaced, and that defendant should have turned his Buick to the right in avoidance of the Ford as he saw it crossing the highway, instead of bearing straight down the road, hopeful that the application of his brakes would slow his car sufficiently to escape the otherwise inevitable crash. At any rate, it cannot be said, as a matter of law, that under all the circumstances of this case, a reasonably prudent person, after the time when a jury might find that defendant should have realized the danger, would or would not have attempted to turn his car in an effort to avoid the collision, or would have succeeded in avoiding it had he acted to change the direction of his car. These were all questions for the consideration of the trier of the facts. *Betschart v. Steel*, 61 Cal.App.2d 517, 522, 143 P.2d 81. Cases like *Curry v. Williams*, 109 Cal.App. 649, 293 P. 623; *Sinclair v. Harp*, 18 Cal.App.2d 167, 63 P.2d 876, and *De la Motte v. Rucker*, supra, 55 Cal.App.2d 226, 130 P.2d 444, where the collision was caused by one vehicle turning abruptly in front of an oncoming car are not in point here because of different factual considerations incident to the place of the accident or the course of conduct of the respective motorists. In *Podeszwa v. White*, 99 Cal.App.2d 777, 222 P.2d 683, where the defendant was held liable for damages, the facts relating to defendant's failure to swerve his truck and so avoid the collision are more nearly similar to those here involved. However, each case turns upon its own facts and the inferences that may reasonably be deduced therefrom.

In conformity with the foregoing observations, it is our conclusion that the

record contains 'evidence of sufficient substantiality to support a verdict in favor of the plaintiff[s]', *Blumberg v. M. & T. Incorporated*, supra, 34 Cal.2d 226, 229, 209 P.2d 1, 3, and that the trial court accordingly erred in granting the motion for a nonsuit.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

SCHAUER, J., concurs in the judgment.



38 Cal.2d 16

GUERRA et al. v. BROOKS et al.

L. A. 21978.

Supreme Court of California, in Bank.

Nov. 2, 1951.

Miguel Guerra, an individual, and Samuel Guerra, a minor by his guardian ad litem, Miguel Guerra, brought action against Ernie Lee Brooks and others to recover for injuries sustained by the minor when his motorcycle ran into the named defendant's automobile when automobile was turned to the left. The Superior Court of Kern County, Warren Stockton, J., entered a judgment adverse to the plaintiffs, and they appealed. The Supreme Court, Spence, J., held that Superior Court erred in excluding evidence of lack of signposting to limit speed in area in question to 25 miles an hour, in view of evidence that motorcycle was being driven in a speed in excess of 25 miles an hour.

Judgment reversed.

Prior opinion 228 P.2d 589.

I. Automobiles ⇐245(16, 82)

In action by motorcyclist against motorist for injuries sustained by motorcyclist when he ran into automobile coming from opposite direction at night when motorist attempted to make a left turn, questions whether motorist was negligent

and whether motorcyclist was contributorily negligent were for jury.

2. Automobiles ⇐243(7), 246(56)

In action by motorcyclist against motorist for injuries sustained by motorcyclist when he ran into automobile coming from opposite direction at night when motorist attempted to make a left turn, wherein there was evidence that motorcyclist was traveling at a speed in excess of 25 miles an hour, trial court erred in excluding evidence of lack of signposting which would make the area in question a zone in which speed was limited to 25 miles an hour, and erred in failing to give some specific instructions on the relation of signposting to prima facie speed limits prescribed by statute. Vehicle Code, §§ 89, 465, 466, 468, 468.1, 510, 511, 758.

Werdel & Di Giorgio and V. P. Di Giorgio, all of Bakersfield, for appellants.

Johnston, Baker & Palmer, Bakersfield, Stephen Wall and Claude F. Baker, of Bakersfield, for respondent.

SPENCE, Justice.

This is an action for damages arising out of a collision between an automobile driven by defendant and a motorcycle operated by plaintiff Samuel Guerra, a minor twenty years of age. A jury returned a verdict in favor of defendant, and from the judgment entered thereon plaintiffs appeal. As ground for reversal, plaintiffs contend that the trial court committed prejudicial error in refusing to admit certain evidence as to speed restriction signs and to give certain instructions on that subject. The condition of the record sustains plaintiffs' position.

The accident occurred at about 8:30 p. m. on December 29, 1948, on Highway No. 466 (Edison Highway) some three miles east of the city of Bakersfield. Plaintiff Samuel Guerra was driving his motorcycle easterly in the south lane and defendant was driving his Ford automobile westerly in the north lane. The paved portion of the highway is about 28 feet

wide, with 12 feet of shoulder on either side. A railway track runs parallel to the north side of the highway, and on the south side is a builtup section, including Andrews' Market, which faces the roadway and which is some 500 feet east of the highway's intersection with Mount Vernon Street. It was a dark, misty night. In order to enter the market on the opposite side of the highway, defendant made a left turn across the lane in which Guerra was approaching, and his automobile and the oncoming motorcycle collided.

Defendant testified that as he was drawing near the market with the intent of stopping there for some shopping, he was traveling about 25 miles per hour; that he gave a left-turn hand signal for about 150 feet; that by the aid of his own headlights and the lights reflected from the market, he could see a distance of 250 to 300 feet down the road; that he carefully scanned the road in both directions, and when he saw that there were no cars or car lights either in his pathway or behind him to create a hazard, he slowed his automobile to 5 miles per hour and began his turn left; that when partially across the center line, he, for the first time, saw the motorcycle "just the instant before it hit"; that he observed no lights on it; that the motorcycle struck his automobile near the radiator, and the rider (Guerra) was thrown into the air, landing on the soft shoulder on the south side of the highway; that the rider got to his feet, returned to the motorcycle and shut off the motor. Defendant's wife, who was riding in the front seat, corroborated her husband's testimony.

Plaintiff Samuel Guerra testified that he was traveling in the center of the south lane about 40 to 45 miles per hour as he saw the lights of defendant's automobile approaching in the north lane; that he paid not attention to the car until it turned sharply in front of him into the south lane which he was traveling; that he did not observe any signal being made by the driver of the car; that the lights of his motorcycle were then burning; that he had "flicked" them from low to high a short distance down the highway; that he did

not have the opportunity to swerve or slow down before the collision; that after being thrown to the ground from the force of the impact, he walked over to the motorcycle, turned off the motor and "put the parking lights on"; that his broken left arm gave him great pain, and that he was thereafter taken to the hospital.

A highway patrolman who arrived soon after the accident testified that he "could not positively state" whether the lights were on or off the motorcycle when he reached the scene of the collision. Without detailing the testimony of other witnesses on this point, suffice it to say that the record shows a sharp conflict as to their observations of the lighting on the motorcycle upon their arrival at the scene following the crash.

[1] Defendant not only denied negligence on his part but pleaded that the accident was caused by the contributory negligence of Guerra in his operation of the motorcycle. As the above review discloses with regard to two of the main evidentiary issues in dispute—whether the lights were sufficiently illuminated on the motorcycle just prior to the accident and whether defendant made a left-turn signal which was visible to Guerra had he looked—the record presents a typical fact case in which the evidence, and the reasonable inferences therefrom, would support a verdict either way. But the propriety of plaintiffs' objection to the considerations which may have entered into the jury's verdict in favor of defendant stems from another issue raised in the case, the nature of the district where the accident occurred—whether such stretch of highway was or was not within a so-called business district, whether the area was or was not sign-posted as required by section 468 of the Vehicle Code, and what prima facie speed limit should apply there.

The highway patrolman who made the report of the accident stated therein that the district had a permissible 55-mile per hour speed limit. He testified that in the course of patrolling that portion of the highway, he had noticed "several little

businesses fronting on Edison Highway" on the south side but that he had never seen "a speed reduction sign anywhere in that highway in that vicinity." To the point of the materiality of speed restriction signs affecting the area in question, plaintiffs made the following offer of proof to the court: that the place of the accident was between two signs, both on the north side of the highway and visible to persons traveling in a westerly direction, one sign being about a mile east of the place of accident reading "End of 25-mile zone" and the other sign being about 2½ miles west of the place of accident reading "25 miles" for the approach into Bakersfield; and accordingly the intervening area, a stretch of highway with no speed restriction signs applicable to westerly travelers, was a 55-mile per hour zone. The court sustained defendant's objection to this evidence. Thereupon defendant produced a witness who had prepared a plat showing the places of business on the south side of Edison Highway easterly and westerly of the Andrews' Market as of December 28, 1948 (the day before the accident), and who testified that more than fifty per cent of that district was occupied by business structures, so as to satisfy the statutory definition. Veh. Code, § 89. This latter evidence was introduced by defendant for the apparent purpose of showing that the prima facie speed limit in that area was 25 miles per hour.

In its charge to the jury, the trial court read section 89 of the Vehicle Code, defining a business district, and gave a speed limit instruction in the language of sections 510 and 511 of said code, respectively setting forth (1) the "Basic Speed Law" for reasonable and prudent travel on a highway; and (2) the "Prima Facie Speed Limits", with "twenty-five miles per hour" applicable for "any business or residence district" and "fifty-five miles per hour" applicable "under all other conditions unless a different speed is established as provided in [the] code and signs are in place giving notice thereof." No specific instruction was given as to the requirements of the Vehicle Code pertaining to the erection

and maintenance of limited or permissible speed signs. However, plaintiff offered (1) specific instructions as to signposting, in the language of sections 465, 466, 468, 468.1 and 759 of the code; and (2) a further instruction on the relation of signposting to the applicable prima facie speed limit.

Plaintiffs complain of the trial court's rejection of their offer of proof and proffered instructions with respect to the signposting.

[2] In the opinion, *Reynolds v. Filomeo*, Cal.Sup., 236 P.2d 801, consideration was given to the relation of signposting to the prima facie speed limits prescribed in section 511 of the Vehicle Code. The conclusion was there reached that the 1947 amendment to section 758 of the Vehicle Code made no change in the substantive law relating to prima facie speed limits and that "now, as before, no area has the prima facie speed limit of a business or residence district unless it is signposted." 236 P.2d 806. It therefore follows that the trial court erred in excluding evidence of the lack of signposting; and that the trial court further erred in failing to give some specific instruction on the relation of signposting to the prima facie speed limits prescribed by section 511 of the Vehicle Code. Upon the evidence admitted and the instructions given, the jury may well have believed that the lack of signposting had no bearing upon the applicable prima facie speed limit, and may well have rendered a verdict in favor of defendant upon the theory that plaintiff Samuel Guerra was guilty of a violation of section 511 of the Vehicle Code solely because of his admitted speed in excess of 25 miles per hour. Under these circumstances, the above-mentioned errors of the trial court must be held to have been prejudicial to plaintiffs.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

In re HEARD'S ESTATE.

HEARD v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. No. 4320.

District Court of Appeal, Fourth District, California.

Nov. 1, 1951.

Rehearing Denied Nov. 26, 1951.

Hearing Denied Dec. 20, 1951.

Proceeding in the matter of the estate of Emma C. Heard, deceased, wherein John W. Heard, Jr., filed a petition for an order directing the trustee to allocate stock dividends declared out of surplus earnings to income rather than to corpus of trust. The Superior Court of Kern County, Robert B. Lambert, J., rendered a decree holding the dividends to be income and ordering the allocation of the dividend to such purpose, and the Bank of America National Trust and Savings Association, trustee, and the Regents of the University of California, remainderman, appealed. The District Court of Appeal, Griffin, J., held that, where rule of law in force at time of making of will at death of testatrix and creation of trust provided that stock dividends declared on surplus earnings were income of corpus, trustee's refusal to allocate stock dividends declared out of surplus earnings to income was abuse of discretion.

Decree affirmed.

1. WILLS ⚡703

Evidence was sufficient to show that stock dividends were declared out of surplus earnings accumulated since creation of trust within rule of law in force at time of making of will and at time of death of testatrix and at time of creation of trust that such dividends are income which go to life beneficiary.

2. WILLS ⚡684(3)

Where will is entirely silent on what shall constitute corpus and what shall constitute income of testamentary trust and contains no provision as to how that question shall be determined and merely directs that income be distributed in one manner and the corpus in another, the question is determined in accordance with the rules of construction established by law.

3. Trusts ⇐177

While the rule that a trustee abuses its discretion if it exercises such discretion in bad faith or goes beyond the bounds of reasonable judgment is subject to the exception that, where absolute discretion has been conferred, any unsoundness in the trustee's judgment cannot be deemed to be an abuse of discretion, the basic inquiry is always whether the trustee acted in the state of mind contemplated by the trustor.

4. Evidence ⇐65

The testatrix and the person drafting will giving income to son for life would be presumed to have known that the law in force at time of execution of will provided that stock dividends declared on surplus earnings was income of corpus and the will should be interpreted accordingly.

5. Wills ⇐684(10)

A will providing that it should be the duty and power of trustee to determine what was income and what was principal did not give the trustee an uncontrolled discretion to do as it pleased in determining what was principal and what was income of trust estate, but such discretion must be exercised reasonably, in accordance with the intent of the testator and sound judgment and law.

6. Wills ⇐684(10)

Where rule of law in force at time of making of will and at death of testatrix and at time of creation of trust provided that stock dividends declared on surplus earnings were income of corpus, trustee's refusal to allocate stock dividends declared out of surplus earnings to income was abuse of discretion.

Warren K. Taylor, San Francisco, for Appellant Bank of America Nat. Trust & Savings Ass'n.

Calkins, Hall, Linforth & Conard, San Francisco, for appellant Regents of University of California.

John W. Heard, Jr., Bakersfield, in propria persona.

GRIFFIN, Justice.

Emma C. Heard, a widow, died on November 23, 1939, leaving an estate valued in excess of \$200,000. Her only close relatives were a brother, to whom she bequeathed \$5, and her son, John W. Heard, Jr., plaintiff and respondent in this proceeding. Under Section IV of her will, admitted to probate on January 2, 1940, she bequeathed, in trust, the residue of her estate to appellant Bank of America National Trust and Savings Association, in its capacity as trustee (hereinafter referred to as trustee). This trust provided for a life income for the respondent in the sum of \$200 a month, and provided for the payment of various other sums from said income to certain other named persons. The balance of the income was to go to respondent until the termination of the trust, and upon its termination the remaining trust estate was to vest in the issue of John W. Heard, Jr., if any, and if not, then in two named Masonic devisees and the University of California. (According to the briefs, there is now one issue of John W. Heard, Jr.)

After extended litigation in which the validity of the trust was upheld, *In re Estate of Heard*, 25 Cal.2d 322, 153 P.2d 553, a final decree of distribution was entered on March 18, 1946. Among the assets of the estate, held in trust by the trustee, were 953 shares of common stock of the Bank of America National Trust and Savings Association (hereinafter referred to as the "bank") issued in its capacity as issuer of the stock. On February 8, 1949, the bank proposed a declaration of a 20 per cent stock dividend to its shareholders of record at the close of business on March 15, 1949, and on April 15, 1949, the trustee received from the bank a dividend consisting of 190 $\frac{3}{4}$ shares of common stock, based upon the 953 shares above mentioned. Upon receipt of this stock dividend the trustee allocated the dividend to the *corpus* of the trust under its claimed power given to it by sec. IV, paragraph (a) of decedent's will, which reads in part as follows: "In accounting for the income and the principal of the trust estate, my said trustee shall not be required to amortize any pre-

miums paid, nor to accumulate any discounts made upon any securities purchased for the use of the trust, and it shall at all times be the duty and power of my said Trustee to determine what is income and what is principal of the Trust estate; provided, however, that should any sums be received by my said Trustee as bonuses, rentals, or royalties from any real property constituting a portion of the trust estate which may have been leased for oil and/or gas, as more particularly hereinafter provided, then, and in that event, such bonuses, rentals, or royalties and all of them shall be treated as income and not as principal."

Upon the failure of the bank to allocate said stock dividend to income, this proceeding was initiated and on October 19, 1949, respondent filed herein his petition requesting the court below to instruct the trustee that such dividend constituted *income* of said estate and that its failure to so determine was not in accord with its best judgment or within the bounds of reasonable judgment or according to law, and that such failure constituted an abuse of discretion, and for an order directing the trustee to allocate such dividend to income.

After hearing the court found generally in favor of respondent, i. e., that the stock dividend of 190% shares constituted *income* of the trust estate; that the failure and refusal of the trustee to allocate said stock dividend to income of the trust estate constituted an abuse of discretion on the part of the trustee; that the trustee did not act according to its best judgment or within the bounds of reasonable judgment or according to law. Judgment was entered accordingly and the trustee was instructed to forthwith allocate the same to such income. From this order the trustee and the remainderman, Regents of the University of California (hereinafter referred to as "regents") appealed.

In support of the order respondent cites *In re Estate of Duffill*, 180 Cal. 748, 183 P. 337, 340, wherein our Supreme Court, in discussing two methods of apportioning dividends which are in use in America, i. e., the "American or Pennsylvania rule" and the "Massachusetts rule", cited Cook in his work on Corporations, Seventh Edition,

sec. 553, et seq. It is stated, 180 Cal. at page 757, 183 P. at page 340: "According to the American rule, if it be found that the fund out of which the dividend is paid accrued before the life estate arose, it is held to be principal belonging to the *corpus* of the estate. But when it is found that such fund was earned *after* the life estate arose, then it is income belonging to the life tenant. Of the other rule, known sometimes as 'the rule in *Minot's Case*,' which prevails in Massachusetts, Georgia, Rhode Island, and Illinois, the learned author says: 'It regards cash dividends, whether large or small, as income, and stock dividends, whenever earned and however declared, as capital, and the rule, accordingly, is a simple one. Cash dividends belong to the tenant for life and stock dividends to the *corpus*. There is little doubt, however, that this rule works great hardship and injustice in many cases. Hence the rule is not rigidly adhered to, but the court, in deciding whether the distribution is a stock or a cash dividend, may consider the actual and substantial character of the transaction, and not its nominal character merely.'

"That we adopt the American or Pennsylvania rule is evident from the foregoing discussion and the cases cited."

In *re Estate of Traung*, 30 Cal.2d 811, 185 P.2d 801, 803, the court said: "With regard to stock dividends based upon earnings, there are three rules, each of which is known by the name of the jurisdiction in which it was first applied. Under the Pennsylvania rule, a determination is made as to whether the dividend or other distribution was declared from earnings which accrued before or after the trust began, and the dividend is apportioned between corpus and income accordingly. California has followed this rule in determining the ownership of extraordinary dividends."

The Pennsylvania rule, however, was rejected, insofar as it applied to the *sale* of securities. The case held that gains in value of investments, including securities, belong to capital, and are to be credited to the corpus of a trust fund rather than to income, and that although the corporate stock may have increased in value because of earnings accrued since the creation of

the trust, the beneficiary does not become entitled to income or profits until a dividend has been declared and the amount separated from the capital of the corporation for distribution to its shareholders. Apparently this rule was in effect in California at the time the testator in the instant case made her will, at the time of her death, and at the time of the creation of the trust.

Subsequently, our legislature, in 1941, Stats.1941, chap. 898, p. 2476, Gen.Laws, Act 8696, passed an act which is referred to as the "Principal and Income Act", concerning the ascertainment of principal and income and the apportionment of receipts and expenses among tenants and remaindermen. Sec. 5, subdivision (1) thereof provides: "All dividends on shares of a corporation forming a part of the principal which are payable in shares of the corporation of the same kind and rank as the stock on which such dividend is paid, and dividends payable in shares of whatever kind or rank, *to the extent that they represent a capitalization of surplus not derived from earnings*, shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in such shares, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation shall be deemed *income*. Where the trustee shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee." (Italics ours.)

Appellants concede that this act was passed subsequent to the creation of the trust here involved, and would not necessarily be involved except to support the allowable discretion given the trustee by the trust agreement to determine what was principal and what was income and to allocate it accordingly.

Some documentary evidence was produced which consisted of a condensed statement of the bank over the period of years here involved showing the amount of capital, surplus, undivided profits, and reserve funds. The head trust officer of the bank

was questioned as to what matters the trustee took into consideration in making its determination to allocate the stock to *corpus* instead of income. He testified they considered the several rules applied in the named states and believed that California followed the Pennsylvania rule, i. e., that any stock dividends paid from earnings accumulated after the creation of the trust should be considered as income; that they considered the provisions of the 1941 Principal and Income Act; that they believed that it did not apply to trusts created before its enactment; that they knew the accumulated surplus of the bank's earnings, since the death of the testator and the creation of the trust, had increased tremendously; that the policy of the bank in many cases was that if the amount of the cash dividends, plus the reasonable value of the stock dividends was about what the corporation would pay out in a normal year, about the reasonable proportion of the earnings, then they were inclined to allocate that stock dividend to income, but the market value of the 20 per cent stock dividend, plus the dividends paid out by the bank in cash in 1948, greatly exceeded the earnings of the bank in that year, and for that reason they deemed it inappropriate to consider that dividend to be income. He then stated that they discussed the probable intent of the testator, and that in view of the fact that respondent was not "in need" and that he had received a considerable sum in the previous year, they did not believe that the testatrix would have wanted the trustee to have added the dividend of the 190 $\frac{3}{4}$ shares, amounting to about \$9,000, to it; that they did not feel that they were bound by the Pennsylvania rule, but preferred to follow the Principal and Income Act, as interpreted by them, as well as the other factors stated, and determined to rely upon the discretionary power vested in the trustee by the will.

The evidence well demonstrates that the value of the 935 shares would not have been reduced by the declaration of the stock dividend here involved. The par value cost of the 20 per cent stock dividend involved was \$21,329,275, or about \$4,000,000 less than the 1948 earnings transferred to surplus. On March 15, 1949, the stock market

reflected this dividend as being "X-" dividend, which stock had a par value bid price of 41. This would indicate that the market value of the stock held in trust was almost double the original value at the date of the testator's death. Upon this basis the market value of the 1,707,342 shares representing the 20 per cent stock dividend, was \$69,901,022, or about one-half of the bank's \$135,000,000 surplus accumulated from the earnings for the period of 1939-1948.

In *Re Estate of Duffill*, supra, the court said: "Except in a few of the states the determination of the directors of a corporation as to the source of its dividends has no binding or even persuasive effect upon the court when it is required to decide whether a stock dividend constitutes income which goes to the tenant for life or for years or is principal to be held for the benefit of the remainderman." And quoting from *McLouth v. Hunt*, 154 N.Y. 179, at 198, 48 N.E. 548, 39 L.R.A. 230, the court says: "The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remainderman."

[1] The trial court's finding that the declared stock dividend here involved was income within the meaning of the law as it then existed is sufficiently supported. In *re Estate of Gartenlaub*, 185 Cal. 375, 197 P. 90, 24 A.L.R. 1; In *re Schnur's Estate*, Cal.Sup., 32 P.2d 970; In *re Schnurr's Estate*, Cal.Sup., 39 P.2d 402.

[2,3] The question then remaining is, notwithstanding the determination here made by the trustee, was the trial court authorized to find that the trustee abused the discretion given it under the terms of the will, and whether or not it was a reasonable determination and in accordance with the intent of the testator. When the will is entirely silent on what shall constitute corpus and what income, contains no provision as to how that question shall be determined, and merely directs that income be distributed in one manner and corpus in another, the question is determined in accordance with the rules of construction established by law. *American Security & Trust Co. v. Frost*, 73 App.D.C. 75, 117 F.2d 283. Many

cases are cited holding that a trustee abuses its discretion if it exercises it in bad faith or goes beyond the bounds of reasonable judgment. In *re Estate of Canfield*, 80 Cal. App.2d 443, 450, 181 P.2d 732. This general proposition is subject to the exception that where *absolute* discretion has been conferred, any unsoundness in the trustee's judgment cannot be deemed to be an abuse of discretion. *Neel v. Barnard*, 24 Cal.2d 406, 150 P.2d 177. However, in *Re Estate of Canfield*, 80 Cal.App.2d 443, 450, 181 P.2d 732, 736, it is said: "But the basic inquiry, whenever the exercise of a trustee's discretion, absolute or otherwise, is challenged, is always whether the trustee acted in the state of mind contemplated by the trustor." Citing *Restatement of the Law of Trusts*, sec. 187. The *American Law Institute*, in *Restatement of the Law of Trusts*, sec. 187, at page 485, states: "If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of a power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust." And at page 488, under the heading: "*Interpretation of trust instrument as to extent of discretion*", it is said: "The extent of the discretion conferred upon the trustee depends primarily upon the manifestation of intention of the settlor. The language of the settlor is construed strictly so as to effectuate the purposes of the trust. The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment. The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the

court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor."

[4] In the light of this general rule we will examine the terms of the will and evidence produced to determine whether the evidence supports the finding that the determination of the trustee was unreasonable and that it abused its discretion in refusing to allocate the stock dividend to income, and in accordance with the state of mind contemplated by the settlor. In the will it shows that the mother, the testator, intended her son to receive *all* the income of the estate, except for the small portion otherwise indicated, whether it be small or large. She specifically provided that sums of money received as bonuses, rentals or royalties resulting from the trustee's execution of oil and gas leases should be treated as income and not as principal. We may rightfully assume that the testator knew, at the time of the creation of the trust, that her son, under the law, would be entitled to the stock dividend here in question as income. She further provided in her will that if, in the "*absolute and uncontrolled*" discretion of her trustee, the *income* should not be sufficient to provide for her son's reasonable needs, it could use any portion of the *principal*, including the whole thereof, if necessary. By its terms the trustee was authorized to invest and reinvest the corpus so that it would be "income producing". An examination of the authorities cited by the respective parties convinces us that at the time of the making of the will, at the time of the death of the testator, and at the time of the creation of the trust, the Pennsylvania rule was recognized and in effect in this state, and it must be presumed that the person who drafted the intricate will, as well as the testator, must have had the law in mind as it prevailed at that time. The will should be interpreted accordingly. The intention of the testator should be controlling in this respect unless by the will a different intention is clearly expressed. It should be further noted that

in other paragraphs of the will providing for the sale of property, etc., the testator used the phrase "absolute discretion", and "absolute and uncontrolled" discretion, but when she came to this particular paragraph the term "absolute discretion", or "absolute and uncontrolled" discretion was not used, but she used only the term "duty and power" to determine what was income. Section 2269 of the Civil Code provides: "A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised, unless an *absolute discretion* is clearly conferred by the declaration of trust." (Italics ours.)

Counsel for respondent well points out that if the trustee is permitted to determine what is income and what is corpus of the estate, without restriction or control of the court, it could easily declare all income, from whatever source, except the possible income from bonuses, rents or oil royalties, a part of the corpus, and thus defeat all bequests made from the income of the trust, which would be contrary to the expressed desire of the testator. No doubt such actions would be, under those circumstances, subject to review by the court in determining the reasonableness of the trustee's action, even though the trustee may have claimed that it acted in good faith and under the terms of the will.

Appellant trustee argues that since the court found that it acted in good faith, the only question for the court to determine is "Whether the trustee acted beyond the bounds of a reasonable judgment". It concedes that the trustee "should, if possible, ascertain the probable intention of the settlor" as gleaned from the instrument. A somewhat similar question was presented to this court in *Re Estate of Greenleaf*, 101 Cal.App.2d 658, 225 P.2d 945, hearing denied by the Supreme Court. Many of the contentions made by appellants here were there presented and discussed. There it was contended by the trustee that there was no evidence or finding by the trial court that the trustee acted in bad faith or abused its discretion, or that its

decision was unreasonable, and that to support the action of the trial court a finding would have to be made against the trustee on those issues; also, that the trial court erred in substituting its own judgment for that of the trustee. We there held the general rule to be that if the power of the trustee is discretionary, and the trustee is fairly employing his judgment to advance or not to advance, the court will not control his action merely because it disagrees with him, but it must find some abuse of discretion or bad faith before it will interfere. We concluded, however, that since the declaration of trust did not give the trustee *sole or absolute discretion* to determine the amount to be paid the life beneficiary, the court was authorized to examine the provisions of the entire will and determine whether the trustee had abused its discretion and had not complied with the intention of the testator, as expressed in the will.

Some light may be shed upon the question whether the trustee acted beyond the bounds of a reasonable judgment, or whether it abused its discretion in not declaring this particular issue of stock income, by a recitation of an item of accounting of the trustee in respect to a certain somewhat similar stock dividend received from the Standard Oil Company of California, which item was referred to in the briefs. It appears that the Standard Oil Company declared a somewhat similar stock dividend under somewhat similar circumstances and the trustee willingly allocated that stock to plaintiff as income.

[5,6] From all of the foregoing and from the language of the will, it seems clear to us that the trustee did not have an uncontrolled discretion to do as it pleased in determining what was principal and what was income of the trust estate; that such discretion must be exercised reasonably, in accord with the intent of the testator, and in accordance with sound judgment and the law. The finding that the trustee did not act according to its best judgment, within the bounds of reasonable judgment, or according to law, and that its failure and refusal to allocate said

stock dividend to income of the trust estate constituted an abuse of discretion has sufficient evidentiary support. In re Talbot's Will, 170 Misc. 138, 9 N.Y.S.2d 805; American Security & Trust Co. v. Frost, supra; In re Estate of Jacks, 80 Cal.App. 2d 562, 182 P.2d 605.

Decree affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



PHILLIPS v. PHILLIPS.

Civ. 7885.

Sac. 6130.

District Court of Appeal, Third District,
California.

Nov. 6, 1951.

Rehearing Denied Nov. 30, 1951.

Hearing Granted Jan. 3, 1952.*

Rosemond M. Phillips brought action against George W. Phillips for divorce on ground of cruelty, and the defendant cross-complained for annulment of the marriage or for divorce. The Superior Court of Placer County, Snell, J., entered a judgment denying both parties a divorce, and the plaintiff appealed. The District Court of Appeal, Deirup, J., pro tem., held that if parties are equally at fault, a divorce cannot be granted to either of them.

Judgment affirmed.

1. Divorce ☞ 130

In action by wife for divorce on ground of cruelty, wherein husband cross-complained for divorce on ground of cruelty, evidence sustained finding that both parties were guilty of cruelty.

2. Divorce ☞ 184(10)

Where finding in divorce action could have been made that either party was or was not guilty of extreme cruelty, depending upon weight which trial judge gave to the testimony of the witnesses, and the con-

* Subsequent opinion 264 P.2d 926.

flicts in the testimony could not be resolved, District Court of Appeal on appeal could not disturb finding of trial court that both parties were guilty of extreme cruelty.

3. Trial ⇨393(1)

Statute providing that, in all cases where court directs party to prepare findings, copy of proposed findings shall be served on all parties in action at least five days before findings shall be signed by court, and court shall not sign any findings therein prior to expiration of such five days, is not mandatory. Code Civ.Proc. § 634.

4. Divorce ⇨55

If parties in divorce action are equally at fault, a divorce cannot be granted to either of them. Civ.Code, §§ 111, 122.

5. Divorce ⇨108

Fact that there was no affirmative defense of recrimination set up to either complaint or cross-complaint seeking divorce on ground of cruelty would not preclude trial court from denying divorce to both parties under principle of recrimination. Civ.Code, §§ 111, 122.

6. Divorce ⇨53

Court has duty to deny divorce if parties are equally at fault. Civ.Code, §§ 111, 122.

7. Divorce ⇨252

Though court intended to deny a divorce to both husband and wife, court had jurisdiction to divide the properties between the parties, but trial court was not required to determine issues raised by wife in respect to community property.

8. Divorce ⇨253

In divorce action, wherein trial court denied a divorce to both parties, evidence with respect to value of resort properties was insufficient to enable trial court to make a fair division of the property.

9. Divorce ⇨286

Where allowance made to wife in divorce action in which both parties were denied a divorce was made on conflicting affidavits, finding of trial court could not be disturbed on appeal.

Angell, Hearn & Adams, San Francisco, for appellant.

T. L. Chamberlain, F. L. Sinclair Auburn, for respondent.

DEIRUP, Justice pro tem.

Appellant brought this action for divorce and for a division of the community property. Respondent cross-complained for annulment of the marriage or for divorce. The trial court found both of the parties guilty of extreme cruelty and denied each of them a divorce and made no disposition of the community property. This appeal was taken "from that *certain part of the judgment* in said action rendered on the 4th day of October, 1949, whereby the plaintiff is denied a divorce from the defendant."

The findings and judgment read as follows:

"Memorandum

"The Court finds from the evidence introduced in this case;—1. That the defendant and cross-complainant has wrongfully inflicted upon the plaintiff and cross-defendant grievous mental suffering.

"2. That the plaintiff and cross-defendant has wrongfully inflicted upon the defendant and cross-complainant grievous mental suffering.

"It therefore follows that neither party is entitled to a divorce from the other.

"It is ordered that each party to this action be, and they are hereby denied a divorce from the other."

The judgment was filed on October 4, 1949. A motion for a new trial on the ground of insufficiency of the evidence was denied. The notice of appeal and demand for a transcript were filed on December 22, 1949. On January 5, 1950, appellant filed a motion for an allowance of \$400 a month for alimony, \$1,200 for costs on appeal, \$3,000 for attorneys' fees and \$150 for traveling expenses. On February 1, 1950, the court entered an order allowing \$150 a month for alimony, \$500 for costs on appeal and \$750 for attorneys' fees. It does not appear from the record that an appeal was taken from that order.

Appellant contends that the trial court erred in denying her a divorce; in not making specific findings on the acts of cruelty alleged; in applying the rule of recrimination; in not determining that the property referred to in her complaint was community property and dividing it between the parties; and in making an inadequate allowance for her support pending the appeal.

[1,2] The evidence adduced at the trial is discussed extensively in the briefs, but we have found it necessary to peruse the entire record in order to determine what actually transpired. The conflicts in the testimony cannot be resolved. A finding that either party was or was not guilty of extreme cruelty would have ample support in the record, depending upon the weight which the trial judge gave to the testimony of the witnesses. For this reason we cannot disturb the finding of the trial court that both of the parties were guilty of extreme cruelty.

[3] It is true that the court did not make special findings on the acts of cruelty alleged. Inasmuch as specific acts were alleged this case is dissimilar from *LaMar v. LaMar*, 30 Cal.2d 898, 186 P.2d 678, in which it is held that a finding of extreme cruelty is a finding of an ultimate fact and is sufficient if cruelty is alleged in general terms. Nor is it like the case of *La Vigne v. La Vigne*, 96 Cal.App.2d 531, 216 P.2d 75, in which it is suggested that a general finding of extreme cruelty is probably insufficient where specific acts are alleged in the pleading but that the right to specific findings is waived by the failure to object to the proposed findings which had been served pursuant to Section 634 of the Code of Civil Procedure. Notwithstanding the provisions of that section proposed findings need not be served. *Treat v. Superior Court*, 7 Cal.2d 636, 62 P.2d 147; *Estate of Rosland*, 76 Cal.App.2d 709, 173 P.2d 830; *Noland v. Noland*, 44 Cal.App.2d 780, 113 P.2d 11. And since here the proposed findings were not served, the parties were not given an opportunity to object to them before they were filed and the judgment thereon entered. However since

1939 the trial court has had the power, in ruling upon a motion for a new trial, not only to grant a new trial but also to "change or add to the findings." Code Civ.Proc. Sec. 662. Upon the principle that a litigant should give the trial court an opportunity to correct its errors, it would seem that the appellant, having made a motion for a new trial, should have called to the attention of the trial court the defect in the findings if it mattered. *Cappelmann v. Young*, 73 Cal.App.2d 49, 56, 165 P.2d 950.

In denying the divorce to both parties the trial court applied the principle of recrimination. "Divorces must be denied upon showing: * * * 4. Recrimination * * *." Civ.Code Sec. 111. "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." Civ.Code Sec. 122.

"Since a divorce cannot be granted if the parties are equally at fault, it follows, and statutes sometimes expressly so provide, that if complainant has been guilty of the same offense as defendant, there can be no divorce. Thus, if complainant has committed adultery, no divorce can be obtained on the ground of defendant's adultery. If complainant has been guilty of cruelty, a divorce cannot be obtained because of defendant's cruelty; and assuming that both parties can be guilty of desertion or abandonment, the doctrine of recrimination applies and neither is entitled to a divorce." 27 C.J.S., Divorce, § 67, p. 626.

[4] The rule rests upon the principle that one who comes into court for relief must do so with clean hands. *Brazell v. Brazell*, 54 Cal.App.2d 458, 129 P.2d 117. In other jurisdictions there has been a tendency towards the adoption of a principle of comparative guilt, but the general rule is in accord with our statute—that if the parties are equally at fault a divorce cannot be granted to either of them. *Blankenship v. Blankenship*, 51 Nev. 356, 276 P. 9, 63 A.L.R. 1127 and note; note 170 A.L.R. 1076.

In California cases it has been said that recrimination must be pleaded as a defense, *Klemmer v. Klemmer*, 42 Cal.App. 618, 187 P. 85; *De Haley v. Haley*, 74 Cal. 489, 16 P. 248; *Avery v. Avery*, 148 Cal. 239, 82 P. 967; *Brazell v. Brazell*, supra and in the other cases in which the principle has been discussed the defense was pleaded. *White v. White*, 82 Cal. 427, 23 P. 276, 7 L.R.A. 799; *Cassidy v. Cassidy*, 63 Cal. 352; *Smith v. Smith*, 119 Cal. 183, 48 P. 730, 51 P. 183. In the present case there was no affirmative defense of recrimination set up to either the complaint or the cross-complaint. We have therefore the question whether it is essential that recrimination be pleaded in bar to enable the trial court to deny both parties a divorce because they are equally guilty.

[5,6] To make the application of the rule dependent upon affirmative pleas in the answers of the parties would be to defeat its purpose. By failing to enter such pleas parties could compel the court to apply the rule of comparative fault in all cases. In *Phillips v. Phillips*, 48 Ohio App. 322, 193 N.E. 657, and *Veler v. Veler*, 57 Ohio App. 155, 12 N.E.2d 783, in which there were petitions and cross-petitions for divorce, it was held that the question of comparative guilt could not be considered by the court. It is the duty of the court to deny a divorce if the parties are equally at fault. That fact may be brought to the attention of the court by a pleading of recrimination as a defense, if the defendant does not desire a divorce. Or it may come to the attention of the court by virtue of a cross-complaint for divorce.

In her complaint appellant alleged that there was community property consisting of the Sandy Beach Resort and its equipment, moneys in bank, life insurance policies, an automobile and other credits. The most important item is the Sandy Beach Resort which consisted of 10 or 12 acres fronting on Lake Tahoe, with hotel, cabins and a store, the store being kept open all the year around. This property had been acquired and developed during a prior marriage of the parties. Appellant

and respondent were first married in Mexico in 1934 and were married again in Oakland, California, a year later, to overcome some possible question about the legality of their first marriage. On February 26, 1945, appellant secured an interlocutory decree of divorce on the grounds of cruelty. A property settlement agreement had been entered into and was approved by the court. By this agreement the Sandy Beach Resort became vested in the respondent and he executed to the appellant a promissory note for \$15,000, payable at the rate of \$125 a month and a deed of trust on the Resort property to secure the payment of the note. The final decree was filed March 6, 1946, but before and after that date the parties met and discussed remarriage and the cancellation of the property settlement agreement. They were remarried on May 22, 1946. On the next day respondent wrote the following agreement and handed it to appellant:

"May 23, 1946

"We, the undersigned, having remarried on May 22, 1946, hereby cancel a property agreement entered into Feb. 26, 1945, and hereby agree that all of our holdings of any kind shall remain and become community property."

The agreement was signed by respondent at that time and either then or later it was signed by appellant. A year later appellant acknowledged it and had it recorded. She did not return the promissory note or release the lien of the deed of trust. She testified that respondent told her to keep the note and deed of trust; he testified that he did not. They lived in the resort and managed it jointly until after this suit was brought; then she was enjoined by the court from living there or interfering in the management and was given an allowance of \$350 a month for her support pending the trial.

After the taking of the testimony on the issue of the divorce the action was continued for several weeks to enable counsel to prepare for the trial of the issues raised in respect to the property of the parties. The trial was resumed for this purpose,

July 26, 1949. Counsel for appellant had nothing to offer in the way of proof of the actual value of the Sandy Beach Resort, though appraisals had been discussed at the previous hearing. He had made an attempt to find an appraiser and explained that there had been a death in his family which had prevented him from giving his attention to the matter. He stated that he was trying to find an appraiser who had had experience with vacation resorts. Counsel for respondent presented appraisements in letter form, in which the value of the resort was stated to be approximately \$65,000. Counsel for appellant moved to strike out the appraisals for the reason that the appraisers were not present for cross-examination. The trial judge granted his motion, returned the appraisals, said that he knew no more about the property than he had before, refused to receive further appraisals and submitted the case, saying that if the parties reached an agreement while the case was under submission he would consider it. The case remained under submission until October 4, 1949, when the findings and judgment were filed. There is nothing in the record to indicate that appellant made any attempt to reopen the case in order to prove the values of the properties.

[7] Though he intended to deny a divorce to both parties, the trial court had jurisdiction to divide the properties between the parties. *Mason v. Mason*, 219 Cal. 111, 25 P.2d 461; *Lorraine v. Lorraine*, 8 Cal.App.2d 687, 48 P.2d 48; *D'Alessio v. D'Alessio*, 56 Cal.App.2d 118, 132 P.2d 271. On the other hand, denying appellant a divorce, he was not required to determine the issues raised by her in

respect to the community property. *West v. West*, 206 Cal. 706, 276 P. 100.

[8] In her briefs appellant makes extravagant statements about the value of the properties: That it is worth \$150,000; that respondent had refused an offer of \$125,000 for the Sandy Beach Resort; that the trial judge had remarked during the trial that the resort was worth \$100,000 net; that respondent had admitted that it was worth \$100,000; that the *gross* income one year was \$50,000. She does not say that respondent explained that the offer of \$125,000 was not a bona fide offer—the man had no money—and that he did not say that \$100,000 was the fair value of the property, but said that it was the top price at which it might be sold. What the trial judge said was merely the expression of a tentative opinion, and the *gross* income is of little interest. One income tax return showed a net income of \$4,500, though appellant and respondent were operating the resort. The evidence before the court at the time of the last hearing was wholly insufficient to enable the court to make a fair division of the property.

[9] Appellant further contends that the court erred in allowing her only \$150 a month for her support pending the appeal and asks this court to find that she was entitled to a larger amount, payable retroactively. The allowance was made upon conflicting affidavits and the finding of the trial court cannot be disturbed. Furthermore, it does not appear from the record that an appeal was taken from that order.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

107 Cal.App.2d 211

In re Adoption of D. S.**DEPARTMENT OF SOCIAL WELFARE****v. CAROLLO et al.****Civ. 14714.**District Court of Appeal, First District,
Division 2, California.

Nov. 1, 1951.

Hearing Denied Dec. 20, 1951.

Proceeding in the matter of the adoption of D. S., a minor, by Guido and Clara Carollo, wherein the Department of Social Welfare entered objections to the adoption. The Superior Court, County of Alameda, James R. Agee, J., entered an order of adoption, and the Department of Social Welfare appealed. The District Court of Appeal, Dooling, J., held, *inter alia*, that the Superior Court could grant the petition for adoption without the consent of the Department of Social Welfare to the adoption, and that the evidence sustained the finding that the best interests of the child would be promoted by the adoption.

Affirmed.

1. Adoption ⇨7

Where child had been declared abandoned, mother's consent to adoption was not required. Civ.Code, § 224, subd. 1.

2. Adoption ⇨13

Even though the Department of Social Welfare had not abused its discretion in recommending against adoption, the Superior Court could order the adoption. Civ.Code, § 226.

3. Marriage ⇨40(5, 11)

The burden of proof in attacking a second marriage is on the attacker, and the second marriage has a strong presumption of legality.

4. Marriage ⇨50(1)

The illegality of a marriage is not established by evidence merely showing previous marriage of one of the parties and an invalid decree of divorce.

5. Divorce ⇨330

Where wife and husband had been divorced and had married other spouses, wife and husband were both estopped to question the validity of their Mexican divorce. Civ. Code, § 79.

6. Divorce ⇨330

Where adopting mother and her first husband had both married other spouses after Mexican divorce and second husband of adopting mother had relied upon his marriage to adopting mother and had represented himself as her husband when adopting child, both adopting parents were estopped from attacking the Mexican divorce, and these estoppels would be binding upon their heirs. Civ.Code, §§ 79, 226.

7. Divorce ⇨174**Marriage ⇨50(1)**

In adoption proceeding, evidence showed that adopting mother had been divorced from previous husband before marriage to adopting father and supported finding that adopting parents were husband and wife. Civ.Code, §§ 79, 224, subd. 1, 226.

8. Adoption ⇨13

In adoption proceeding, evidence supported finding that best interests of child would be promoted by the adoption. Civ. Code, §§ 224, subd. 1, 226.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, B. Abbott Goldberg, Deputy Attys. Gen., San Francisco, for appellants.

Hoffmann & Erickson, Robert V. Winkler, Oakland, for respondents.

DOOLING, Justice.

Appeal by the State Department of Social Welfare from an order of adoption declaring Guido and Clara Carollo the adoptive parents of D. S.

Guido and Clara Carollo petitioned on May 19, 1948, to be allowed to adopt the minor child, D. S., who was at that time a little more than three years of age. The child was illegitimate, and had been left with petitioners when he was approximately 10 months old.

[1] The natural mother consented to the adoption but later withdrew the consent upon being advised by the Department of Social Welfare that they had recommended denial of the adoption. However, inasmuch as the child was declared abandoned on April 11, 1950, the first day of the hearing

the mother's consent to the adoption was not required. Civ.Code, sec. 224(1).

After withdrawal of the mother's consent, the child was declared a ward of the juvenile court and removed from the custody of the petitioners by the juvenile probation officer.

Petitioners thereupon instituted guardianship proceedings which were consolidated with the adoption proceedings for trial. Upon the granting of the adoption, the guardianship proceedings were dismissed.

The Department of Social Welfare opposed the granting of the adoption in the hearing below in the role of "objector". Upon the adoption being allowed, it prosecutes this appeal.

[2] Appellant argues that the order of adoption cannot stand unless the court finds that the Department of Social Welfare has abused its discretion in recommending against the adoption, asserting that this proceeding is "analogous to mandamus to determine whether the agency has abused its discretion."

While section 226, Civil Code uses the language "the county clerk upon receipt of the report of the State Department of Social Welfare * * * shall immediately refer it to the superior court for review", and speaks of an "appeal" to the Superior Court from the Department's refusal to give its consent to the adoption, the last sentence of the section makes it clear that the court exercises its independent judgment in the matter. It reads, so far as here material: "After the filing of said findings (of the Department of Social Welfare), the court may * * * if the appeal be from the refusal of said department * * * to consent thereto, *grant the petition* without such consent." (Emphasis ours.) The emphasized language furnishes the complete answer to this argument of appellant.

Originally the appellant's objection to the adoption was on two grounds: (1) that the petitioners' marriage had not been established and (2) that no medical reports on the child and the petitioners had been submitted. Subsequently the respondents were married pursuant to sec. 79, Civ.Code and the requisite medical reports were submit-

ted. Thereafter a supplemental report was filed reiterating the department's objection to the adoption.

In the meantime the respondents had been denied a foster home license chiefly on the ground that their home was not clean, and in the guardianship proceeding a probation officer had filed a report recommending that the guardianship be denied.

[3-7] The evidence showed that respondent Mrs. Carollo had been divorced from a previous husband by a Mexican decree in 1938. She and Mr. Carollo testified that they were married in Mexico in 1939 but the record of this marriage was not produced. Mrs. Carollo testified that her previous husband had remarried. Appellant attacks the finding that respondents are husband and wife, asserting the invalidity of the Mexican divorce. The burden of proof in attacking a second marriage is on the attacker, and the second marriage has a strong presumption of legality. In *re* Pusey, 173 Cal. 141, 159 P. 433; *Estate of Newman*, 34 Cal.App.2d 706, 94 P.2d 356. The illegality of a marriage is not established by evidence merely showing a previous marriage of one of the parties and an invalid decree of divorce. In *re* Pusey, *supra*; *Hamburgh v. Hys*, 22 Cal.App.2d 508, 71 P.2d 301.

Furthermore under familiar rules Mrs. Carollo and her former husband are both estopped to question the validity of their divorce, this estoppel now extends to Mr. Carollo who adopted the child in reliance upon his marriage to Mrs. Carollo and representing himself as her husband, and these estoppels are binding on their heirs. *Estate of Smith*, 86 Cal.App.2d 456, 470, 195 P.2d 842; *Estate of Grazzini*, 31 Cal.App. 2d 168, 172, 87 P.2d 713; *Estate of Davis*, 38 Cal.App.2d 579, 101 P.2d 761, 102 P.2d 545. The case of *In re Johnson's Estate*, 301 N.Y. 13, 92 N.E.2d 44 relied upon by appellant as casting doubt on *Estate of Davis*, *supra*, has since been reversed by the United States Supreme Court. *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552.

We are satisfied that the evidence is sufficient to support the trial court's determina-

tion that the adopting parents are husband and wife.

[8] The court had conflicting testimony before it as to the character of the home and the parties. Because of the objections to the physical character of the home the court continued the hearing for 60 days to allow respondents to acquire another home, which they did. The evidence was sufficient to support the court's finding that the best interests of the child would be promoted by the adoption, the record in this respect showing a conflict of evidence which it was the province of the trial judge to resolve.

Appellant's complaint that the report of the probation officer in the guardianship proceeding was excluded from evidence is not well taken since the minutes included in the clerk's transcript show that at the second hearing this report was placed in evidence on the court's own motion.

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.



107 Cal.App.2d 256

PENLAND v. GOLDEN et al.

Civ. 18357.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1951.

Elledge R. Penland brought an action against Nathan Golden and Maurice Rosen, and the copartnership of Nathan Golden and Maurice Rosen, and others. The Superior Court of Los Angeles County, Arnold Praeger, J., sustained demurrer to plaintiff's complaint with leave to amend and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem, held that an appeal did not lie from such order.

Appeal dismissed.

Appeal and Error ¶102

An appeal did not lie from an order sustaining a demurrer to a complaint with

leave to amend, and would lie only from judgment entered thereon.

Elledge R. Penland, in pro. per.

Major & Tenner, by Jack Tenner, Los Angeles, for respondents.

HANSON, Justice pro tem.

This is an appeal from an order sustaining a demurrer to a complaint with leave to amend. As an appeal does not lie from such an order, but only from a judgment entered thereon we are without jurisdiction to review the case on its merits. *Cornic v. Stewart*, 179 Cal. 242, 176 P. 164. Accordingly, we are required on our own motion to dismiss the appeal.

Appeal dismissed for want of jurisdiction.

WHITE, P. J., and DORAN, J., concur.



107 Cal.App.2d 148

ALMEIDA et ux. v. PRICE et al.

No. 14760.

District Court of Appeal, First District,
Division 1, California.

Oct. 29, 1951

Hearing Denied Dec. 20, 1951.

Antonio J. Almeida and wife brought action against Mary Price, formerly known as Mary Almeida, and others for specific performance of an option to purchase contained in a lease executed by Mary Price to her son, Antonio J. Almeida, and defendants cross-complained alleging that title to the property was in all of the children of Mary Price, subject to a life estate in Mary Price, and that plaintiff had obtained the lease by imposing upon the confidence of his mother in him. The Superior Court, County of Alameda, James R. Agee, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Bray, J., held, *inter alia*, that the evidence supported the conclusion that the mother did not know that

the option was in the lease when she signed it and that the transaction was fraudulent.

Affirmed.

1. Specific Performance ⇨121(8)

In action by son against mother for specific performance of purchase option provision in lease, evidence supported finding that mother did not know that the option provision was in the lease when she signed it.

2. Landlord and Tenant ⇨28(1)

Where lease containing option to purchase was drawn under instructions of son, and signed by mother, who had expressed wish that property should be divided among her children, without independent advice, in presence of son and a friend of son, without knowledge on mother's part that lease contained option provision, the transaction was fraudulent on its face, even though the price set forth in the option was the then fair value of the property.

3. Contracts ⇨10(4)

Where one party to a contract knows nothing of its provisions, and is required to sell when she does not want to, even at a fair price, there is not mutuality.

4. Contracts ⇨10(5)

Where son failed to disclose to mother that purchase option provision was in lease, there was an abuse of confidence reposed in the son which would result in an injury if option were enforced, and, therefore the transaction lacked mutuality.

5. Appeal and Error ⇨717

An appellate court must look to the findings of the trial court, and if the findings are supported by evidence, the judge's remarks inconsistent therewith have no effect.

6. Specific Performance ⇨123

In action by son against mother for specific performance of option to purchase contained in lease agreement wherein lease was attacked for breach of confidential relationship, while it would have been better for trial court to have made an express finding of when mother gained knowledge of option provision and that by accepting rent thereafter mother was not

estopped to deny the option, under the facts, such a finding was not indispensable to a judgment which invalidated the lease, in absence of a showing of injury to son by failure of mother to attack option immediately upon notice thereof.

7. Estoppel ⇨107

Where fact that lessor-optionor knew that lessee-optionee had made improvements was not pleaded, such fact could not create an estoppel which would prevent lessor from attacking validity of lease which contained an option to purchase.

8. Landlord and Tenant ⇨31

Where improvements were made by son prior to the time his mother learned that the lease she had executed to son contained an option to purchase, mother's silence upon learning of improvements did not estop her from subsequently attacking the validity of the option provision.

9. Life Estates ⇨18, 19

Where life tenant was the mother of the reversioners, and reversioners did not expect mother to pay either taxes or insurance, statutory provision that life tenant must pay taxes was not applicable, and mother did not have duty to pay either the taxes or the insurance. Civ.Code, § 840.

10. Remainders ⇨11

Where life tenant did not have duty to pay either taxes or insurance, payment of those items by one remainderman and improvements by another remainderman entitled those remaindermen to liens on the interests of each other and of the other remaindermen for their proportionate share of such expenses. Civ.Code, § 840.

Haig T. Toomajian, J. Elwood Andresen, Oakland, for appellants.

Richards & Rankin, Albert K. Whitton, Oakland, for respondents.

BRAY, Justice.

Plaintiffs brought an action for specific performance of an option to purchase contained in a lease. Judgment went for defendants. Plaintiffs appeal.

Questions presented.

1. Sufficiency of the evidence.
2. Sufficiency of the finding on estoppel.
3. The liability of the remaindermen, rather than the life tenant, for taxes and insurance.

Record.

Plaintiff Antonio is the son of defendant Mary Price. Plaintiff Margaret is his wife. Defendants Joseph and Rose are the brother and sister respectively of Antonio and the children of Mary. The complaint alleged the making of a lease by Mary to plaintiffs of a certain improved lot in Berkeley, owned by her for a five year period, containing an exclusive option to purchase for \$3500 before the expiration of the lease; the conveyance of the property by Mary to Antonio, Joseph and Rose, reserving a life tenancy in herself; the exercise of said option by plaintiffs; and the refusal of defendants to comply with the option, and a prayer that defendants be required to fulfill the option. Defendants filed an answer and cross-complaint alleging that the title to the property was in the three children, subject to a life estate in the mother, and that, in effect, plaintiff Antonio had obtained the lease by imposing upon the confidence of his mother in him. The court found, among other matters, that by deed dated September 19, 1941, the mother conveyed the property to the three children, reserving a life estate; that the deed was not recorded until April 5, 1945; that on April 10, 1944, plaintiffs and Mary entered into a five year lease of the premises with a monthly rental of \$50; that included in the agreement was the option to purchase; that ever since the date of the deed it was the intention of Mary that the property was to vest in the three children upon her death; that there was no effective delivery of the deed until April 5, 1945, but that at all times since the date of the deed Mary believed it had become and was effective; that at the time of the execution of the lease she had confidence in Antonio, and did not

know nor was it ever discussed or explained to her that the option was in the lease; that had she so known she would not have executed the lease; that in executing it she acted in full reliance upon the belief that Antonio would fully explain to her anything in it which might destroy the effectiveness of the deed, the terms of which Antonio knew ever since its execution; that the option is not valid or enforceable; that plaintiffs, while in possession under the lease, had made repairs and additions to the value of \$1807.37, and that Joseph had expended \$131.68 for taxes and insurance. The judgment quieted title in the property in the three children, subject to the mother's life estate, and found that each of the three remaindermen were liable for one-third of the expenditures for repairs, taxes and insurance. It then gave a lien in favor of plaintiffs on the interests of the other two remaindermen for one-third of plaintiffs' expenditures for repairs, and a lien in favor of Joseph on the interests of plaintiffs and Rose for one-third of the expenditures for taxes and insurance.

Sufficiency of evidence.

An examination of the transcript shows that there is ample evidence to support the court's findings. Plaintiff¹ testified that in September, 1941, his mother requested that he have a deed prepared for her to sign. He then instructed her attorneys to prepare it. It was a deed of gift to the three children, reserving a life estate. His mother signed it about September 19, in his office in the presence of Harry Bloom, who was a good friend of plaintiff's, both plaintiffs, and an employee of plaintiff. The deed was not acknowledged because his mother did not want it to become effective until her death. His mother handed it to plaintiff asking him to keep it in her file, which he did, keeping it there until August 20, 1944, when he turned the contents of the file over to Joseph. The lease was prepared by Mr. Bloom at plaintiff's request, and was signed by his mother at her home in the presence of plaintiff

1. In discussing the evidence, the word "plaintiff" will refer to Antonio unless otherwise noted.

236 P.2d—52½

Cal.Rep. 235-236 P.2d—45

and Mr. Bloom. Mr. Bloom read and explained it fully to her. (This is denied by the mother. Moreover, Mr. Bloom testified that he merely read it to her and did not explain it.) Plaintiff and Mary had discussed the option a dozen times theretofore. (This Mary denied.) Plaintiff did not discuss the lease or option with his brother or sister, although he knew that his mother always wanted the property to go to the three children.

Mr. Bloom, an insurance and real estate broker and notary public, testified that he read the lease to Mary but he did not recall any discussion with her of the option provision. At Antonio's request he had the lease and option prepared without discussing the matter with Mary.

Plaintiff Margaret testified to being present at the signing of the deed and that Mary said she wanted it definitely understood that the property was still hers; she would receive the rents, and that after her death the property would belong to the three children. Mary gave the deed to Antonio to put in her file, which he did.

Mary testified that she had asked Tony to get a deed prepared dividing the property into three parts and then to keep the deed and record it after her death. After signing the deed she handed it to Antonio. He kept it in his file. Antonio had been renting the property from her at \$50 per month for a month or so before the execution of the lease. Mr. Bloom and Tony came into her place, with two papers. Tony told her to sign. She said she would not because he did not read it to her or let her read it. He shook his fist at her and said she had to sign it. She was afraid of him and Mr. Bloom, so she signed. A lease had not been discussed beforehand. She did not know there was an option to buy in the lease. Plaintiff and Mary were friendly at the time.

[1,2] While it is doubtful if the court believed that plaintiff threatened his mother at the time of signing the lease, the evidence well supports the conclusion that the mother did not know that the option was in the lease when she signed it. Her

testimony that she did not, coupled with Mr. Bloom's testimony that he merely read the lease to her and did not explain it (refuting plaintiff's statement that he did), with the background of the signing theretofore of the deed to all three children, amply supports the conclusion that the mother did not know or realize that the option was there. Both plaintiffs testified that they knew that the mother wanted the property to go to all three children. Plaintiff also testified: "The Witness: I might say that the lease was made around the deed. We were aware of the deed when we made the lease. The Court: As far as you knew, your mother always wanted to see the property go to you three children when she died? The Witness: That's correct. The Court: She never changed her ideas about that, did she? The Witness: Not one bit." Certainly the relationship between mother and son and the fact that the son knew what his mother wanted done with the property requires a clear and unmistakable showing that the mother definitely knew of the option and that its effect would be to overthrow completely her intended disposition of the property. Those facts required that she have independent advice. See 37 C.J.S., Fraud, § 35, p. 283; 12 Cal.Jur. 772; 6 Cal.Jur. § 43, p. 75. Here the lease containing the option was drawn under instructions of the son; it was signed in the presence of the son and his friend (who states that it was not explained); the brother and sister who by the mother's wishes would receive two-thirds of the remainder were kept in ignorance of the option, and no independent advice was received by the mother. The situation was fraudulent on its face. The fact that the price set forth in the option was the then fair value of the property (and the court so found) does not change the situation. It is clear from the testimony of the plaintiffs as well as the mother that the mother wanted to keep the property for her life and then to have it go to the three children. The fact that the price set by plaintiff was a fair one makes his act in obtaining the option without a full and fair disclosure no less a fraud.

[3, 4] Plaintiffs quote from *Leathers v. Leathers*, 77 Cal.App.2d 134, 141, 174 P.2d 875, 879: "The significant factors in a case of this kind are the adequacy of the consideration and the general fairness and mutuality of the transaction * * * and where no injury has been suffered by reason of the influence complained of and there has been no abuse of the confidence reposed, the transaction will not be set aside." They contend that this statement is authority for the proposition that because the amount inserted in the option was the then fair market price of the property, there was no abuse of the confidential relationship. Such a conclusion overlooks all of the factors in the above quotation except, possibly, adequacy of consideration. There can be no "mutuality" where one party to a contract knows nothing of its provisions, and is required to sell when she does not want to, even at a fair price. Again, forced sale is an "injury" and failure to disclose what is in the contract is an "abuse of the confidence reposed."

[5] During and at the end of the trial the judge made statements concerning plaintiff's actions that are inconsistent with his findings and judgment. It is well settled that the remarks of the trial judge cannot control over his findings. It is to the latter that this court must look, and if they are supported by the evidence, the judge's remarks inconsistent therewith have no effect. See *Department of Social Welfare v. Machado*, 98 Cal.App.2d 364, 220 P.2d 411.

Estoppel.

[6-8] In their answer to the cross-complaint plaintiffs pleaded that Mary was estopped from attacking the lease "due to the fact that she has retained all payments made pursuant to said lease in accordance with its terms well knowing all the terms and provisions thereof." Plaintiffs contend that the judgment should be reversed because of the failure of the court to find directly on this issue. The court did find that at the execution of the lease Mary did not know of the option provision and that she had trust and confidence in her son. While it would have been better for the court to have made an express finding

of when Mary gained knowledge of the option and that by accepting the rent she was not estopped to deny the option, under the peculiar circumstances of this case, such a finding is not indispensable. The acceptance of the rental could not have misled plaintiffs into believing that Mary was willing to let the option stand. They had been renting the property for \$50 per month and under the lease continued to pay that sum which the court found was the reasonable rental value. Defendant Joseph testified that he discovered the option clause in August, 1944, and consulted an attorney about it. There is no evidence that Mary knew of it at this time. But even if she had, the acceptance of the rent for some time afterwards and the failure to do anything about it would not work an estoppel as plaintiffs were getting value received for the monthly payments. It might be pointed out that plaintiffs were not injured by Mary's failure to attack the option immediately, if she knew of it, as they were subleasing the property for the same rental they were paying Mary. The circumstances of this case do not bring it within the rule of *Hayes v. Khinoo*, 1 Cal. App.2d 572, 37 P.2d 133. Plaintiffs made improvements. However, the bulk of these were made prior to August, 1944, when plaintiffs contend that Mary, through Joseph, learned of the option. Mary knew of these when made. This fact could not create an estoppel, first, because it is not pleaded. Secondly, they were made prior to the claimed discovery. The knowledge of the making of the improvements was consistent with Mary's claim of lack of knowledge of the option for the reason that she had the right to assume that he was making them as remainderman having a one-third interest in the property.

Lien for taxes.

[9, 10] It is interesting that plaintiffs make no complaint of the action of the court in awarding them a lien on the interests of defendants Joseph and Rose in the property for two-thirds of \$1807.37, the cost of improvements. But they contend that the court had no right to award defendant Joseph a lien on their interest for

one-third of \$131.68, the cost of insurance and taxes. They point out that section 840 of the Civil Code provides that the life tenant must pay the taxes, and 26 C.J. 34, § 17, 37 C.J.S., Insurance, § 190, states that it is the duty of the life tenant and the reversioners to insure their respective interests, or they may insure jointly. These rules have no application where, as here, the life tenant is the mother of the reversioners, and where, as here, it is plain that the reversioners never expected the mother to pay either taxes or insurance. At no time did any of the children suggest that these charges be paid by the mother. The action of the court in requiring contribution between the remaindermen for improvements, taxes and insurance was eminently fair and just.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; EDMONDS, J., dissenting.



107 Cal.App.2d 215

PARKER v. PARKER.

Civ. 14744.

District Court of Appeal, First District,
Division 2, California.

Nov. 1, 1951.

Rehearing Denied Dec. 1, 1951.

Hearing Denied Dec. 20, 1951.

Divorce action by Edna Earle Parker against Fred Watson Parker. Defendant was served and defaulted and plaintiff was given an interlocutory decree of divorce. Thereafter defendant filed a notice of motion to amend the decree to include a finding that there was one child the issue of the marriage. The Superior Court, in and for the City and County of San Francisco, Edward Molkenbuhr and George W. Schonfeld, JJ., denied the motion and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that there was not possibility of access between parties during possible period of conception.

Orders affirmed.

1. Bastards ⇨6

On hearing of defendant's motion to amend plaintiff wife's interlocutory decree of divorce to include finding that there was one child the issue of the marriage born to plaintiff, evidence sustained finding of trial court that there was no possible access between parties during possible period of conception. Civ.Code, § 195.

2. Divorce ⇨188

Award of counsel fees and costs to plaintiff wife in resisting defendant husband's motion to amend interlocutory decree of divorce was within power of court.

3. Divorce ⇨222

Power of court to compel husband to defray wife's legal expenses in matrimonial cause is not exhausted by rendition of judgment in case and where decree is attacked in any way by husband such allowance is proper.

4. Trial ⇨388(1)

Trial court is not required to make findings in an order made after motion.

Malcolm N. McCarthy, San Francisco, for plaintiff and respondent.

Joseph L. Bortin, San Francisco, for defendant and appellant.

DOOLING, Justice.

Defendant appeals from an order denying his motion to amend an interlocutory decree of divorce, and from two orders awarding plaintiff counsel fees and costs to resist the motion.

The parties were married in Missouri in 1944, divorced in that state on July 11, 1946 and remarried in San Francisco on September 3, 1946. A child was born to the wife on January 19, 1947, about 4½ months after the parties' remarriage.

On April 8, 1949 plaintiff filed her complaint for divorce in this action wherein she alleged that there was no issue of the marriage. Defendant was served and defaulted and on May 11, 1949 plaintiff was given an interlocutory decree of divorce, the court finding all of the allegations of her complaint to be true.

On January 18, 1950 defendant filed a notice of motion to amend the decree to include the finding that there is one child the issue of the marriage, naming the child born to plaintiff in January, 1947. After hearing evidence the court denied this motion.

[1] Plaintiff testified that she left Kansas City, Missouri, where defendant resided, in December, 1945 and came to San Francisco where she was continuously present thereafter and that defendant did not come to San Francisco until August 1946. She further testified that at the time of their remarriage she was already 4½ months pregnant. Defendant testified to one visit of plaintiff to Kansas City in April, 1946 when he had intercourse with her, but plaintiff expressly denied this. Resolving the conflicting testimony in favor of plaintiff the court was entitled to find that there was no possibility of access between the parties during the possible period of conception, which overcomes the presumption of legitimacy. In re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313; Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308; Murr v. Murr, 87 Cal.App.2d 511, 197 P.2d 369.

Appellant does not dispute this rule of law but asserts "that plaintiff is estopped to testify to her own misconduct." The one case cited in support of this argument is United States Fidelity & Guaranty Co. v. Henderson, Tex.Civ.App., 53 S.W.2d 811, which is out of line with California law. Section 195, Civil Code expressly gives the wife the right to dispute the presumption of legitimacy and adds: "Illegitimacy, in such case, may be proved like any other fact." Serway v. Galentine, 75 Cal.App.2d 86, 170 P.2d 32; Cinders v. Lewis, 93 Cal. App.2d 90, 208 P.2d 687; McGillis v. Hofeditz, 101 Cal.App.2d 760, 226 P.2d 372.

[2,3] The award of counsel fees and costs was within the power of the court. "The power of the court to compel the husband to defray the wife's legal expenses in the matrimonial cause * * * is not exhausted by the rendition of judgment in the case." 1 Cal.Jur. pp. 1001-1002. Where the decree is attacked in any way by the

husband such allowance is proper. Parker v. Parker, 22 Cal.App.2d 139, and cases cited on page 141, 70 P.2d 1003.

[4] The trial court was not required to make findings. "The universal practice in this state is not to require findings on an order made after motion." Waymire v. California Trona Co., 176 Cal. 395, 399-400, 168 P. 563, 565.

We express no opinion on respondent's claim that the motion came too late.

The orders are affirmed.

NOURSE, P. J., and GOODELL, J., concur.



107 Cal.App.2d 280

FUSCHI et al. v. VIR DEN.

Civ. 18507.

District Court of Appeal, Second District,
Division 2, California.

Nov. 6, 1951.

Rehearing Denied Nov. 28, 1951.

Hearing Denied Jan. 3, 1952.

Creta Fuschi and Antonio Fuschi brought an action against Leon J. Vir Den, individually, and Leon J. Vir Den, as administrator of the estate of Louise Vir Den, deceased, to impress and enforce an alleged resulting trust in realty. The Superior Court of Los Angeles County, Charles E. Haas, J., rendered a judgment for defendants and plaintiffs appealed. The District Court of Appeal, Wilson, J., held, inter alia, that evidence did not establish that plaintiffs were legally obligated to pay part of money secured by trust deed and sustained finding that monthly payments made by plaintiffs constituted rent and not payments on trust deed.

Judgment affirmed.

I. Trusts ☞89(3)

In action to impress and enforce an alleged resulting trust in realty, wherein plaintiffs contended that a resulting trust was created in plaintiffs' favor to extent to which plaintiffs had become liable by reason of plaintiffs' alleged oral promise

to pay money secured by trust deed executed by a defendant, evidence did not establish that plaintiffs were legally obligated to pay part of money secured by trust deed and sustained finding that monthly payments made by plaintiffs constituted rent and not payments on trust deed.

2. Appeal and Error ⇨1057(1)

In action to impress and enforce an alleged resulting trust in realty, alleged error committed by trial court in refusing to admit evidence of a preliminary conversation respecting purchase of the realty by plaintiffs was cured where such evidence was otherwise before court.

3. Appeal and Error ⇨694(1)

On appeal from judgment for defendants in action to impress and enforce an alleged resulting trust in realty, District Court of Appeal would not search record to ascertain whether it contained evidence to support contention of plaintiffs that a defendant had agreed to reimburse plaintiffs for value of improvements placed upon the realty by plaintiffs who were in possession of the realty allegedly as tenants only.

Earl E. Howard, Hollywood, and Charles F. Howard, Los Angeles, for appellants.

Allan L. Leonard, Los Angeles, for respondent.

WILSON, Justice.

This is an action to impress and enforce an alleged resulting trust in real property. Findings and judgment were in favor of defendants and plaintiffs have appealed from the judgment.

In May, 1946, plaintiffs and Louise Vir Den, now deceased, entered into negotiations with Mr. and Mrs. Matlin for the purchase of real property. They reached an agreement that the Matlin property would be purchased for \$14,000, payable \$8,000 in cash, the remaining \$6,000 to be secured by mortgage or trust deed payable at the rate of \$60 a month. Defendant Leon Vir Den was not present at the time. A cash payment of \$200 was made to the Matlins to bind the transaction. An escrow was opened wherein \$3,500 was paid, the

same having come from the bank account of Louise Vir Den, and the further sum of \$4,365 from the bank account of defendant Leon Vir Den. A trust deed in the sum of \$6,000 was executed by Leon.

Plaintiffs contend that the aforesaid sum of \$200 was paid by them and that a trust resulted in their favor for that amount; that a trust resulted to the extent of \$6,000 in their favor because they had orally agreed to pay the amount of the trust deed; that a trust resulted in the sum of \$3,500 in favor of the estate of Louise Vir Den because that amount had been advanced from her bank account, to one half of which sum plaintiff Creta Fuschi, decedent's daughter, is entitled. The evidence is in conflict as to each of such contentions.

Plaintiffs testified that the deposit of \$200 was made by plaintiff Antonio Fuschi while defendant Leon Vir Den testified that his mother paid the sum in question and he reimbursed her in that amount. The receipt from the Matlins for \$200 was made in the name of Louise Vir Den. Since the evidence with reference to such amount is conflicting the finding thereon will not be disturbed.

As to the sum of \$3,500 it was shown that the money was withdrawn from Louise Vir Den's bank account and placed in the account of Leon Vir Den. Plaintiffs assert that Mrs. Vir Den in effect deposited this sum in escrow while defendant testified that such amount was a gift to him from his mother. The finding as to this amount in favor of defendants will not be questioned since there is evidence to sustain it and other evidence only raises a conflict.

[1] Plaintiffs maintain that a resulting trust was created in their favor to the extent to which they had become liable, by reason of their alleged oral promise, for payment of the sum of \$6,000 secured by the trust deed. No evidence has been pointed to in the record that would indicate plaintiffs were legally obligated to pay any part of the sum secured by the trust deed which was executed by defendant Leon Vir Den. It was his obligation and not theirs. Plaintiffs contend that during

the lifetime of Louise Vir Den they made some monthly payments to her and some to Leon and continued paying Leon after the death of Louise. They maintain that their monthly payments were to apply on the trust deed and defendant Leon Vir Den asserts that such payments were made as rent. There was evidence of a conversation between Leon and Louise Vir Den in which the occupancy of the premises by plaintiffs was discussed and Leon expressed the opinion that \$120 would be a reasonable rental and his mother persuaded him to accept \$100 a month. Plaintiffs made one or two payments of \$65 each and increased the payments to \$130, later paying only \$100 a month. In addition to the conversation between Leon and Louise Vir Den in which the former agreed to accept \$100 a month as rent there is the testimony of Creta Fuschi concerning a conversation with Louise Vir Den in which Mrs. Fuschi stated plaintiffs could pay at least \$100 a month regularly. There is also in evidence a check dated October 6, 1948, signed by Antonio Fuschi and payable to Leon Vir Den in the amount of \$100, containing writing on the back which, had the check been cashed, would have constituted an acknowledgment that the sum was a payment on account of the encumbrance on the property in question. Leon Vir Den testified that he refused to accept the check with the writing on the back and that it was subsequently replaced with another check for the same amount but without the writing to which he objected. The evidence as a whole sustains the finding that the monthly payments made by plaintiffs constituted rent and not payments on the trust deed.

[2] Plaintiffs assign as error the refusal of the court to admit evidence of a preliminary conversation among plaintiffs, Louise Vir Den and Mr. and Mrs. Matlin respecting the purchase of the property. Since Leon Vir Den was not present he would not be bound by the conversation. Plaintiffs did not make an offer of proof and furthermore both Mr. and Mrs. Matlin testified fully concerning the conversation and related what each person said. Since the evidence was before the court

any error in the ruling complained of was cured. Although the conversation between Leon and Louise Vir Den wherein the former agreed to accept \$100 a month as rent occurred out of the presence of plaintiffs, the error if any in admitting evidence of the conversation was not prejudicial to plaintiffs since they paid the sum of \$100 over a considerable period of time.

[3] Finally, plaintiffs contend that the court erred in failing to adjudge that they were entitled to reimbursement for the value of improvements placed by them on the property. It is not unusual for a tenant to make repairs and improvements on property occupied by them and we are not pointed to evidence of any agreement whereby Leon Vir Den agreed to reimburse plaintiffs for any such expenditures. If there be such evidence it was the duty of plaintiffs to point it out. It is not the province of a reviewing court to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



CUGAT v. CUGAT et al.

Civ. 18176.

District Court of Appeal, Second District,
Division 1, California.

Nov. 2, 1951.

Rehearing Denied Nov. 21, 1951.

Hearing Granted Dec. 20, 1951.*

Lorraine Cugat brought action for divorce against Xavier Cugat, husband, and others, and alleged that the husband had concealed community property to defraud her of her share thereof and had left the jurisdiction and that she had no means to support herself or pay legal counsel. The court appointed a temporary receiver ex parte to take possession of the community property and directed the receiver to pay alimony, attor-

* Dismissed March 7, 1952.

ney's fees, and costs to wife during pendency of the action. The husband appeared specially and attacked the court's jurisdiction and filed notice of motion to vacate the orders on ground that there had been no service of process upon him either personally or constructively. The Superior Court of Los Angeles County, Mildred L. Lillie, J., entered an order denying the motion, and the husband appealed. The District Court of Appeal, Drapeau, J., held that the court had jurisdiction to appoint a receiver and to direct him to pay the wife alimony, attorney's fees and costs.

Affirmed.

Hanson, J., pro tem., dissented.

See also, 102 Cal.App.2d 760, 228 P.2d 31.

1. Divorce ☞207

Where wife in divorce action alleged that husband was concealing community property to defraud her of her share and had left jurisdiction and that she had no means to support herself or to pay legal counsel, notwithstanding that there had been no personal or constructive service of process on husband, trial court had jurisdiction to appoint a temporary receiver ex parte to take charge of community property in California and to order receiver to pay from the property during the pendency of the action, alimony, attorney's fees, and costs.

2. Divorce ☞207

Where wife in divorce action alleged that husband was concealing community property to defraud her of her share and had left California and that she had no means to support herself or to pay legal counsel, in determining whether ex parte receiver should be appointed to take charge of the community property and to pay wife alimony, attorney's fees, and costs during pendency of action though husband had not been personally or constructively served with process, trial court could assume that the allegations of the complaint were true and made in good faith.

3. Divorce ☞207

In wife's divorce action wherein husband had not been served with process either constructively or personally and trial court appointed a receiver ex parte and directed him to take possession of com-

munity property allegedly concealed by husband to defraud wife of her share thereof, and to pay wife alimony, attorney's fees and costs during pendency of the action, affidavit of receiver was sufficient to establish his possession of the property which was a requisite to jurisdiction of the trial court.

Pacht, Tannenbaum & Ross, Isaac Pacht, Samuel I. Barchas, and Bernard Reich, all of Los Angeles, for appellant.

Gold & Needleman, J. George Gold, and James J. Needleman, all of Beverly Hills, for respondent.

DRAPEAU, Justice.

January 12, 1950, plaintiff, Lorraine Cugat, filed her complaint for divorce. The complaint alleged the existing marriage of plaintiff and defendant husband, and their separation after two years of married life; that plaintiff has been a resident of the state of California and the county of Los Angeles for the required length of time; that there are no children; that defendant husband had inflicted upon plaintiff extreme cruelty; that the parties have extensive community property; that defendant husband is pursuing a course of conduct whereby he is concealing his assets from plaintiff for the purpose of depriving and defrauding her of her share thereof; that plaintiff has no means to support herself or to pay legal counsel, and that defendant husband is well able to do so; that in furtherance of a design to defraud plaintiff of her interest in the community property defendant husband left the jurisdiction of California, and told her that unless she settles her property rights on his terms he will remain outside the jurisdiction of California for many years. The bank and others were joined as parties defendant and alleged to be in possession of assets of plaintiff and defendant husband.

On the same day the complaint was filed, the court issued an ex parte order appointing a receiver, directing him to take possession of the real property, lease it, and collect rents; also, all defendants

were ordered to appear January 20, 1950, to show cause why the appointment of the receiver should not be confirmed and continued pendente lite.

January 20, 1950, the appointment of the receiver was confirmed.

January 26, 1950, the court issued an ex parte order on affidavit of plaintiff's attorney extending the powers of the receiver to take possession of all personal property of defendant Xavier Cugat, including the contents of all safety deposit boxes in any bank, "especially the California Bank."

February 1, 1950, the receiver was ordered to pay plaintiff \$2,000 per month alimony pendente lite and to pay plaintiff's attorney \$5,000 attorney fees and \$2,500 court costs. The receiver was authorized to sell or dispose of any holdings in his possession to comply with the order.

February 6, 1950, on application of the receiver, the court ordered the approval of a depository for funds coming into his possession.

March 1, 1950, the court modified the order of February 1st allowing \$500 of the \$2,500 for costs and the balance of \$2,000 for additional attorney's fees.

June 7, 1950, the court ordered the receiver to pay plaintiff's attorney an additional \$5,000.

Until August 16, 1950, plaintiff had not served defendant husband with summons and complaint, and until that date no application had been made for an order directing service by publication. So that at the times when all of the foregoing orders were made there had been no service of process upon defendant husband, nor had any proceedings been initiated for constructive service.

August 10, 1950, defendant Xavier Cugat's attorneys appeared specially to attack the court's jurisdiction and filed a notice of motion to vacate all of the above orders. The motion was argued on August 17th, on which date affidavits in opposition to the motion were filed, among them the affidavit of the receiver

stating that he took constructive possession of the real property on January 13th and that he took possession of the contents of the safety deposit box on January 27, 1950. The motion to vacate was denied, and from the order denying the motion defendant appeals.

[1,2] In support of his motion, and of this appeal, defendant cites an impressive list of authorities which he contends establishes that the Superior Court was without jurisdiction to make the orders. However, the case of *Nichols v. Superior Court*, 1 Cal.2d 589, 36 P.2d 380, 95 A. L.R. 894, would seem to be in point and determinative of all questions here involved. In that case our Supreme Court held that in circumstances similar to those appearing here the Superior Court had jurisdiction to appoint a receiver to take charge of community property, and to direct the receiver to pay from said property during the pendency of the action alimony, attorney's fees, and costs. While appellant has very ably sought to distinguish the *Nichols* case, the broad powers and the extensive jurisdiction given the trial court thereunder are still applicable. The divorce complaint herein contained the necessary allegations to bring the matter within the purview of the *Nichols* case, and the trial court may assume the allegations are true and made in good faith. *Baldwin v. Baldwin*, 82 Cal.App. 2d 851, 187 P.2d 429.

[3] Appellant contends the proper interpretation of the *Nichols* case is to be found in *Baldwin v. Baldwin*, 28 Cal.2d 406, 415, 170 P.2d 670, with reference to actual possession of the property by the receiver as being a requisite for jurisdiction. However, in the instant case, the fact of possession is amply supported by the affidavit of the receiver.

The order is affirmed.

WHITE, P. J., concurs.

HANSON, Justice pro tem. (dissenting).

The question presented by this appeal is whether the superior court has jurisdiction in an action for divorce to order a

temporary receiver, who had been appointed ex parte, to pay out of the funds and properties of the defendant which he had seized, support money, attorney's fees, and costs, in the absence of any legal process served upon the defendant personally or by substituted service.

The majority opinion holds that the court is possessed of such jurisdiction in view of the decision of the Supreme Court in *Nichols v. Superior Court*, 1 Cal.2d 589, 36 P.2d 380, 95 A.L.R. 894. I cannot agree that the case is a controlling precedent on the facts of this case, and even if it is I must dissent to its application here on the ground that the defendant is denied his rights of due process under the federal constitution Amend. 14. The contention here made that the orders before us violate the due process clause of the federal constitution was not presented in the *Nichols* case as appears by the briefs therein and, what is more, was not discussed by the court in its opinion.

That the orders of February 1st, March 1st, and June 7, 1950, made in the instant case were invalid to the extent they ordered the receiver to pay alimony, attorney's fees, and court costs out of the property seized by him it seems to me is not open to doubt under the decisions of the Supreme Court of the United States construing the federal due process clause. Cf. *Propper v. Clark*, 337 U.S. 472, 488, 69 S.Ct. 1333, 93 L.Ed. 1480, and the cases therein cited to the point; *Pennington v. Fourth Nat. Bank*, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713; *Security Sav. Bank v. California*, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301; 63 Harv.L.Rev. 657, 660.

In the case before us the defendant appeared specially on August 10, 1950, to vacate not only the orders here mentioned, but certain other orders, all of which were made without service upon defendant of any legal notice, actual or constructive, and without service upon him of any summons upon the complaint either actually or by way of substituted service. The majority by affirming the orders below

renders them *res judicata* and denies to the defendant not only his right to his day in court but a decision on the merits of his cause to which he is likewise entitled.



107 Cal.App.2d 245

IRWIN et ux. v. ZUVER et al.

Civ. 4178

District Court of Appeal, Fourth District,
California.

Nov. 2, 1951.

Rehearing Denied Nov. 20, 1951.

Hearing Denied Dec. 20, 1951.

Action by Cecil C. Irwin and Grace Irwin, husband and wife, to quiet title to certain real property as against the wife's judgment creditor, Ruth E. Zuver, and others. The Superior Court of Orange County, Robert Gardner, J., gave judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained the finding that the realty was not held by the plaintiffs as community property.

Judgment affirmed.

1. Evidence ⇨426, 461(4)

In actions involving issue whether real property is owned by husband and wife as community property, evidence is admissible to show that parties intended to take property as community property, although it was conveyed to them by a joint tenancy deed.

2. Husband and Wife ⇨266

Realty may be converted into community property by oral agreement between husband and wife, and an agreement at time property is acquired has same effect.

3. Husband and Wife ⇨14(3)

Where husband and wife acquired realty under written agreement providing that it should be conveyed to them as joint tenants with right of survivorship, and subsequent deed so conveyed property, strong presumptions that parties held as joint tenants arose from such written instruments.

4. Husband and Wife Ⓒ264

In action by husband and wife to quiet title to real property as against judgment creditor of wife, oral evidence was insufficient to show intention to hold as community property realty acquired by husband and wife under joint tenancy deed.

5. Evidence Ⓒ426, 461(4)**Husband and Wife** Ⓒ264

In action by husband and wife to quiet title to certain real property as against judgment creditor of wife, oral evidence was admissible to show husband and wife intended to hold as community property realty conveyed to them by joint tenancy deed, but some substantial evidence was required to establish such contrary intent.

6. Husband and Wife Ⓒ270(9)

In action by husband and wife to quiet title to real property as against judgment creditor of wife, question as to whether property conveyed to husband and wife under joint tenancy deed was held as community property, was one of fact.

7. Husband and Wife Ⓒ264

In action by husband and wife to quiet title to real property as against judgment creditor of wife, evidence sustained finding that realty was not the community property of the parties.

Harold A. McCabe, Fullerton, for appellants.

Robert L. Corfman, Santa Ana, for respondents.

BARNARD, Presiding Justice.

This quiet title action involved the issue as to whether certain real property was owned by the plaintiffs as community property, or as joint tenants.

On May 5, 1931, the plaintiffs purchased the property under a written agreement signed by both, which provided that they were to receive the property as joint tenants with the right of survivorship. As a part of the down payment Mrs. Irwin conveyed another parcel of real property which stood in her name and which had previously been conveyed to her by Mr. Irwin, at a time when he was being pressed by his creditors.

The remainder of the down payment was made with Mr. Irwin's earnings since marriage, and some bonus money he received from World War I. In 1932, the property was deeded to the plaintiffs as joint tenants with the right of survivorship, subject to certain trust deeds. Subsequent payments were made from a joint bank account maintained by the parties, in which was placed rentals from the property and Mr. Irwin's earnings.

In a proceeding before the Industrial Accident Commission the defendant, in 1947, obtained an award against Mrs. Irwin. A judgment based on that award was later entered in the superior court and upon execution the interest of Mrs. Irwin in this property was sold to the defendant.

In this action which followed the plaintiffs alleged, among other things, that they acquired this property by a deed dated December 9, 1932, which was made to them as joint tenants; and "that said property was, now is and at all times since December 9, 1932, has been the community property of the plaintiffs." The court found that the statement just quoted was not true; that the plaintiffs acquired the property under a written contract whereby they agreed to purchase and hold it as joint tenants, with the right of survivorship; that certain other real property standing in the name of Mrs. Irwin, and also bonus money received by Mr. Irwin from World War I, had been applied on the purchase price; that subsequent payments had been made from a joint bank account maintained by these parties; and that since their first written agreement to purchase this property as joint tenants there has never been any agreement of any kind between them with respect to changing it from joint tenancy to any other form of property. As conclusions of law, it was found that this property is not the community property of the plaintiffs; that prior to the time of the execution sale to the defendants the plaintiffs held the property as joint tenants with the right of survivorship; that the defendant is entitled to enforce her rights as purchaser at the execution sale; and that judgment should be entered in her favor. Judgment was entered accordingly, and the plaintiffs have appealed.

The appellants contend that the intention of the parties at the time of acquiring the property is the controlling issue to be determined in such a case; that this intention may be determined by the testimony of the parties; that the testimony here conclusively shows that this was community property; that the judgment of the court was based upon a misconception of the law; that this appears from "the opinion of the trial court"; and that such an opinion may be considered for the purpose of explaining the findings and showing the basis of the court's decision.

[1,2] It is well settled that evidence is admissible to show that the parties intended to take property as community property, although it was conveyed to them by a joint tenancy deed; that parol evidence is admissible to establish their real intent; that property may be converted into community property by oral agreement; and that an agreement at the time property is acquired has the same effect. *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905; *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708. It has been held, however, that the hidden intention of one party "not disclosed to the other party at the time of the execution of the instrument" is not even admissible to prove that they intended that the property would remain community property. *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905; *Watson v. Peyton*, 10 Cal.2d 156, 73 P.2d 906.

[3,4] The appellants acquired this property under a written agreement providing that it should be conveyed to them as joint tenants with the right of survivorship, and the subsequent deed conveyed the property in that manner, as required by the original contract. Strong presumptions naturally arise from these written instruments, and a considerable part of the purchase price came from funds and property which, so far as the evidence shows, was the separate property of the parties. The oral evidence introduced for the purpose of showing a different intention was unsatisfactory, to say the least. Mr. Irwin testified that this property was taken in the name of himself and his wife as joint tenants; and that he had never changed it from that joint tenancy to any other form. While he testified

that at the time the deed was made he had no intention of giving his wife any interest in the property, he did not claim that his wife was informed as to what his intentions were and he said nothing concerning his intention at the time the agreement to buy the property was executed. He further testified that when the deed was made he instructed the title company to make the deed out in both their names. Mrs. Irwin testified that she had never discussed with her husband whether this property was to be taken in joint tenancy, as community property or as his separate property, and that there had been no discussion between them of any kind in this regard. While she testified that she considered that her husband owned the property, she also said that the joint tenancy must have been made so that "in case of death I would automatically receive the home", and that "I was happy to have it that way."

[5-7] It rather clearly appears that the parties had never discussed the matter in question; that Mrs. Irwin understood the situation as disclosed by the deed, and was satisfied to let it remain that way; and that for some sixteen years Mr. Irwin had failed to express or disclose any other intention. While oral evidence was admissible to show an intention contrary to that apparently disclosed by the written instruments, some substantial evidence was required to establish such a contrary intent. The question presented was one of fact. If it could be assumed that a contrary conclusion could have been reached, the evidence as a whole does not justify or require a reversal.

It is further argued that the judgment was based upon a misconception of law, which is disclosed by the opinion of the trial court. There was no "opinion" of the court in the sense relied on. At the close of the evidence the court acceded to a request to have the matter submitted on briefs, and made some suggestions as to the matters he desired to have briefed. In so doing, he stated that it was then his understanding that where property which was held in joint tenancy was to be converted into community property there must be some express oral agreement between the spouses; that there had never been any discussion

at all between these parties; and that he doubted whether the fact that some community property had gone into the property in question was sufficient, in itself, to "take it out of the status of joint tenancy and make it community property." The matter was then submitted on briefs and later decided. Aside from other considerations which need not be discussed, there is nothing to show that the findings subsequently made were based on any misconception of law, or that they were not based entirely upon the evidence presented after considering the briefs filed. The controlling questions of fact were decided by the court and it cannot be held, as a matter of law, that the findings are without evidentiary support.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



107 Cal.App.2d 243

PEOPLE v. COHEN.

Cr. 4643.

District Court of Appeal, Second District,
Division 2, California.

Nov. 2, 1951.

Harry Cohen was convicted in Superior Court, Los Angeles County, Clement D. Nye, J., of having recorded and registered bets upon horse races, and he appealed. The District Court of Appeal, Wilson, J., held that the evidence sustained the conviction.

Affirmed.

1. Gaming $\S$ 98(3)

Conviction of having recorded and registered bets upon horse races was sus-

tained by the evidence. Pen.Code, $\S$ 337a, subd. 4.

2. Criminal Law $\S$ 563

The corpus delicti may be established by circumstantial evidence.

3. Criminal Law $\S$ 406(1)

In prosecution for having recorded and registered bets on horse races, where the corpus delicti had been established, it was not error to admit into evidence conversations between defendant and officers wherein defendant made certain admissions. Pen. Code, $\S$ 337a, subd. 4.

Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WILSON, Justice.

This is another of the fruitless and meritless appeals following convictions of bookmaking with which appellate courts have been infested. Defendant has appealed from a judgment of conviction of having violated subdivision 4 of section 337a of the Penal Code¹ in that he recorded and registered bets upon horse races, and from the sentence.

Defendant, a news vendor on a street corner in Los Angeles, was observed by a police officer for about twenty minutes during which time several persons approached defendant; each engaged him in conversation and handed him what appeared to be paper money. On two or three occasions he left the corner and went to a telephone in the vicinity. On his last visit to the telephone the officer followed him and saw he was holding in his right hand while telephoning a piece of white paper with writing on it. The officer opened the door of the booth, identified himself and took possession

1. Sec. 337a "Every person, * * *.

"4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or pow-

er of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever;

* * *.

"Is punishable by imprisonment

* * *."

of the paper. On it were several letters and figures which he identified after it had been stipulated that he was an expert in the manner and method in which bookmaking is conducted in Los Angeles County. He testified the letters, figures and abbreviations on the paper indicated horse races run at the Saratoga and Rockingham race tracks, the names of horses entered in the races and the amounts bettors were wagering on such horses to win and to place, nothing to show. The officer recovered from defendant's pocket a scratch sheet dated on the day of the arrest; compared the notations on it and testified the horses mentioned on the slip of paper defendant was holding while telephoning were running on the day in question at the tracks indicated on such paper. The officer took also several pieces of paper from a leather pouch which contained defendant's money changer. He testified such papers indicated the amounts of money owed to defendant and possibly the amounts he owed to various bettors; that such papers are commonly known as "owe" sheets and that the writing on them possibly indicated the names or initials of bettors. The officer testified as to how a telephone is used in relation to bookmaking. He stated the agent commonly transmits or relays his bets to telephone "spots," the agent being the person who takes bets from the various bettors and telephones them to a central location where they are recorded; that on some occasions the agent records the bet on a small piece of paper before telephoning it and that such papers are called betting markers.

[1-3] The foregoing evidence is sufficient of itself to sustain defendant's conviction of having recorded and registered bets upon horse races. *People v. Newland*, 15 Cal.2d 678, 681, 684, 104 P.2d 778; *People v. Warnick*, 86 Cal.App.2d 900, 902-903, 195 P.2d 552; *People v. Stones*, 99 Cal.App.2d 54, 55, 221 P.2d 202. In addition there is defendant's admission of guilt. While en route to the jail in custody of the arresting officers he was asked by them how long he had been bookmaking and he answered he had been operating about two years. Concerning the slip of paper recovered from his hand he admitted he was

telephoning bets recorded on the marker at the time the officer approached the telephone booth. He stated the other pieces of paper recovered from his leather pouch contained initials and names of persons owing money to him and the amounts thereof and also the amounts he owed other people. The *corpus delicti* may be established by circumstantial evidence, *People v. Newland*, supra, 15 Cal.2d 678, 683, 104 P.2d 778; *People v. Warnick*, supra, 86 Cal.App.2d 900, 903, 195 P.2d 552, and having been established the court did not err in admitting the evidence of the conversations between defendant and the officers.

Judgment affirmed. Purported appeal from sentence dismissed.

MOORE, P. J., and McCOMB, J., concur.



107 Cal.App.2d 209

KOLIS v. KOLIS et al.

Civ. 18406.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1951.

Action by Alfred Kolis against Genevieve Kolis, Wladyslawa Lukaszewicz, also known as Lottie Lukas, and others, for an accounting and for partition of real property. Wladyslawa Lukaszewicz filed a cross-complaint to quiet title. The Superior Court of Los Angeles County, Walter S. Gates, J., rendered judgment that the plaintiff take nothing by his complaint and that Wladyslawa Lukaszewicz take nothing by her cross-complaint, and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that, where husband and wife took title to realty as joint tenants, and part of purchase price was paid by wife and part by husband and part was obtained by bank loan, and husband and wife were divorced, and wife's mother obtained judgment against husband and wife for an indebtedness and upon execution the property was sold by sheriff to

mother, and husband brought action against wife and mother for accounting and partition and mother filed cross-complaint to quiet title, Superior Court had duty to determine all issues presented and jurisdiction to do complete justice amongst all the parties and should have adjudged redemptioners' rights as against mother, and if 12 months had not elapsed from date of sheriff's deed the husband had right to redeem.

Judgment reversed with directions.

See also, 230 P.2d 641.

Partition ⇐65

Where husband and wife took title to realty as joint tenants, and part of purchase price was paid by wife and part by husband and part was obtained by bank loan, and husband and wife were divorced, and wife's mother obtained judgment against husband and wife for an indebtedness and upon execution the property was sold by sheriff to mother, and husband brought action against wife and mother for accounting and partition and mother filed cross-complaint to quiet title, Superior Court had duty to determine all issues presented and jurisdiction to do complete justice amongst all the parties and should have adjudged redemptioners' rights as against mother, and if 12 months had not elapsed from date of sheriff's deed the husband had right to redeem, Code Civ. Proc. § 702.

Houston A. Snidow, Azusa, for appellant.

David C. Marcus, Los Angeles, for respondents.

DRAPEAU, Justice.

When plaintiff and defendant were husband and wife they took title to real property as joint tenants. The purchase price was paid as follows: \$5,500 by plaintiff, \$5,000 by defendant, and \$8,500 from a loan by a bank to plaintiff and defendant, secured by a trust deed upon the property.

When plaintiff and defendant were divorced the wife was given possession of the property. She agreed to apply the

rents to the upkeep of the property, and to payments on the indebtedness.

Then the wife's mother sued both plaintiff and defendant for indebtedness claimed due to her from them. In that action judgment was rendered against both the former husband and wife. Upon execution the property was sold by the sheriff to the wife's mother.

Then plaintiff brought this action against his former wife and her mother—for an accounting, and for partition of the real property. The trial court found that neither plaintiff nor defendant had title to the property, but only an equity of redemption from the judgment sale; that such equity of redemption was not the subject of partition; and that defendant received no money or property for which she should account. The judgment was that plaintiff take nothing by his complaint, and that the mother-in-law take nothing by her cross-complaint to quiet title.

On this appeal, defendants assert that there is but one question to pass upon: "May the right of redemption from an execution sale be partitioned?"

Such, however, is not the case. It was the duty of the Superior Court to determine all of the issues presented. The court had jurisdiction to do complete justice amongst all of the parties. *Buhrmeister v. Buhrmeister*, 10 Cal.App. 392, 102 P. 221; *Bacon v. Wahrhaftig*, 97 Cal.App.2d 599, 218 P.2d 144. The court should have adjudged redemptioners' rights as against the mother-in-law. If twelve months had not elapsed from the date of the sheriff's deed, Code Civ.Proc. sec. 702, plaintiff had the right to redeem.

The court should have adjudged that if all the redemption money was furnished by plaintiff within twelve months from the date of the sheriff's deed, the property be sold, and, after paying the secured indebtedness, the balance remaining be divided between the two cotenants, with credit to plaintiff for advances, if any, for redemption by him of his former wife's interest.

The judgment is reversed, with directions to the Superior Court to take an

accounting as between the former husband and wife; to permit plaintiff to redeem the property from the execution sale, if he can do so within sixty days from the coming down of the remittitur in this case; and if neither plaintiff nor his former wife redeem within that time, to quiet title to the property in the mother-in-law; and to make such further orders and decree as may be necessary under all the issues in the case, in conformity with the views hereinbefore expressed.

WHITE, P. J., and DORAN, J., concur.



107 Cal.App.2d 206

DORSK v. SPIVACK et al.

Civ. 18297.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1951.

Hearing Denied Dec. 20, 1951.

Action by Dan D. Dorsk against Alfred Spivack and Cecile Rosenberg, individually, and as tenants in common, to foreclose a mechanic's lien on defendants' real estate and recover for the value of services rendered and materials paid for. The Superior Court of Los Angeles County, Arthur Crum, J., gave judgment for the plaintiff and the defendants appealed. The District Court of Appeal, Doran, J., held that the evidence sustained the finding that the plaintiff was employed by the defendants as a building supervisor under their direction and control.

Judgment and order denying motion for judgment notwithstanding verdict affirmed.

1. Master and Servant ☞6

In action by plastering contractor against real estate owners to foreclose mechanic's lien on property for services rendered and materials furnished, evidence sustained findings that plastering contractor was employed by owners as building supervisor under their direction and control, and not as an independent contractor.

2. Licenses ☞39.43

Where plastering contractor was employed by real estate owners as building supervisor or superintendent, fact that he was not licensed as general contractor did not preclude his enforcement of mechanic's lien on owners' real estate for services rendered and materials furnished. Business and Professions Code, § 7025 et seq.

Louis Most, Beverly Hills, Jerry Berk and Lester Bise, Los Angeles, for appellants.

Laurence J. Rittenband, Los Angeles, Jack Gold, Beverly Hills, for respondent.

DORAN, Justice.

The present action was instituted by respondent Dan D. Dorsk to foreclose a mechanic's lien on appellants' real estate for services rendered as a building superintendent or supervisor. A second cause of action sought recovery for the agreed and reasonable value of services rendered and materials paid for. A jury trial was had on the issues presented on the second cause of action, resulting in a verdict and judgment for plaintiff-respondent in the sum of \$4,072.22. By consent of the parties this judgment was later vacated and a judgment entered in the sum of \$4,040.03.

Appellants' theory, as expressed in answer and brief, is that respondent Dorsk although not licensed as a general contractor under Business and Professions Code, Section 7025 et seq., was in effect so acting in the building of respondent's \$80,000 apartment building, rather than acting as a mere building superintendent employed by appellants.

The record discloses evidence to the effect that for a period of almost thirty years the respondent Dan Dorsk although not a general contractor, had been a licensed plastering contractor; that about May, 1948, Dorsk was invited by appellants to submit a plastering bid on a projected apartment house. In addition to the plastering work, the parties entered into an oral agreement whereby respondent was to act as a building supervisor or superintendent. Dorsk was to receive a flat wage of

\$3,500, payable after completion of the building at which time appellants would procure a loan on the structure.

According to respondent's testimony, appellants first offered to pay \$100 per week for respondent's services as superintendent in place of Dorsk's demand for \$200 per week; the parties finally agreed on a flat fee of \$3,500 for the job. Dorsk was to take orders from the appellant Spivack; subcontractors dealt directly with and were paid by Spivack; Dorsk saw to it that "everything was done right" by the subcontractors. Respondent testified that "whatever Mr. Spivack wanted me to do, I did". Spivack visited the job "nearly every day", sometimes staying for an hour, sometimes for four hours, and sometimes remaining all day. Upon completion of the job December 1, 1948, appellants refused to pay the agreed \$3,500 or to reimburse Dorsk for advances for occasional labor and miscellaneous supplies.

There was evidence that while respondent was supervising the construction of appellants' apartment building, "he was at the same time supervising the construction of" other building jobs for a flat fee under an arrangement similar to that entered into with appellants. Alfred Spivack testified "that before engaging plaintiff, that plaintiff (Dan Dorsk) stated that he was a licensed general contractor, but this was denied by plaintiff and was found to be untrue". Appellants' brief also stresses the fact that certain subcontractors' bills came addressed to "Dorsk Construction Company", and that there was a sign posted on the outside of appellants' building saying "Dorsk Construction Company". This sign was said to belong to respondent's son, Cyril M. Dorsk who was a general building contractor.

Appellants' brief states: "The question here is whether the legislature intended to exclude the classification of 'Superintendent of building' or 'Supervisor of building construction' from the requirements of the contractors' license laws". Attention is called to the fact that the only expressed exemption to such license requirement is that found in Section 7044 of the Business and Professions Code which provides that

"This chapter does not apply to owners of property, building or improving structures thereon for the occupancy of such owner and not intended for sale"; that "Nowhere in the exemptions is the word 'superintendent' or 'supervisor' used". From this fact appellants seek to draw the conclusion that respondent, an unlicensed general contractor, is not entitled to recover the agreed payment for supervising construction.

It is the respondent's position that there is substantial evidence in support of the findings that respondent was employed by appellants as a building supervisor under the direction and control of appellants and not as an independent contractor, and that there is no statutory requirement that such a supervisor be licensed as a general contractor, or at all.

A question similar to that here involved, was under consideration in *Frugoli v. Conway*, 195 Cal.App.2d 518, 520, 213 P.2d 76, 77, and the court there said: "The question whether one is an independent contractor or an employee is largely one of fact depending on all the circumstances of the relations of the parties. When those circumstances disclose a mixed relation of employment, the finding of the trial court based on substantial and competent evidence cannot be disturbed".

In *Powell v. Berg*, 99 Cal.App.2d 353, 221 P.2d 743, 744, appellants contended that "the evidence establishes as a matter of law that Powell was 'a contractor' within the meaning of Section 7026 of the Business and Professions Code, and since he admittedly was not licensed as such he could not recover." The reviewing court in reference thereto, said: "Appellants' argument in support of such contention is merely an attack upon the weight of the evidence. However, since the record discloses substantial evidence in support of the findings, their contention is utterly without merit".

[1,2] As in the cases just cited, the question whether respondent herein was actually functioning in the capacity of unlicensed general contractor as appellants insist, or merely as an employe hired by appellants to supervise the construction,

was clearly one of fact. If respondent's evidence is to be believed, then the findings in favor of respondent's position, are adequately supported. The fact that subcontractors were responsible to and paid by the appellants rather than by the respondent, and that appellant Spivack was on the job daily, apparently overseeing the work, lends support to the view that Dan Dorsk was a supervising employee rather than a general contractor. It is true that from certain items of evidence, inferences might be drawn in support of appellants' contention. The evidence disclosed by the record on this and other phases of the case is clearly in conflict, and the resulting question is one of fact rather than of law.

So far as statutory law is concerned, there is no provision of the Business and Professions Code which requires a mere supervisor or superintendent of building construction to be licensed. Appellants' complaint in respect to the instructions given to the jury is without merit; the issues seem to have been adequately presented. The jury's decision and the findings of the trial court find substantial support in the record and no reversible error has been made manifest.

The judgment is affirmed. The order denying a motion for judgment notwithstanding the verdict is likewise affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



107 Cal.App.2d 274

VAN DER MOST v. WORKMAN.

Civ. 18311.

District Court of Appeal, Second District,
Division 1, California.

Nov. 6, 1951.

June Van Der Most, a minor, by William Van Der Most, her guardian ad litem, brought action against Max Workman to recover for injuries sustained by the minor when struck

by automobile driven by defendant after minor alighted from bus and passed around front of bus to cross street when motorist proceeding in same direction as bus passed bus on left side at allegedly excessive rate of speed. The Superior Court of Los Angeles County, Martin De Vries, J., entered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding of Superior Court that defendant was negligent and that minor was not contributorily negligent.

Judgment affirmed.

1. Automobiles $\S$ 244(7)

In action against motorist for injuries sustained by ten year old girl who was struck by automobile after alighting from bus and passing around front of bus to cross street when motorist proceeding in same direction as bus passed bus on left side at allegedly excessive rate of speed, evidence sustained finding of trial court that motorist was negligent in failing to stop automobile.

2. Trial $\S$ 140(1), 142, 143

The credibility of witnesses, the value and effect of their testimony, and inferences to be drawn from evidence, contradicted or uncontradicted, are matters for the decision of the trier of fact.

3. Appeal and Error $\S$ 931(1), 1010(1)

The District Court of Appeal may not disturb conclusions of trier of fact unless District Court of Appeal can say that, viewing evidence in light most favorable to prevailing party and indulging in every legitimate inference which may be drawn there from in favor of prevailing party, the result is a conclusion that there is no substantial evidence to support the verdict or decision.

4. Automobiles $\S$ 244(55)

In action against motorist for injuries sustained by ten year old girl who was struck by automobile after alighting from bus and passing around front of bus to cross street when motorist proceeding in same direction as bus passed bus on left side at allegedly excessive rate of speed, evidence sustained finding that girl was not contributorily negligent.

5. Negligence ⇨85(2)

Defense of contributory negligence may be invoked in action by or on behalf of child of age sufficient to exercise discretion to avoid injury.

6. Negligence ⇨85(2)

A child is not held to the same degree of care as an adult, but only required to exercise degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion.

7. Negligence ⇨136(29)

There is no precise age at which, as a matter of law, a child is to be held accountable for his actions to same extent as one of full age, and question as to capacity of child at a particular time to exercise care to avoid a particular danger is one of fact for jury.

8. Appeal and Error ⇨1046(5)

In action against motorist for injuries sustained by ten year old girl who was struck by automobile after alighting from bus and passing around front of bus to cross street when motorist proceeding in same direction as bus passed bus on left side at allegedly excessive rate of speed, wherein police officer testified that motorist acted as a normal person, though there was the odor of alcohol on motorist's breath, statement of trial judge, who was trier of facts, in finding for girl, that drinking drivers, though they may not be drunk, are the cause of many accidents, was not prejudicial error.

9. Judgment ⇨272

Failure to comply with statute requiring the filing of findings of fact and conclusions of law within 30 days after submission of cause did not oust trial court of jurisdiction to enter judgment, since provisions of statute are directory only. Code Civ.Proc. § 632.

Clifton A. Hix, San Pedro, for appellant.
Clark Heggeness, Long Beach, for respondent.

WHITE, Presiding Justice.

Defendant has appealed from a judgment against him for \$3,500 entered after

trial before the court, sitting without a jury, in an action for personal injuries sustained by the plaintiff when she was struck by an automobile operated by the defendant. He has also attempted to appeal from the order denying his motion for a new trial.

It is contended that the evidence was insufficient to establish negligence on the part of defendant; that the evidence discloses contributory negligence on the part of plaintiff; that the findings of fact are unsupported by the evidence; that a statement of the trial judge at the close of the trial shows that he "violated defendant's substantial rights"; and that it was error to deny defendant's motion for a new trial.

On the date of the accident, January 22, 1944, plaintiff was ten years of age. She and her brother Alvin were passengers on a bus proceeding south on Capitol Drive in San Pedro. The bus stopped at the intersection of Capitol Drive and Senate Drive, where plaintiff alighted. She remembered nothing concerning the accident until she awoke in the hospital.

Senate Drive, running in an easterly and westerly direction, intersects Capitol Drive from the west, forming a "T" intersection. The bus stopped at the northwest corner of the intersection, opposite the sidewalk on the north side of Senate Drive. Plaintiff was attempting to cross to the east side of Capitol Drive, having walked in front of the standing bus, when she was struck by defendant's automobile, which was coming from the north and passing the bus on the left side. Plaintiff's brother testified that his sister got off the bus ahead of him. When he was standing near the curb at the northwest corner he saw his sister approximately fifteen feet out into the street, where she was struck. He estimated the speed of defendant's automobile at thirty to thirty-five miles per hour, and said it was "going pretty fast". He saw his sister, after the impact, "fly through the air" and come to rest at a point near the southwest corner of the intersection. He did not hear the defendant sound his horn. The defendant's automobile came to a stop at a point approxi-

mately one hundred feet south of the intersection.

The defendant, corroborated by his wife, who was riding with him, testified that he passed the bus at a speed of fifteen miles per hour. He knew that the bus had pulled over to let off passengers. He first observed the plaintiff just prior to the impact, but did not see whether she was walking, running or standing. That he thought she ran into the front door of his vehicle.

Police officers who arrived at the scene about five minutes after the accident, found a "brush mark" in back of the upper hinge on the right front door and blood on the pavement nine feet south of the north curb of Senate Drive and seventeen feet east of the west curb of Capitol Drive. Capitol Drive is thirty to thirty-five feet wide at the intersection.

[1-3] It cannot be held that the findings of the trial court are without evidentiary support. The credibility of witnesses, the value and effect of testimony, and the inferences to be drawn from evidence, contradicted or uncontradicted, are matters for the decision of the trier of fact; and this court may not disturb the conclusions of the trier of fact unless it can say that, viewing the evidence in the light most favorable to the prevailing party and indulging in every legitimate inference which may be drawn therefrom in favor of the prevailing party, the result is a conclusion that there is no substantial evidence to support the verdict or decision. This we cannot do in the present case. There is substantial evidence that plaintiff was in a crosswalk when struck and that defendant's car was moving at thirty to thirty-five miles per hour. The testimony of defendant and his wife raised a conflict which was resolved by the trier of fact, who found negligence in defendant's failure to yield the right of way. The physical facts ascertained by the investigating officers did not compel an inference that the child was not in the crosswalk when struck, but would admit an inference of equal validity that she was in the crosswalk and almost to the middle of the street she was attempting to cross. Further, the distance

the child was thrown, according to the testimony of her brother, supports an inference as to the speed of the car. Defendant's speed, his knowledge that the bus had stopped to discharge passengers, and that he was approaching a crosswalk, amply support the trial court's findings on the issue of negligence.

[4-7] It is further manifest from the foregoing discussion that the question of contributory negligence on the part of the child was a question of fact for the trial court, which tribunal resolved in favor of the plaintiff the contradictions and conflicts in the testimony. The trial court concluded that plaintiff was in the crosswalk. As was said in *Barrett v. Harman*, 115 Cal.App. 283, 1 P.2d 458, 459: "The defense of contributory negligence may be invoked in an action by or on behalf of a child where the latter was of an age sufficient to exercise discretion for the avoidance of injury; but a child is not held to the same degree of care as an adult, and is only required to exercise that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury. * * * And the rule has been applied where the child sought to be charged with contributory negligence was considerably older than the plaintiff in the present case. * * * The presumption is that the child was at all times exercising due care for its own safety * * *. Until overcome, the presumption was evidence in accordance with which the jury was bound to decide. * * * Here the child was upon the street at a place where he had a right to be, and where pedestrians were expected to cross * * *. The implied finding was against the plea of contributory negligence, and the evidence was amply sufficient to sustain the conclusion of the jury." So here, it must be assumed on appeal that the child was within the crosswalk, and the conclusion that the accident was not proximately

caused by her contributory negligence, if any, finds ample support in the evidence, even in the absence of any presumption of the exercise of due care on her part.

The trial court, in finding for the plaintiff announced from the bench that he found the defendant negligent in not stopping his car. "I think the Court can well assume she was in the parkway and the bus was then stopped for the purpose of permitting the child or any other person to have access to the crosswalk. As she was going across that crosswalk it was incumbent on any other car to stop.

"No. 2 observation is this: The officer testified that the blood spot was nine feet south of the north curb line, which is the north curb of Senate Drive, when that child undoubtedly was struck or ran into the car (whichever was the case). By the time she was struck, with the moving motion of the car that car could very easily carry her to the spot where her blood remained, a distance of nine feet.

"Third is judicial recognizance that these drinking drivers, although they may not be drunk, are the cause of many accidents. I don't think if this boy had drunk that beer even an hour before he could have avoided a situation of that kind."

[8] Appellant predicates prejudicial error upon the remarks of the trial judge last above quoted concerning drinking, one of the officers having testified that although he smelled the odor of alcohol on defendant's breath, defendant acted as a normal person and was not given a sobriety test. Appellant's claim of prejudicial error in this regard is without merit, for it is undoubtedly the law that in an action such as this, to recover dam-

ages based on alleged negligence, the trier of fact should consider all the circumstances present at the time of the accident, and this would include the condition of the driver of the car that caused it, in so far as his consumption of alcoholic beverages is concerned. *Purcell v. Goldberg*, 34 Cal.App.2d 344, 348, 93 P.2d 578. In any event, and notwithstanding the aforesaid remarks of the trial judge, the record reflects that his conclusion was based on defendant's excessive speed in the circumstances, his failure to anticipate the presence of a pedestrian in the crosswalk, and his consequent inability to yield the right of way or avoid striking the plaintiff.

[9] For reasons that are unexplained in the briefs, four and one-half years elapsed between the conclusion of the trial and the signing of findings of fact and conclusions of law and the entry of judgment. No showing has been made as to how or in what manner defendant has been prejudiced by the delay. The failure to comply with section 632 of the Code of Civil Procedure, requiring the filing of findings of fact and conclusions of law within thirty days after submission of the cause, did not oust the court of jurisdiction to enter judgment, the provisions of the section being directory only. *City of Los Angeles v. Hannon*, 79 Cal.App. 669, 673, 674, 251 P. 247; *Farmers, etc., Nat. Bank v. Peterson*, 5 Cal.2d 601, 607, 55 P.2d 867.

The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

107 Cal.App.2d 140

In re MCSWEENEY'S ESTATE.**SWEENEY et al. v. WELTE et al.**

No. 14739.

District Court of Appeal, First District,
Division 1, California.

Oct. 29, 1951.

Hearing Denied Dec. 20, 1951.

Proceedings in the matter of the estate of Daniel McSweeney, deceased, in which Eugene B. Sweeney, sometimes known as Eugene B. McSweeney, and others, heirs at law, appealed from an order of the Superior Court, County of San Mateo, Aylett R. Cotton, J., which awarded to the attorneys for Alexander J. Welte, and Eleanor Welte, as executor and as executrix, an allowance for extraordinary legal services. The District Court of Appeal, Wood, J., held that suit in equity against executor and executrix, individually and in their official capacities, to impress trust in favor of plaintiff upon certain properties left by decedent and others conveyed during his life time to defendants, affected only the residue of the estate after debts of decedent and expenditures of administration had been paid, and expenses of such litigation were not chargeable to estate.

Order reversed.

I. Evidence ⇨43(2)

Where clerk's transcript was sole record upon appeal from order in Probate Court awarding amount to attorneys for executor and executrix as allowance for extraordinary legal services, and such records disclosed nothing concerning litigation for which allowance had been made, and litigation out of which purported right to allowances arose appeared on records of appellate court, court might, and in interest of justice should, take judicial notice of its own records for purpose of ascertaining nature of litigation and determining whether, as matter of law, legal services rendered therein were compensable out of funds of estate.

2. Descent and Distribution ⇨74**Executors and Administrators** ⇨38

Title to intestate property which does not pass by will of testator, passes to heirs at law of the decedent upon death of decedent, subject to possession of executor

and executrix, and control of court for purposes of administration and payment of decedent's debts and the expenses of administration. Probate Code, §§ 300, 750.

3. Executors and Administrators ⇨456(2)

Where devisee under will brought action against two other devisees, individually and as executor and executrix, to impress trust in his favor upon certain properties of estate, and to impress trust upon property which decedent had conveyed during his lifetime to executor and executrix, action affected title of devisees and heirs of decedent to their respective portions of residue in their individual capacities only, and costs of such litigation were not chargeable against estate.

4. Trusts ⇨359(1)

Remedy of person asserting claim to residue of estate, predicated upon purported agreement to leave property to him, is action for quasi specific performance of such agreement against heirs, devisees and legatees personally, to impress trust upon property in their hands.

5. Trusts ⇨363

The court, acting in probate, has no jurisdiction of action by person asserting claims to residue of estate in nature of proceeding for quasi specific performance of agreement by decedent to leave property to him and brought against heirs, devisees, and legatees to impress trust in favor of claimant upon property in their hands.

6. Executors and Administrators ⇨439**Specific Performance** ⇨106(1, 3)

The heirs, devisees and legatees, and not the executor or administrator, are necessary parties to action in nature of one for quasi specific performance of purported agreement by decedent to leave property to plaintiff, and plaintiff under such agreement need not join all parties in one action, but may litigate separately with them.

7. Judgment ⇨690

Where person asserting claim to residue of estate on ground of asserted agreement by decedent to leave property to him, brings action for quasi specific performance

of agreement against heirs, devisees and legatees to impress trust in his favor upon property in their hands, those heirs, devisees and legatees, not joined as parties to such action are not bound by any judgment which may be rendered.

8. Specific Performance $\S$ 106(1, 3)

Action by person asserting claim to residue of an estate on ground of asserted agreement by decedent to leave property to him which seeks quasi specific performance of purported agreement, which is brought against executor or administrator without joining any of the heirs, legatees or devisees, does not present a justiciable controversy.

9. Executors and Administrators $\S$ 456(2)

In view of fact that action by person asserting claim to residue of estate on ground of purported agreement by decedent to leave property to him, when brought against executor and administrator without joining any of the heirs, legatees or devisees, does not present justiciable controversy, compensation for extraordinary legal services rendered an executor or administrator in such an action are not payable out of the funds of the estate, since such contest or proceeding involves solely the ownership of the residue of the estate after administration.

10. Wills $\S$ 415

Compensation for extraordinary legal services rendered an executor or administrator in a will contest, are not payable out of the funds of the estate, since such contest involves solely the ownership of the residue of the estate after administration.

11. Appeal and Error $\S$ 1172(1)

Where compensation for extraordinary services rendered in conduct of sales of real property in probate proceeding were allowable, but compensation for services rendered executor or administrator in another action was not properly allowable from funds of estate, and allowance for extraordinary services, including part not properly allowable, was made in lump sum, court would be compelled to reverse order as a whole.

Edwin H. Williams, Donald B. Richardson, San Jose, for appellants.

Dolwig, Gaudio & Davis, and Antonio J. Gaudio, all of South San Francisco, for respondents.

FRED B. WOOD, Justice.

The heirs of Daniel McSweeney, deceased, have appealed from an order in probate which awarded to the attorneys for the executor and executrix an allowance upon their statutory fees and \$8,175 for extraordinary legal services rendered by them. In their briefs, appellants question only the allowance for extraordinary services.

The clerk's transcript is the sole record upon this appeal. In that record there is disclosed no basis for considering the order except to affirm it, unless we may take judicial notice of certain litigation for the conduct of which this record shows the fee for extraordinary services was largely, if not principally, awarded.

The application of Alexander J. Welte and Eleanor Welte, executor and executrix of the estate, for the allowance of \$8,175 for extraordinary legal services recites that they, as executor and executrix, undertook the defense of the action of Ryan V. Welte, in the Superior Court of San Mateo County (identifying it by name and number), for which purpose they employed the services of their attorneys, which services included the handling of that litigation in the superior court, District Court of Appeal, and Supreme Court. The application also recited the successful conclusion of proceedings for confirmation of the sale of three parcels of real estate. The order made after the hearing of that application contains substantially the same recitals concerning the services rendered in Ryan v. Welte and in the conduct of the sales in probate, as the basis for the allowance of the fee for extraordinary legal services.

In that application the executor and executrix also stated that Ryan v. Welte was successfully concluded by procuring from the plaintiff therein a dismissal with prejudice, in the form of an "agreement

and consent to final distribution with the said Joseph L. Ryan, under date of January 19th, 1950, which resulted in conserving for the benefit of said estate fifty (50) percent of the total value of the assets of said estate, estimated at some thirty one thousand dollars (\$31,000.00) which would otherwise have been lost to the estate by impressing thereupon a trust in favor of said Joseph L. Ryan and other persons who were strangers to the estate." In the same document (the portion thereof which related to partial distribution), Alexander and Eleanor Welte stated that, in their individual capacity, on January 19, 1950, they entered into an agreement with Ryan, under the terms of which Ryan conveyed to them all of his right, title and interest in and to the real property the decedent had devised to Ryan, and in and to all property to which Ryan might have been entitled under the will or under the laws of succession, and that Ryan had consented to the distribution of his said right, title or interest unto Alexander and Eleanor Welte, in equal shares.

The parties, in their briefs upon this appeal, discuss at length the nature of the issues involved in *Ryan v. Welte* on the question whether or not the cost of the conduct thereof to Alexander and Eleanor Welte is a proper charge against the funds of the estate. Respondents, in their brief, direct attention to the fact that "A judgment on demurrer to the Second Amended Complaint was the subject of an appeal and decision before this court, entitled *Ryan v. Welte*, 87 Cal.App.2d 897, 198 P.2d 357"; state that "A brief reading of the decision and reference to the record in *Ryan v. Welte*, supra, shows that the purpose and intent thereof * * * was to divest the estate * * * of all of the beneficial right * * * in the entire assets of the estate by impressing a trust thereon * * in favor of Joseph L. Ryan as to an undivided one-half of such total assets"; and recite that the litigation involved in *Ryan v. Welte*, supra, "formed the basis for the allowance of fees for extraordinary services in this case." There were two appeals in *Ryan v. Welte*, each heard and

decided by this court, reported respectively in 87 Cal.App.2d 888, 198 P.2d 351, and 87 Cal.App.2d 897, 198 P.2d 357.

[1] Under these circumstances, this court may and in the interest of justice should take judicial notice of its own records in the two appeals in *Ryan v. Welte*, supra, for the purpose of ascertaining the nature of that litigation and determining whether or not, as a matter of law, the legal services rendered therein are compensable out of the funds of the estate. In *Sewell v. Johnson*, 165 Cal. 762, 134 P. 704, the court took notice of its reversal of the very judgment upon which the judgment immediately involved was solely based. In *City of Los Angeles v. Abbott*, 217 Cal. 184, 17 P.2d 993, the court took judicial notice of a judgment, affirmed by it in another action, which enjoined the city from proceeding in eminent domain (showing that the city did not voluntarily abandon the proceeding then before the court), both parties expressly or impliedly admitting that the legal effect of that injunction was in fact considered and argued before the trial court. See, also, *Hammell v. Britton*, 19 Cal.2d 72, 119 P.2d 333; *Christiana v. Rose*, 100 Cal.App.2d 46, 52-53, 222 P.2d 891; *Mann v. Mann*, 76 Cal.App.2d 32, 40-42, 172 P.2d 369; and cases cited in each.

[2] By his will, the testator gave certain parcels of real property and certain moneys, respectively, to Alexander and Eleanor Welte, and certain real property to Joseph L. Ryan; and appointed Alexander and Eleanor Welte as executor and executrix. He made no other disposition in his will, dying intestate as to some of his property. Title to this intestate property, of course, passed to the appellants, as heirs, upon the death of decedent, subject to possession of the executor and executrix and control of the court for the purposes of administration, and payment of decedent's debts and the expenses of administration. Prob.Code, § 300. See *Reeve v. Jahn*, 9 Cal.2d 244, 248, 70 P.2d 610; *Mears v. Jeffry*, 80 Cal.App.2d 610, 617-618, 182 P.2d 294; *Burns v. McGraw*, 75 Cal.App.2d 481, 488, 171 P.2d 148. Those expenses, including the fee in

question, are a first charge against the intestate property. Prob.Code, § 750. If this property is adequate to the purpose, the fee in its entirety will in effect be paid by appellants, none thereof by Alexander or Eleanor Welte.

Joseph L. Ryan, one of the devisees under the will, brought the action of Ryan v. Welte, above mentioned, against Alexander and Eleanor Welte, naming them as defendants, individually and as executor and executrix. By the first cause of action stated in his amended complaint, he sought to impress a trust in his favor upon certain properties left by the decedent, including those which the decedent had devised to Alexander and Eleanor Welte, respectively. The asserted trust was predicated upon an alleged agreement between the decedent and his wife, who predeceased him, that their property accumulations would go to the survivor, and upon the death of the survivor to plaintiff Ryan and his sister, in equal shares. By his second cause of action, Ryan sought to impose a like trust for similar reasons, upon certain property which the decedent had conveyed to Alexander and Eleanor Welte during his lifetime, property which formed no part of his estate in probate.¹ None of the appellants herein was a party to that action; hence, not bound by any judgment that might have been rendered therein.

[3] It is apparent that Ryan v. Welte, supra, was a suit in equity which presented issues that were not of concern to the estate of McSweeney. It affected only the residue of the estate after the debts of McSweeney and the expenses of administration had been paid. It affected and bore upon the title of the devisees, legatees, and heirs of McSweeney to their respective portions of that residue and thus was of concern to them only in their individual capacities. The circumstance that two of them happened to be the executor and the executrix did not alter and should not obscure that fact. It follows that the cost of that litigation should be borne by them

in their individual capacities. It would be quite inequitable to charge any of that cost to them through the medium of an allowance out of the funds of the estate when that would not result in a ratable contribution by them, especially when, as in this case, it would probably result in the appellants paying all and respondents Alexander and Eleanor Welte paying none of it. If the respondents have any right of contribution from appellants, it is not a right which is enforceable by way of allowance out of the funds of the estate. Whether or not they have such a right, we do not decide, for it is not involved upon this appeal.

The applicable statutes and judicial precedents support the views which we have expressed.

In a probate proceeding, allowances may be awarded the executor or administrator for "any extraordinary services, such as sales * * *, contested or litigated claims against the estate, * * * [certain other enumerated services] * * * and *such other litigation or special services as may be necessary for the executor or administrator to prosecute defend, or perform.*" Prob.Code, § 902; emphasis added. The words "as may be necessary" do not appear in sections 910 or 911 of the Probate Code, relative to the allowance of fees for the attorney, but they are implied, for his services are rendered to the executor or administrator and may not be paid out of estate funds if rendered in the conduct of litigation the cost of which is not allowable to the executor or administrator out of those funds. Estate of Hite, 155 Cal. 448, 451-454, 101 P. 448, and Estate of Higgins, 158 Cal. 355, 357, 111 P. 8; construing the predecessor statute, §§ 1616, 1618, and 1619, Code Civ.Proc.

[4-8] The remedy for a person asserting a claim to the residue of an estate, predicated upon an asserted agreement to leave the property to him, is an action for quasi specific performance of the agreement, against the heirs, devisees and legatees, personally, to impress a trust in his

1. See pages 899 and 900 of 87 Cal.App. 2d 198 P.2d 357, for a more detailed

statement of the allegations of the complaint.

favor upon the property in their hands. The court, acting in probate, has no jurisdiction of such a controversy. *Ryan v. Welte*, 87 Cal.App.2d 897, 900, 198 P.2d 357; *Estate of Cropper*, 83 Cal.App.2d 105, 187 P.2d 780. The heirs, devisees and legatees, not the executor or administrator, are necessary parties to such an action. *McCabe v. Healy*, 138 Cal. 81, 70 P. 1008; *Stewart v. Smith*, 6 Cal.App. 152, 91 P. 667. The claimant need not join them all in one action. He may litigate separately with them. Those not joined are not bound by any judgment that may be rendered. *Bank of California v. Superior Court*, 16 Cal.2d 516, 106 P.2d 879. Such an action brought against the executor or administrator without joining any of the heirs, legatees or devisees, does not present a justiciable controversy. *Lee v. Zimmerman*, 75 Cal.App. 617, 243 P. 62.

[9-11] It necessarily follows that compensation for extraordinary legal services, rendered an executor or administrator in such an action, are not payable out of the funds of the estate. *Estate of Ross*, 179 Cal. 358, 182 P. 303. The same is true of legal services rendered an executor in the contest of a will, *Estate of Hite*, supra, 155 Cal. 448, 101 P. 448, and *Estate of Higgins*, supra, 158 Cal. 355, 111 P. 8, contests before probate, or in a proceeding to determine heirship, *Estate of Friedman*, 176 Cal. 226, 168 P. 21. Such a contest or proceeding involves solely the ownership of the residue of the estate after administration. The executor has no interest in that residue.

Respondents suggest that the rule is different in respect to an executor's successful defense of a will contest after probate. One of the cases upon which they rely is *Estate of Duffill*, 188 Cal. 536, 206 P. 42. But that was an allowance of attorney's fees at the request of testamentary trustees, after distribution to them as trustees, out of the trust estate, for services rendered in preserving the trust estate. The court applied a principle of the law of trusts (not of the law governing the administration of decedents' estates), to the effect that "the trust estate is chargeable with all expenditures incurred in the interest of the

beneficiaries", 118 Cal. at page 556, 206 P. at page 51. In *re Whetton's Estate*, 98 Cal. 203, 32 P. 970, merely holds that in a contest after probate citation must be served on the executor, as well as on the heirs and the beneficiaries under the will, and that he has a duty to defend against such an attack. But it says nothing about extraordinary fees to his attorneys in conducting that defense. The opinion in *Estate of Hunt*, 33 Cal.App.2d 356, 91 P.2d 612, holds that when six months have elapsed after issuance of letters testamentary, the trial court has jurisdiction to allow attorney's fees for services rendered in the defeat of a contest after probate, but does not indicate that the question whether those fees should be paid out of estate funds or by the holders of title to the distributable residue was involved or presented to the court for consideration. In *Estate of Dunton*, 15 Cal.App.2d 729, 60 P.2d 159, the executor's attorney was allowed out of the funds of the estate a fee for services rendered in successfully resisting a contest after probate. But the court emphasized the fact that there the executor was the sole beneficiary of the residue of the estate. The fee in such a case would, for all practical purposes, be paid by the person who solely benefited by the litigation in which the services were rendered. Similar is *Estate of Brightman*, 87 Cal.App. 80, 261 P. 1044. The executrix was sole legatee, except for gifts of \$4,000 to others, of an estate inventoried at \$23,240. The court in the *Dunton* case characterized the *Brightman* case as one in which the executrix was "substantially the sole beneficiary under the will", 15 Cal.App.2d at page 732, 60 P.2d at page 160. The *Dunton* and *Brightman* cases serve to emphasize the inequity of such an allowance when, as in the instant case, the persons principally benefiting would bear little, if any, of the cost, and others, not parties to the litigation, would bear most, perhaps all, of that cost.

[12] The trial court, of course, had authority to allow compensation for extraordinary services rendered in the conduct of the sales of real property, but the allow-

ance was in a lump sum and, in large part, for services which cannot under the law be compensated out of the funds of the estate, and we have no means of knowing how much was awarded for each type of service. The order, therefore, must be reversed as a whole.

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.



107 Cal.App.2d 284

CHAFFEE v. SORENSEN et al.

Civ. 18518.

District Court of Appeal, Second District,
Division 2, California.

Nov. 6, 1951.

Dorothy M. Chaffee sued Alice V. Sorensen and others to quiet title to real property and to cancel a deed executed by plaintiff's deceased husband in favor of the named defendant. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment adverse to plaintiff, and she appealed. The District Court of Appeal, Wilson, J., held that the evidence sustained the trial court's finding that the deed had been delivered.

Affirmed.

I. Appeal and Error ⚡1010(1)

Deeds ⚡66

Delivery or nondelivery of deed is question of fact to be determined by surrounding circumstances of transaction, and where there is substantial evidence or where inference or presumption may be drawn from evidence to sustain trial court's finding of delivery, such finding will not be interfered with on appeal.

2. Deeds ⚡208(1)

In widow's action to cancel deed executed by her deceased husband to his daughter, evidence sustained finding of delivery essential to validity of deed. Code Civ. Proc. § 1933; Civ.Code, § 1626.

3. Deeds ⚡88

Recording of deed gives notice to world of transfer but does not add to its efficacy as complete conveyance of title, and therefore operation of deed to transfer title was not affected by its nonrecording.

4. Deeds ⚡194(2)

Presumption of nondelivery raised by grantor's possession of deed may be overcome by evidence.

5. Deeds ⚡179

Re-delivery of deed to grantor does not amount to re-conveyance of title, even though it is delivered with intent that grantor cancel it.

6. Deeds ⚡181

Grantor's destruction of deed re-delivered to him by grantee would have been legally ineffective to reclaim title in him.

7. Gifts ⚡19(1)

Where grantor intended to make gift of land by deed to grantee, fact that escrow was not opened, that title insurance report or title insurance policy was not ordered, and that no consideration was paid, would not affect delivery, since none of such acts would be necessary to consummation of transfer

8. Divorce ⚡255

Husband and Wife ⚡14(10)

Where husband and wife had held property in joint tenancy, and husband had conveyed his interest therein to his daughter, daughter could not have been deprived of such interest either by agreement between husband and wife or by decree in divorce action between them to which daughter was not party, and therefore it was not incumbent upon her to rise in court during trial of divorce action and proclaim her title.

9. Cancellation of Instruments ⚡47

Quieting Title ⚡44(3)

In widow's action to quiet title to real property and to cancel deed executed by her deceased husband to his daughter, payment of taxes, insurance, and repairs on property by decedent in his lifetime and by executrix of his will after his decease

would be merely circumstances to be weighed against other evidence in case.

10. Appeal and Error Ⓒ1011(1)

Trial court's findings upon conflicting evidence will not be disturbed by District Court of Appeal.

11. Deeds Ⓒ56(1)

To constitute effective conveyance, there need be no formal transfer or manual tradition of deed from grantor to grantee.

12. Quieting Title Ⓒ44(1)

In widow's action to quiet title to real property and to cancel deed executed by her deceased husband to his daughter, burden of proof rested upon widow to establish every element of her case, including alleged nondelivery of deed.

Button & Herzog, Hollywood, for appellant.

Snyder & Fletcher and Owen E. O'Neil all of South Pasadena, for respondents.

WILSON, Justice.

This is an action to quiet title to real property and to cancel a deed executed by plaintiff's deceased husband to his daughter, defendant Alice V. Sorensen, and for other relief. From an adverse judgment plaintiff has appealed.

Plaintiff and Ira Chaffee were married on October 11, 1944, when she was 59 years of age and Chaffee 74. The latter had three children by his first marriage—the two daughters who are named as defendants and a son. Chaffee was possessed of separate property valued at about \$100,000. In April, 1946, Chaffee purchased with his separate funds the property which is the subject of this action and took title in himself and plaintiff as joint tenants. Marital difficulties arose in March, 1947. About March 13 Chaffee asked his daughter Alice to take him to an attorney; she first suggested an attorney known to her father but he did not accept the suggestion; he spoke of Mr. Fletcher, who had been Alice's attorney for several years, and at his request she accompanied him to Mr. Fletcher's office. Plaintiff also engaged an attorney and

negotiations were commenced between the two attorneys looking to a divorce and a property settlement agreement. On March 24, 1947, at Chaffee's request, Alice again took him to the attorney's office. Chaffee told his attorney the home place was in joint tenancy and he wanted to "fix it" so plaintiff would not get it; he wanted anyone to have the place except his wife. His attorney told him he could not deprive her of her vested half interest in the joint tenancy property and in order to break the joint tenancy it would be necessary for him to make a conveyance of his interest. He was further advised that to prevent plaintiff from getting any of his estate at his death he should make a will. When asked to whom he wanted to convey the property Chaffee said, "Give it to Alice."

At Chaffee's direction the attorney prepared a deed from Chaffee to Alice which was dated March 24, 1947. As it lay on the desk Chaffee signed it and upon completion of his signature he said "There!" The attorney took Chaffee's acknowledgment to the deed, signed the notarial certificate and placed it in Chaffee's file. Alice Sorensen never had possession of the deed; it was kept in the attorney's office. Chaffee and wife continued to occupy the property until they separated on August 5, 1947.

On May 21, 1947, Chaffee's attorney prepared a property settlement agreement in which it was recited that the property in question was vested in Chaffee and wife as joint tenants, and sent a letter to plaintiff's attorney stating that when the grant deed he enclosed with the letter was excuted and returned he would send Mrs. Chaffee's attorney a check for \$5,500. The value of the joint tenancy property was estimated at \$11,000.

The property settlement agreement was not signed and negotiations for a settlement failed. Chaffee and his attorney had some slight difficulty and on October 8, 1947, Chaffee requested his papers, having consulted with another attorney. The papers were delivered to Chaffee by the attorney's secretary. The deed, which had remained in the file, was delivered with the other papers.

Shortly after the separation on August 5, 1947, plaintiff brought an action against Chaffee for separate maintenance. He filed a verified answer and cross-complaint in which he stated he owned the property. He testified to the same effect at the hearing of the motion for temporary alimony and again on the trial of the action. Alice was present in court and heard her father's testimony but did not inform the court or anyone else that he had conveyed the property to her. The divorce was granted in October, 1948. In November, 1948, Chaffee returned to Mr. Fletcher and engaged the latter to oppose incompetency proceedings brought against him by his son. He was adjudicated incompetent and at his request Alice was appointed his guardian. She continued to employ Mr. Fletcher to act for her. As guardian she paid for a new roof on the house and took credit for the cost in her guardianship account.

Chaffee died on January 31, 1949. On January 28, while Alice and her attorney were examining papers in Chaffee's desk preparatory to filing an inventory in the guardianship proceedings they found the deed in question. Noting that it did not bear the recordation stamp they had it placed of record immediately. Alice was appointed executrix of her father's will and as such paid taxes on the property out of the estate funds. Such payments were not credited to her account as executrix; it was understood that such disbursements would be charged to the three heirs since she declared she did not want the property herself but intended to share it with her brother and sister.

Plaintiff's sole point is that the evidence is insufficient to sustain the finding that the deed in question was delivered. She opens her argument with the concession of the rule in such cases: "That disregarding all evidence favorable to appellant, if there is evidence to support the respondent the court is without power to reverse the judgment."

Section 1626 of the Civil Code provides: "A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." Section 1933 of the Code of Civil Procedure reads: "The

execution of an instrument is the subscribing and delivering it, with or without affixing a seal." In *Williams v. Kidd*, 170 Cal. 631, 638, 151 P. 1, 3, the court said: "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question."

[1-3] Delivery or nondelivery of a deed is a question of fact to be determined by the surrounding circumstances of the transaction and where there is substantial evidence or where an inference or presumption may be drawn from the evidence to sustain the court's finding of delivery such finding will not be interfered with on appeal. The evidence that Chaffee was having marital trouble, asked to be taken to an attorney, sought advice as to how to prevent his wife from getting his property, his statement "Give it to Alice," the acknowledgment of the deed, his exclamation "There!" after he had signed it, leaving it with the attorney who he knew had been Alice's attorney for many years, clearly indicate his intent to deliver the deed. There is no evidence that Chaffee left the deed with the attorney to be delivered and become effective at his death, or that he intended Alice to hold the property in trust for him, and there are no such inferences. It was a final act upon his part with which he expressed his emphatic satisfaction upon completing his signature. His intent to deprive his wife of any of his property is further demonstrated by his executing his will, whereby his entire estate, which was all separate property, was bequeathed to his three children. All these facts make it manifest that he had no other

intention than to divest himself of title and to vest title irrevocably in Alice. The operation of the deed to transfer title was not affected by its nonrecording. The recording of an instrument gives notice to the world of the transfer but does not add to its efficacy as a complete conveyance of title.

[4-6] Plaintiff contends that possession of the deed by Chaffee raises a presumption of its nondelivery. Such presumption may be overcome by evidence and has been overcome in the instant case. Possession of the deed by the grantor is explained by evidence which the court accepted and upon which its findings were based. When Chaffee went to Mr. Fletcher's office and asked for his papers he was engaged in a divorce action and the parties and their attorneys were negotiating a property settlement agreement. When he changed attorneys the papers the new attorney desired and needed were those relating to the divorce action and the property settlement agreement, and those were no doubt the only papers in Chaffee's mind. He did not ask for the deed, and the attorney's secretary inadvertently handed him the entire file in which the deed reposed. He had not had any difficulty with his daughter Alice and had no reason to request possession of the deed. If he had expressly requested it the legal situation would not be altered. Redelivery of a deed to the grantor does not amount to a reconveyance of title, *Roberts v. Abbott*, 48 Cal.App. 779, 782, 192 P. 345 even though it is delivered with the intent that the grantor cancel it. *Lawton v. Gordon*, 34 Cal. 36, 38. Furthermore, for several months before he became incompetent Chaffee had had possession of the file of his papers which included the deed. Had it not been his intention to convey title to his daughter he could have manifested the absence of such intent during those months by destroying the deed. Even though such act would have been legally ineffective to reclaim title in him he might have made a layman's attempt but did not do so.

[7] The facts stressed by plaintiff that an escrow was not opened, a title insurance report or a title insurance policy was not ordered, and no consideration was paid, do

not affect delivery since none of such acts was necessary to a consummation of the transfer. Inasmuch as Chaffee was making a gift of his interest in the property to his daughter we do not expect to find the presence of the same formalities as if it had been a transaction in which one person was selling property to another for a cash consideration.

Plaintiff contends that Chaffee's nonintent to deliver the deed is shown by the facts (1) that in the proposed property settlement agreement reference was made to the property as joint tenancy property of the parties and (2) that Chaffee testified in the divorce action that the property belonged to him. These contentions are without merit. (1) Mr. Fletcher testified that in preparing the property settlement agreement he had inadvertently referred to the property as being owned by the parties in joint tenancy instead of as tenants in common. The court evidently accepted this testimony as being true. (2) At the time of the trial of the divorce action on October 26, 1948, Chaffee was 78 years of age. He was adjudicated an incompetent in November, 1948. His deed to Alice had been executed a year and a half previously. Due to his age and mental condition the execution of the deed had gone from his memory. This is evidenced by his testimony at the trial that the property belonged to him and his wife had no interest in it. Having forgotten that he had placed the title in joint tenancy it is reasonable to assume he had likewise forgotten the execution of the deed to Alice which was made for the purpose of breaking the joint tenancy.

[8] Plaintiff also comments that during the trial of the divorce action when the joint tenancy was under discussion Alice did not inform the court that she held a deed to the property. It was not incumbent upon her to rise in court and proclaim her title of which she could not be deprived either by agreement between Chaffee and his wife or by a decree divorcing them since she was not a party to the action.

Plaintiff says Chaffee may have meant any one of several things by his expression "There!" after he had signed the deed.

The trial court has drawn its inference from such expression and from the evidence of all the surrounding circumstances leading to the signing of the deed and the expressed desire of the grantor. The inference drawn by the court is that Chaffee thought he had done all that was necessary to transfer title to Alice, and his exclamation was one of exulting satisfaction not only that he had given the property to his daughter but that he had deprived his wife of her right to succeed to a half interest therein upon his death.

[9-11] The payment of taxes, insurance, and repairs on the property by Chaffee in his lifetime and by the executrix of his will after his decease are merely circumstances to be weighed and that were weighed by the trial court against other evidence in the case and particularly the affirmative evidence of delivery given by Alice and Mr. Fletcher, the only persons present when the deed was signed, acknowledged and delivered. Such facts did no more than raise a conflict of evidence on the vital issue of the sufficiency of the delivery of the deed to pass title, and the trial court having resolved that conflict its finding will not be disturbed by this court. *Blackledge v. McIntosh*, 85 Cal.App. 475, 480-481, 259 P. 770. Likewise, the reference during the trial of the divorce action and in the property settlement agreement to the joint tenancy does no more than create a conflict which has been resolved by the trial court. There need be no formal transfer or manual tradition of a deed from grantor to grantee. It is clear that the thought uppermost in Chaffee's mind was the passing of an undivided one-half interest in the property so that his wife would not obtain title to the whole property at his death by her right of survivorship. When the attorney asked to whom the title should be transferred Chaffee said "give it to Alice." When he signed and acknowledged the deed and said "There!" he indicated that he thought he had done all that was necessary to complete the transfer. His delivery of the deed to Mr. Fletcher, who to his knowledge was also Alice's attorney, without any direction or restriction, indicated as the

court found that he intended to divest himself of title completely and sustains the finding that the deed was delivered.

[12] The burden of proof rested upon plaintiff to prove every element of her case including the alleged nondelivery of the deed. Having failed to sustain the burden which the law casts upon her, and the court having resolved the conflicts, if any, in the evidence and upon the evidence and reasonable inferences drawn therefrom having rendered judgment against her, she cannot prevail on this appeal.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



107 Cal.App.2d 105

PEOPLE v. SIMON.

Cr. 2740.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1951.

Rehearing Denied Nov. 9, 1951.

Hearing Denied Nov. 19, 1951.

Michael R. Simon was convicted in the Superior Court of the County of Alameda, Charles Wade Snook, J., on eight counts of grand theft by trick or device, and he appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained conviction.

Affirmed.

1. False Pretenses ☞5

In order to establish theft by trick or device, proof of fraudulent taking with intent to deprive the owner of the property is sufficient without proof that defendant intended to convert the property to his own use.

2. False Pretenses ☞49(1)

Evidence sustained convictions on eight counts of grand theft by trick or device.

3. Criminal Law ⇨641(1)

Where defendant, who was an accountant with a prior felony conviction, requested at his arraignment on charges of grand theft by fraud and device that public defender be permitted to withdraw and that defendant appear in propria persona, and that was done without any hearing by court to determine whether defendant was capable of intelligently waiving his right of representation by counsel, defendant would not be deemed to have been deprived of his right to be represented by counsel.

4. Criminal Law ⇨1043(2), 1044

Admission of hearsay evidence could not be considered on appeal, in absence of any specified ground in defendant's objection made after the testimony was given, and in absence of motion to strike.

5. Criminal Law ⇨698(2)

In prosecution for grand theft by trick or device, defendant who appeared in propria persona without an attorney could not complain about failure of trial court to object to testimony introduced by the prosecution.

6. Witnesses ⇨291

In grand theft prosecution, sustaining of objection to question of defendant on recross-examination of witness was not error, where relevancy of question was not shown.

7. Criminal Law ⇨1170(1)

In grand theft prosecution, refusal to permit defendant to ask witness as to whether letter was in handwriting of prosecuting witness was not prejudicial error, where letter was immaterial. Code Civ. Proc. § 1943.

8. Criminal Law ⇨1168(1)**Witnesses** ⇨4

In grand theft prosecution, wherein representative of bank appeared as a witness for the people from another state, it was error for court to refuse to make witness available to defendant for direct examination, but such error was not reversible error, where witness had no special knowledge as to matters with respect to which defendant desired to question witness, and other witnesses thereafter ful-

filled defendant's purpose. Code Civ. Proc. § 1990; Pen. Code, § 1334.3.

9. Criminal Law ⇨1173(2)

In grand theft prosecution, court's failure to give on its own motion an instruction that confessions and admissions are not admissible as evidence without independent proof of the corpus delicti, was not reversible error, where evidence apart from defendant's statements to police officer fully established the corpus delicti.

10. Criminal Law ⇨781(1)

In grand theft prosecution, failure of court to instruct on necessity that confession be free and voluntary, was not error, where police officer testified to the free and voluntary character of defendant's statements, and defendant did not intimate in any way that his statements were not free and voluntary, and he stressed on cross-examination his friendly relation with the police officer during arrest.

11. Criminal Law ⇨1110(1)

Where defendant, on motion for new trial, did not make any showing of prejudice caused by restriction of argument to jury, and he neglected to have matter included in record on appeal, and he did not move separately for augmentation prior to submission of case on appeal, and he did not indicate in his briefs any matter not argued to jury because of lack of time which possibly might have influenced verdict, defendant was not entitled to augmentation of record on appeal. Rules on Appeal, rules 12(a), 36(b).

12. Criminal Law ⇨1037(2), 1129(1)

Where no misconduct on part of District Attorney was assigned as error by defendant, and no instruction to jury to disregard alleged misconduct was requested at any time, and it was not even contended that alleged misconduct was of such character that it could not have been cured by any admonition, alleged misconduct was no basis for reversal.

George Nye, Public Defender of Alameda County, John B. Reilley, Asst. Public De-

fender of Alameda County, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., California, David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant appeals from judgments on eight verdicts finding him guilty of eight counts of grand theft and from the order denying his motion for a new trial as to each count. A prior felony conviction (two counts of forgery) had been alleged and found.

All counts have some relation to the estate of Dr. Emile G. Schuster, who died on December 23, 1949. Defendant became a patient of the doctor in April, 1949, and later audited the doctor's books once a month. He was also preparing the income tax returns of the doctor for the year 1949, in which year the doctor did not make quarterly payments on estimated income. Defendant had received \$1500 from the doctor for those services. Under the doctor's will his mother, Mrs. Marie Schuster, and his son, Emile L. Schuster, then a minor going on twenty, usually called Junior as will be done hereinafter, were the main beneficiaries. The death of the doctor caused his mother, who until then had been living with him, such mental strain that she was hardly able to handle her own affairs. Junior had been in military service and had since then worked in Ohio. He had no knowledge of the financial and business matters of his father or of such matters in general. The assets of the estate amounted to \$50,000 to \$60,000, mostly in commercial and savings bank accounts, war savings bonds, and stocks; there was also a large amount of accounts receivable for doctor's services and the lease and goodwill of the doctor's office. Mr. Stephen Casalina, the attorney of the doctor, assisted Mrs. Schuster in handling the petition for probate of the will and her appointment as executrix. Stella Painter, who had been the office nurse of the doctor during the last two years preceding his death, stayed temporarily in the office to take care of current matters and later when the doctor's practice and office were taken over by Dr.

Gleason she stayed as his nurse. The first five counts relate to thefts from Mrs. Schuster, the executrix, the last three counts to thefts from Stella Painter, the nurse. The theory of the People as to all counts was theft by trick and device. Several related acts of defendant not charged in the information were shown as similar offenses showing appellant's intent and purpose.

The evidence for the People was mainly as follows:

Mrs. Schuster contacted defendant around January 1, 1950, in connection with the tax work he was doing for the doctor. She had several conferences with him in the first half of that month at which Junior and her son William Schuster, a longshoreman, were always present. It was first agreed that defendant would complete the preparation of the income tax. He told them that he was a certified public accountant working for doctors and attorneys. In later conversation he told them that he was immensely wealthy, that he had \$200,000 in a safe deposit box and that he just did this work for a pastime, and later still that he had an automobile agency from which army and navy had to buy both in Oakland and in Reno. He actually had a business there under the name of Simon's Buyers Service, which sold some cars at a discount to military personnel. When defendant found out that Mrs. Schuster was not satisfied with Mr. Casalina he proposed that as a favor he would take over the administrative and estate tax work of the estate. He said he did it out of gratitude as the doctor had been the only physician who had been of any help to him. However when the income tax work had been completed and the tax paid he asked whether a salary of \$2000 would be convenient without mentioning that he had already received \$1500 for that work. The \$2000 was paid. When on January 13th Mrs. Schuster had been appointed executrix and his services for the estate had been accepted, he made her sign and her son William and Junior witness a power of attorney to administer and manage the estate which in that document he called "Power of Appointment." He gave as the reason that

without it the banks and brokers who held the assets of the estate would not give him the required information and records. At the signing of this power William Schuster asked defendant whether that power did not entitle him to touch any of the money of the estate. Defendant answered that it was only to get the records of the estate and to make certain arrangements but that it was definitely understood that only Mrs. Schuster as executrix would have the right to touch the moneys of the estate. After that he assisted Mrs. Schuster in having the different accounts of the doctor changed into her name as executrix and in bringing about arrangements as to the doctor's practice and accounts receivable. Dr. Gleason took over the office under the obligation to pay the estate a percentage of his receipts and Stella Painter undertook the collection of the accounts receivable for which she would be paid 25% of her collections. The collections were paid by her into the account of the executrix at the Bank of America, 12th and Broadway branch in Oakland. Monthly after Mrs. Painter's accounts had been audited by defendant her salary of 25% was paid her by check on that account by Mrs. Schuster. In that account also were deposited the payments of Dr. Gleason and on that account Mrs. Schuster drew for rent of the office and living expenses for herself and Junior. Defendant told her that she was allowed to make those withdrawals but that otherwise before the settlement of the estate no assets could be disposed of without court permission.

Late in January he told Mrs. Schuster that attending to automobile and accountancy business both in Reno and Oakland was too much for him and that he was going to concentrate on Reno and live there. He said the assets of the estate should be in one account for administration and settlement and that for convenience that should be with him in Reno. They would then be put in an account of the estate of Dr. Emile G. Schuster and not be touched. He also said that out of gratitude to the doctor he would treat Junior as his son and teach him the automobile business and make him earn a living. Junior would also act as intermediary between

defendant who could not often come to Oakland and Mrs. Schuster. Mrs. Schuster should send him all financial records and vouchers and should follow all directions defendant would send her through Junior and not speak about them with other people. Another ground given later to Junior for bringing all assets to Reno was that there they were safe from attachment by Mrs. Painter who according to defendant asserted a doubtful claim against the estate. More will have to be said about this claim later. In early February Junior followed defendant to Reno where he was given little opportunity to learn or work but much to spend money provided partly by Mrs. Schuster but mostly by defendant. Repeatedly defendant sent him to Mrs. Schuster with directions to have her take money from specified accounts of hers as executrix and transfer it through Western Union to a specified account of defendant in Reno. The instructions to Junior were detailed on note pads. The two earliest of such remittances brought out at the trial (\$2000 on February 15 and \$2100 on February 23) were not part of the information but shown as similar offenses only. Thereafter defendant sent Junior down again with directions to get money from the account in the Berkeley Guarantee and Savings and Loan Association and to send the money to the account Mike Simon in the First National Bank of Nevada, First and Virginia Branch, Reno. Defendant also had an account Michael Simon, Trustee in that bank into which some other moneys of the estate were deposited, but several transfers he directed to be made to his personal account. Junior had his grandmother execute the directions and in accordance with them she withdrew \$2050 from her account on February 27, bought with it a Western Union money order to be credited to said "Mike Simon" account to which its amount of \$2040.97 was credited on February 28. On March 4, defendant received in the same account \$5077.09 from the estate not charged in the information. On March 21 defendant returned \$2000 or \$2500 through Junior when Mrs. Schuster complained that the

balance in the Bank of America at 12th and Broadway, Oakland, had temporarily become too low for current needs but a few days later he instructed Junior to have money taken out of the account and sent to him in the same manner as the money sent on February 27. This was done and accordingly a Western Union money order of Mrs. Schuster for \$2500 was credited to the "Mike Simon" account on March 27.

In the meantime defendant had formed a Nevada corporation "Fleet Sales, Inc." to continue the automobile business he had done under the name Simon's Buyers Service. He offered Mrs. Schuster and Junior a living in the new corporation on the following basis: Junior was to become president, Mrs. Schuster, vice-president and defendant, secretary-treasurer. Mrs. Schuster would get \$200 a month out of it. The set up of the corporation was that Junior would hold seven, Mrs. Schuster three, and defendant three shares, but actually defendant would furnish the money required. No money of the estate would be touched for it. Defendant told Junior he had to take \$4000 out of his safe deposit box for Fleet Sales, Inc. but because that money was not accounted for with the tax authorities, he wanted a fictitious loan from Mrs. Schuster to that amount and he gave Junior a note of his in behalf of Mrs. Schuster for \$4000 dated March 5, 1950, which Junior showed to Mrs. Schuster and put away for her. No money was actually lent to defendant. Neither Mrs. Schuster nor Junior received certificates of stock. They signed minutes prepared by defendant without any meetings actually having been held. On March 10 they signed the agreement by which Fleet Sales, Inc. took over the assets and liabilities of Simon's Buyers Service with as only consideration defendant's position in Fleet Sales, Inc. The actual direction was solely in the hands of defendant, who acted as if he owned the business—even after he had formally resigned as secretary-treasurer. Junior signed checks for Fleet Sales, Inc. but on instruction of defendant. Some of the favors defendant did for Junior and Mrs. Schuster he did through Fleet Sales,

Inc. He proposed in the beginning of April that Fleet Sales, Inc., without additional cost, should take over the collection of the accounts receivable of the estate on which Miss Painter had collected more than \$5000 but which had begun to lag. The testimony of Mrs. Schuster and Junior that defendant was to furnish the money for Fleet Sales and that no money of the estate would be touched is corroborated by Frank Baker the manager of the Oakland office of Fleet Sales whom defendant told that he was setting up Junior in the business as a friendship gesture and that the money to run Fleet Sales, Inc. came from defendant's personal funds; that Fleet Sales, Inc. was collecting temporarily for the estate to save Mrs. Schuster expenses and several times that the funds of the estate could not be used and could not be touched by anybody before the estate had gone through probate.

At the end of March defendant sent Junior down again to California to arrange the sale of stock of the estate held by Davies and Mejia in San Francisco, the proceeds of which should also go into the account in Reno. He instructed Junior to ask the assistance of Mr. Casalina to obtain the approval of the probate court for the sale. However Mr. Casalina, who had been pressing defendant for an inventory of the estate, refused to act. He gave as his opinion that moneys and bank accounts, of which he did not receive a listing, should be sufficient for the taxes and administration costs and that he was opposed to selling stock which he considered A-1. Informed by Junior of the refusal of Mr. Casalina, defendant procured Mr. Carl P. Abbott and his associates to be substituted for Mr. Casalina as attorneys for the estate. Relying on information given by defendant and approved by the executrix that the sale was necessary to raise cash to pay costs of administration and taxes, Mr. Abbott petitioned for and obtained the authorization of the court to the sale. Davies and Mejia paid over the proceeds to the executrix in three checks totaling \$15,672.24 and dated April 13 and 14 which she endorsed in blank and which were handed over to defendant who endorsed

two in his own name and one in behalf of Fleet Sales, Inc.

Approximately at that time defendant instructed Mr. Baker of Fleet Sales, Inc. to take Mrs. Schuster to the bank where she had war bonds in a safe deposit box and then to the Crocker National Bank for the cashing of those bonds. This was done. Approximately two weeks later Mr. Baker took her again to the Crocker National Bank to receive a cashier's check for the amount cashed. With that cashier's check they bought a Western Union money order of \$5,737.50 to Michael Simon, care of First National Bank of Nevada, First and Virginia Branch, Reno. It was endorsed by defendant and deposited by him on April 27 in his trustee account with said bank, which account at that date had been overdrawn by a withdrawal of \$2500. On that same date defendant had bought at that bank a cashier's check of \$2500 payable to Marie C. Schuster, which he sent to Mr. Abbott, her attorney, who had made a settlement of \$2500 with a beneficiary under the will of Dr. Schuster. The fact that the money came by cashier's check from Reno was a reason for Mr. Abbott, who did not know that the assets of the estate had been transferred to defendant, to press for an inventory. Defendant stalled, giving as an excuse that the accounts receivable had first to be liquidated.

On May 17 defendant instructed Mr. Baker to pick up Mrs. Schuster at her home and bring her to the Oakland office of Fleet Sales, Inc. There defendant asked her whether she had some more money as he had to have all together for the keeping of the account and the taxes. He instructed Mr. Baker to get a blank check on the Bank of America, had another employee of Fleet Sales, Inc. make it out for \$1000 to Michael R. Simon, had Mrs. Schuster sign it and instructed Mr. Baker to cash it. Mr. Baker did so and gave the money to defendant.

After defendant had obtained the last \$1000 from her Mrs. Schuster told her son William of all the money she had given to defendant. The Schusters as well as Mr. Abbott became worried. Both Mr. Abbott

and William Schuster separately visited defendant in Reno in June to find out how matters stood and where the money was. Defendant told William Schuster around June 20 that the funds of the estate were intact in a bank, that the following week he would be in Oakland and that the estate could be settled. Mr. Abbott demanded that all the assets of the estate be turned over to Mrs. Schuster. Defendant first promised him that on June 20 he would come to Oakland to settle everything and then postponed the meeting with Mr. Abbott and the Schusters to June 27, at which time he did not come either. He was arrested without having returned any of the funds or having given any account of them.

The obtaining by defendant from Mrs. Schuster of the \$2040.97 on February 28, 1950, the \$2500 on March 27, the \$15,672.-27 on April 14, the \$5,377.50 on April 27 and the \$1000 on May 17 form the basis of counts 1 to 5 of the information.

With respect to the next three counts, relating to Stella Painter, the evidence was as follows: When defendant in the beginning of April, 1950, told Stella Painter that the collection of the accounts receivable was going to be taken from her and given to a "collecting agency", she showed him a receipt of Dr. Schuster dated 9-2-1948 for an amount of \$1400 received from her as a loan, and told him that that note had not been paid. Defendant said that it was a perfectly good note and that he would present it to the attorney for payment. She thereupon gave him the note. He did not present the claim for her to the executrix or to Mr. Abbott, the attorney of the estate, and did not tell them that he had the note. He had told Mr. Abbott that such a note was in existence but that he and Mrs. Schuster knew that it had been repaid and that he would take care of that matter. Around April 16 he showed the note to Junior and said to him that he had got it away from her (Mrs. Painter). Defendant offered the receipt in evidence at the trial. There was evidence that Stella Painter had loaned the money to the doctor for some of his stock transactions and no evidence of payment.

In early May, 1950, defendant offered to sell Dr. Gleason the practice of Dr. Schuster outright instead of on a percentage of receipts. Dr. Gleason was not interested in acquiring the accounts receivable, and in the presence of Dr. Gleason defendant offered to sell them to Stella Painter for \$3000, a price he said Mrs. Schuster had agreed to. He further told her that she had to put down \$2000 immediately and the rest on approval of the sale by the court. Until said approval she had to deposit her collections for which the accounts were returned to her (Fleet Sales, Inc. had collected only a little on them) in the account of Mrs. Schuster. In accordance with instructions of defendant she paid him the \$2000 in a cashier's check dated May 17, 1950, payable to Michael R. Simon, Trustee, which defendant cashed. Defendant did not pay over the money to the executrix, who testified that she did not know either of the sale of the accounts receivable or of the outright sale of the practice, and Mr. Abbott was not instructed to ask approval of the sale.

In June defendant induced Dr. Gleason to give him an initial payment of \$1000 on the pretended outright purchase of the practice for \$5000. In accordance with defendant's instructions the \$1000 was paid in a cashier's check dated June 13, 1950, payable to Michael R. Simon, Administrator of the Estate of Emile G. Schuster M.D. and so endorsed by defendant. This matter was shown as a similar offense.

Finally on June 24th defendant told Stella Painter by telephone from Reno that for the hearing of the settlement of the estate all money had to be available and that therefore Mrs. Schuster demanded that all moneys paid as salary for collections should be returned to him by telegraphic money order; the matter would be straightened out after the settlement in court. She sent him a telegraphic money order for \$1200 on the same date, which money order he cashed at the First National Bank of Nevada but did not deposit in any account there. It was not paid to the executrix.

At the trial it was shown that in neither of the two banks in Reno where defendant had accounts was there a separate

account in the name of the estate or in defendant's name in special relation to the estate. In the First National Bank of Nevada there was an account "Mike Simon" of longer standing which from the middle of November, 1949, to the middle of January, 1950, did not show a balance over \$5; it then mounted until on March 6, it reached a high of over \$6000 from which the trend was generally downward; since June 1, 1950, it stayed below \$10. An account "Michael R. Simon, Trustee," in the same bank was opened with a debit balance climbed until nearly \$7500 on March 21, 1950, and again to nearly \$5000 on April 17 and May 2 but then declined rapidly and from June 1 it contained less than \$20. Both accounts showed a large number of deposits and withdrawals in round amounts of hundreds and thousands of dollars. Many of the withdrawal checks were cashed at the Mapes Casino in Reno. Junior testified that he often saw defendant gambling there for high stakes. Sometimes they cashed checks there for other purposes but ninety percent of the checks they cashed there were for gambling. There were also in the same bank two accounts "Fleet Sales, Inc." and "Fleet Sales, Inc. (Petty Cash Account)" which after June 1, 1950, together contained always less than \$30. In the Nevada Bank of Commerce in Reno defendant had one account "Michael R. Simon" opened February 17, 1950, which on March 20, 1950, reached its apex of over \$4000 but on June 1 was down to below \$2.00. On June 14 the balance again reached \$1000 to be practically exhausted after June 29. Defendant also offered in evidence the statements of his accounts with Crocker First National Bank, Oakland. The accounts "Simon M" and "Simon, Michael R., Trustee" did not show a balance of any importance after the end of February, 1950; of the three accounts of Fleet Sales, Inc. in said bank two were closed on June 1, whereas the third, the "Petty Cash Account" since then contained less than \$100. Mr. Baker, manager of the Oakland office of Fleet Sales, Inc., testified that around June 1 Fleet Sales, Inc. closed down and that defendant offered

him to take over the Oakland Office. Mr. Baker found that approximately \$2800 deposits on cars previously ordered and not delivered were owing, that the amounts of said deposits were not in the accounts and that also salaries were owing. Defendant promised to have the funds on hand at his lawyer's but he did not appear.

After the evidence with respect to all the above facts had been received G. L. Moore, Inspector of the Oakland Police Department, testified that when he was in Reno in July in the investigation of the complaint of Mrs. Schuster against defendant, he asked defendant about his financial situation and told him that allegedly there was about \$59,000 missing from the estate, and that defendant answered: "They lie, it's \$57,500", and further that it was unfortunate that he was arrested because he was working on a proposition that would have enabled him to pay back everything. He also said that he would prefer to waive extradition, enter a plea of guilty and get the matter over with as quickly as possible. He later told inspector Moore that he had gone to Las Vegas to secure some money to go to Mexico but that he did not want to leave his wife in the mess.

Appellant did not further stress the contention made in his opening brief that the evidence was not sufficient to sustain the verdict. We shall nevertheless discuss this point first because the strength of the evidence will be of importance in the consideration of other assignments of error. The position of appellant is that Mrs. Schuster and Junior, as sole heirs of Doctor Schuster dealt with the assets of the estate as their own, that they appointed appellant to manage the estate, that they used the funds, and authorized use of the funds of the estate by appellant for investment in Fleet Sales, Inc. for the expenses of collecting the accounts receivable and for their personal expenses, and that only when they thought that the investment in Fleet Sales, Inc. was not going to be profitable, they claimed that appellant was holding the funds of the estate as trustee. As to the counts regarding Stella Painter appellant contends that under his power as manager he took possession of the note, sold

the accounts receivable and held for future disposition of the court sums paid to Mrs. Painter without authorization of the Probate Court. It is further asserted that erroneous rulings of the court prevented defendant from presenting this defense. However appellant does not point out any evidence which tends to support his position and the evidence clearly does not support it. The power given him related solely to acts of management of the estate permitted to the executrix herself and even if his authority had not been orally further clarified, as testified by the Schusters, it would not have permitted appellant to commingle funds of the estate with his own, or do other acts not permitted to a trustee. Any permission as asserted by appellant was most vigorously denied by the Schusters and appellant did not himself take the stand or present any other direct proof of such permission or any explanation under oath where the assets of the estate had gone or why no inventory or accounting could be obtained from him. Circumstances which unexplained might have indicated a permission to use estate funds for Fleet Sales, Inc. or the other purposes mentioned by defendant were fully explained by the Schusters and their explanations were not contradicted by any evidence from appellant and were corroborated by independent evidence, especially by that of the witness Baker.

[1,2] Even without the confession or admission to Inspector Moore the evidence is sufficient to show that appellant obtained possession of the funds from Mrs. Schuster and the \$1200 return of salary of Mrs. Painter by the device of representing to the victims that he needed that possession for the administration and probate of the estate, whereas he obtained the funds with the intent to apply them to his own use, immediately commingled them with his own funds and within a few months used them up; the \$2000 from Mrs. Painter he obtained by representing that it was payment or deposit for a sale of the accounts receivable, which sale needed court approval, but, instead of keeping the funds available until such approval had been obtained or denied he took them intentionally for

his own use, and took no steps to effectuate the sale; the note he obtained from Mrs. Painter by the representation that he would present it for her to the attorney of the estate as a claim against the estate, whereas he took it with the intent "to get it away from her." In this last count there was no intention of taking for defendant's own use, but for theft by trick or device proof of fraudulent taking with intent to deprive the owner of the property is sufficient without proof that defendant intended to convert the property to his own use. *People v. Juarez*, 28 Cal. 380, 382. When the evidence of the People is accepted as true there is no doubt that each count constitutes a theft by trick or device and no argument to the contrary is presented by appellant. The above circumstances must be taken into consideration in deciding whether any of appellant's further grievances justify reversal.

[3] At the arraignment appellant requested that the public defender be permitted to withdraw and he to appear in propria persona. This was done. He now contends that this constituted deprivation of his right to be represented by counsel because no hearing was instituted by the court to determine whether appellant was capable of "intelligently" waiving his right of representation by counsel. As his only authority appellant cites *In re Connor*, 16 Cal. 2d 701, 709, 108 P.2d 10, 15. There it is said: "A defendant who, with an intelligent conception of the consequences of his act, declines the aid of counsel prior to or at the commencement of his trial, is not entitled thereafter to interrupt and delay the hearing at any stage he deems advantageous merely to interpose a demand for legal assistance. [citations] *When petitioner stated at the time of his arraignment that he did not need an attorney, the court was justified in taking him at his word.*" (Emphasis added.) Appellant's own citation sufficiently refutes his contention. Neither this case nor any other requires an intelligence hearing before permitting defense in propria persona. See similar to the Connor case, *People v. Cortze*, 108 Cal.App. 111, 290 P. 1083; *People v. O'Neill*, 78 Cal. App.2d 888, 179 P.2d 10. No contention is made that in this case there was any

special indication that defendant, an accountant with prior felony conviction, was not able intelligently to waive counsel. That the court at the end of the trial without appointing counsel advised defendant to accept the assistance of the Public Defender to preserve all of his legal rights is no indication of lack of intelligence of defendant but only of the court's care for his protection.

Appellant further asserts a large number of errors of law in the admission and rejection of evidence. It is first contended that on three occasions valid objections of appellant were completely ignored. In some of the instances cited the objections were defective but in all three instances the evidence received after objection was so unimportant and so evidently harmless as not to require separate discussion.

[4] Next appellant complains of two instances in which he contends that a ruling on objection was made by the District Attorney and not by the court. In the first example cited appellant, after an answer which contained hearsay had been given, said, "I object" without giving any ground for the objection or moving to strike the answer. Both the absence of any specified ground and of a motion to strike prevent consideration on appeal. *People v. Nelson*, 85 Cal. 421, 428, 24 P. 1006; *People v. Selas*, 114 Cal.App. 367, 378, 300 P. 150; *People v. Cucco*, 85 Cal.App.2d 448, 453, 193 P.2d 86. The so called ruling of the District Attorney was his comment: "If it is what your grandson said, we will have to have him testify about it." In the second example after the power of attorney from Mrs. Schuster to defendant had been read the District Attorney asked: "It says nothing about funds, does it? A. Not a thing, no." After the answer was given appellant objected on the ground that the document was the best evidence. The District Attorney conceded that the objection was good and said that the answer might go out. As appellant again had not moved to strike the answer there was no reason why the court should expressly order it stricken.

[5] Appellant complains that the court on its own motion objected to a question of appellant as to the total of the deposits on

a bank statement of Fleet Sales, Inc., whereas the court did not object on its own motion to questions of the District Attorney as to the totals of checks cashed by appellant at the Mapes Casino according to his account there. However, the objections as to appellant's question was not on the court's own motion as the District Attorney had said: "I will submit the exhibit speaks for itself," and appellant cannot complain about the failure of the court to object where appellant did not do so himself.

Next appellant criticizes questions of the District Attorney eliciting opinions or conclusions of witnesses or hearsay, which will not be reviewed because no objection whatever was made. At one place after some leading questions had been asked and answered appellant said, "I object to the line of leading questions", without moving to strike anything. The District Attorney: "I will withdraw it." Appellant can again not complain that the court did not take any further action without being asked to do so.

Finally appellant contends that he was prevented by erroneous rulings from developing evidence material to his defense.

(a) After Junior had testified that he knew that his father had paid Stella Painter \$435 a month whereas his successor paid her only \$250 a month objection was sustained to the question "So there was \$185 to be paid each month?" The question assumed that somebody had to pay the differential whereas in that respect Junior had testified only that he did not recall. Further development of the evidence with respect to this point was not prevented by the sustaining of the objection but by the fact that appellant did not ask further questions so formulated as not to assume matter not in evidence.

[6] (b) Objection was sustained because of irrelevancy to appellant's question on re-cross-examination of Mr. Casalina: "You have testified that it is not necessary to know what these accounts receivable are worth. Are you familiar with tax regulations beyond a \$60,000 income?" Mr. Casalina had testified on redirect in substance that the fact that the accounts receivable had not been liquidated and the actual proceeds were unknown did not pre-

vent defendant from preparing an inventory because they should be listed and their value determined by the income tax appraiser. As this testimony was an expert opinion Mr. Casalina's qualifications were relevant. However it is not clear what is meant by "the regulations beyond a \$60,000 income", what materiality these regulations have for Mr. Casalina's expert testimony or in how far such an income is involved in this case. As the connection with Mr. Casalina's testimony and the relevancy were not shown by appellant the sustaining of the objection was not erroneous.

[7] (c) Objection was sustained to defendant's asking Stella Painter whether a certain letter purportedly written by Mrs. Schuster was in Mrs. Schuster's handwriting. Earlier Mrs. Schuster had testified that she might have written the letter but reading of the letter in evidence was then denied on the ground that the letter was immaterial. The reasons given for the objection by the District Attorney that the question called for the opinion and conclusion of the witness and that she was not responsible for what she did not do herself failed to take into consideration § 1943 Code of Civil Procedure which permits proving of handwriting by anyone who has knowledge of the handwriting of the purported writer. However, no foundation by showing of such knowledge had been laid and there was no error and no prejudice because the letter attempted to be proved had been found immaterial, a ruling not attacked.

It is contended that the District Attorney took advantage of appellant's lack of knowledge of the law of evidence which explains his failure to object and that all the above taken together is repugnant to a fair trial. Study of the whole transcript has convinced us that appellant's grievances as to evidence are trivial and that all considered together they did not impair the fairness of his trial.

[8] Appellant next contends that he was deprived of the right to have the process of the court to subpoena witnesses in his behalf. Appellant requested before the trial that a representative of the First and Virginia Branch of the First National Bank of Nevada at Reno be subpoenaed

with the records of the appellant's several accounts there. Although his request to subpoena this and other witnesses is not made part of the record and no inclusion in the record was asked, it is proved as to this witness by a statement of the court: "The defendant requested that the subpoena be issued, but the Court, not having jurisdiction out of the state, did not issue the subpoena." Appellant argues that section 1334.3, Penal Code, gave the court power to issue a certificate that a person in another state is required as a material witness and have that certificate presented to a court of the state in which such person is found if said state has provisions for commanding such person to testify in this state and that Nevada has such provision in section 11359, Nevada Compiled Laws. The question whether appellant's request was sufficient to require the trial judge to proceed under section 1334.3, Penal Code, became moot when such a representative appeared at the trial, with the desired records, as a witness for the People. Section 1990, Code of Civil Procedure, reads: "A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer." The court therefore had the opportunity to comply with appellant's request and it was error not to do so, especially when appellant at the trial clearly indicated that he still wished to make the representative of the bank, Mr. Friesen, his witness. When appellant asked whether Mr. Friesen was going to be available for direct examination by him the District Attorney said "Go ahead and ask questions. He's here for that purpose now," but thereafter he objected to some of appellant's questions as not proper cross-examination, and the objection was sustained.

Nevertheless a realistic consideration of the effects of the error on appellant's defense must lead to the conclusion that he suffered no prejudice that could justify a reversal. Appellant had not asked for an individual witness with any special knowledge but only for a representative of the bank with the records of his accounts and was willing to accept Mr. Friesen as such.

His bank statements had been received in evidence and defendant was at liberty to cross-examine as to them. He was prevented from using the witness for three other purposes: To ask the witness questions about the fact that checks had been signed by Junior, have the witness link up those checks to have them received in evidence and have him testify that the cashing of the checks at Mapes Casino did not prove that they were for gambling purposes, points as to which the witness had no special knowledge, whereas other witnesses thereafter fulfilled appellant's purpose. Junior testified at length concerning the checks he signed (which he said he signed on instruction of defendant); the checks were received in evidence and the cashier of Mapes Casino testified that the Casino was the normal place for cashing of checks by hotel guests for any purpose. Appellant does not show any prejudice suffered by the restriction of his examination of the witness Friesen to cross-examination and there was none.

[9] Appellant complains of the court's failure to give on its own motion an instruction that confessions and admissions are not admissible as evidence without independent proof of the corpus delicti, notwithstanding the fact that the testimony of Inspector Moore involving such evidence had been received and the court had instructed on the definitions of confession and admission and the caution with which oral admissions are to be used. That such may be reversible error is shown by *People v. Frey*, 165 Cal. 140, 147, 131 P. 127; *People v. Putnam*, 20 Cal.2d 885, 890-891, 129 P.2d 367; *People v. Dobkin*, 74 Cal. App.2d 269, 277, 168 P.2d 729. However in the present case the evidence apart from appellant's statements to Inspector Moore so fully established the corpus delicti, that the failure to give the instruction pointed out by appellant, cannot have been prejudicial and therefore not reversible error. 8 Cal.Jur. 348; *People v. Tomalty*, 14 Cal. App. 224, 236-237, 111 P. 513.

[10] Appellant also complains of the failure to instruct on the necessity that a confession be free and voluntary. In-

spector Moore expressly testified to the free and voluntary character of defendant's statements. Defendant did not intimate in any way that his statements were not free and voluntary, he stressed on cross-examination his friendly relation with the witness during his arrest and he did not offer the instruction. No contention that the statements were not free and voluntary is made on appeal. Under these circumstances the failure to give the instruction was not error. *People v. Gonzales*, 24 Cal.2d 870, 875, 151 P.2d 251; *People v. Hubbell*, 54 Cal.App.2d 49, 74, 128 P.2d 579; *People v. Landry*, 106 Cal.App.2d 8, 234 P.2d 736.

Appellant asserts that after he had been arguing for approximately two hours the court told him that he would be allowed only twenty minutes more, that he vigorously protested that he was not able to finish his argument in that time, but that nevertheless he was not allowed to continue his argument when the twenty minutes were up. It is conceded that such does not appear in the record, but appellant contends that he could not have evidence to that effect included in the record because the reporter did not report his argument and the restriction on it by the court. He suggests augmentation of the record under Rule 12 of the Rules on Appeal or by submission of affidavits and counter affidavits. It is further conceded that courts have a reasonable discretion in limiting argument, 8 Cal.Jur. 261, § 325, but it is contended that the limitation in this case was unreasonable, an abuse of discretion, considering the number of counts and the extent of the evidence involved, citing cases in which reversal on that ground is found: *People v. Fernandez*, 4 Cal.App. 314, 321, 87 P. 1112, time limited to 1¾ hours and 20 minutes additional time given; *People v. Keenan*, 13 Cal. 581, limited to 1½ hours in a capital case; *People v. Green*, 99 Cal. 564, 34 P. 231, 1 hour.

[11] Appellant's contention that the reporter's failure to report his argument and the restriction on it by the court prevented him from making it part of the record is not correct. Rule 36(b) of the Rules on

Appeal describes the procedure to be followed in such a case, settled statement, *People v. Chessman*, 35 Cal.2d 455, 461-462, 218 P.2d 769. If we should order the augmentation of the record we should have to order under Rule 12(a) the preparation and transmission of just such a settled statement as could have been prepared on application of appellant under Rule 36(b). In *Russi v. Bank of America*, 69 Cal.App.2d 100, 102, 158 P.2d 252, 253, we quoted thus from 17 So.Cal.L.Rev. 130-31: "Even where the matter sought to be added is proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right; they both may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons. The new rule does not deal expressly with this aspect of the question and the discretion of the court to deny the application still remains. Hence the augmentation procedure is not to be regarded as a cureall, nor as an assurance that negligent preparation of the record will entail no harmful results." Although we are inclined to permit augmentation of the record liberally in furtherance of justice, we have come to the conclusion that in this case ordering the augmentation would not be justified. On his motion for a new trial appellant did not make any showing of prejudice caused by the restriction of his argument, he neglected to have the matter included in the record on appeal, he did not move separately for augmentation prior to submission of the case on appeal and he does not indicate in his briefs any matter not argued to the jury because of lack of time which possibly might have influenced the verdict. His argument on appeal with respect to insufficiency of the evidence covers one page only of his opening brief and his position with respect to the facts there described, essential for the argument to the jury, is, as we have shown before, wholly inconsistent with the evidence which was one sided because of appellant's failure to take the stand. Since the verdicts appellant has had the assistance of the public defender. It may also be pointed out that according to appellant's contention the court below

did not limit the time for argument in advance as in the cases cited by appellant but after having listened for two hours to what appellant had to say. We are convinced that augmentation of the record would not serve any useful purpose and that appellant is not entitled to it.

[12] Finally, appellant complains of alleged misconduct of the District Attorney in deliberately eliciting improper testimony, unfairness in argument and commenting on facts not in evidence. However, no misconduct was assigned or instruction to disregard requested at any time, and it is not even contended that the alleged misconduct was of such character that it could not have been cured by any admonition. It is then no basis for reversal. *People v. Sieber*, 201 Cal. 341, 356, 257 P. 64. We have moreover considered the acts of misconduct alleged and have found all either clearly harmless and without importance or such that an assignment of misconduct could without doubt have brought correction.

The judgments and order denying a new trial are affirmed.

GOODELL and DOOLING, JJ., concur.



ORELLA v. JOHNSON et al.

Civ. 14752.

District Court of Appeal, First District,
Division 2, California.

Oct. 26, 1951.

Dissenting Opinion Oct. 29, 1951.

Rehearing Denied Nov. 24, 1951.

Hearing Granted Dec. 20, 1951.*

M. J. Orella brought an action against May Johnson and another for certain lands allegedly held in trust for plaintiff. The Superior Court, Santa Cruz County, James L. Atteridge, J., entered judgment of nonsuit at the end of plaintiff's evidence, and plaintiff appealed. The District Court of Appeal, Dooling, J., held, *inter alia*, that testimony

of plaintiff concerning a conversation with his wife, now deceased, wherein his wife allegedly promised that if plaintiff would convey certain property to May Johnson, the wife's daughter by a previous marriage, it would be held for plaintiff and reconveyed upon request, should have been admitted, and that if such testimony were believed, defendants held the property in constructive trust for plaintiff whether or not plaintiff's wife made such promise with the authority of May Johnson.

Reversed.

Goodell, J., dissented.

1. Trusts — 110

In action by stepfather against stepdaughter for land allegedly held in constructive trust, testimony concerning admission of stepdaughter that property was owned by stepfather was sufficient to support an inference that stepdaughter took title to property with knowledge that mother had promised stepfather that stepdaughter would hold property for stepfather and reconvey upon request.

2. Appeal and Error — 996

Evidence — 587

Not only the weight of the testimony but the inferences to be drawn therefrom are for the trial court and circumstantial as well as direct evidence will support a finding.

3. Trusts — 110

In action by stepfather against stepdaughter for certain land, the inference that stepdaughter took title to property with knowledge that mother had promised stepfather that it would be held for stepfather and would be reconveyed upon request was strengthened by testimony that stepfather and mother had always lived on the property without payment of any rent and that stepfather had paid the taxes.

4. Trusts — 108

In action by stepfather against stepdaughter to establish that stepdaughter held property in constructive trust for stepfather on theory supported by evidence, that stepfather's wife, who was the mother of stepdaughter, had acted as stepdaughter's agent when wife allegedly had promised that the property would be held for stepfather and

* Subsequent opinion 242 P.2d 5.

reconveyed upon request, testimony of stepfather concerning such promises was admissible.

5. Trusts ☞103(1)

Where grantee secures conveyance of grantor's property upon promise of reconveyance upon demand, repudiation of that promise is sufficient to raise a constructive trust if the necessary relation of trust and confidence is present.

6. Trusts ☞110

In action by stepfather against stepdaughter for lands which stepfather had conveyed to stepdaughter upon the alleged promise of wife that property would be held for stepfather and would be reconveyed upon request, under evidence, it could be inferred that stepdaughter acted through agency of wife and took advantage of stepfather's confidence in wife, and that inference, coupled with other evidence, established the necessary relation of confidence between stepfather and stepdaughter.

7. Trusts ☞103(2)

Where stepdaughter acted through agency of mother in inducing stepfather to convey property to stepdaughter upon promise of mother that it would be held for stepfather and reconveyed upon request, stepdaughter made herself subject to the same liabilities as the mother would have been under if conveyance had been made to the mother on the same promises. Civ. Code, § 2330.

8. Trusts ☞95

If a third person induces grantor to convey to grantee by fraudulent representations, the grantee holds the property as constructive trustee for grantor.

9. Trusts ☞103(2)

If stepfather was induced to convey to stepdaughter by promise of wife that property would be held for stepfather and reconveyed upon request, stepdaughter held property in constructive trust for stepfather whether or not wife acted with authority from stepdaughter.

J. Frank Murphy, Eugene J. Adams, Santa Cruz, for respondents.

DOOLING, Justice.

This appeal is from a judgment for defendants after a nonsuit was granted.

The prayer of the amended complaint is for a judgment decreeing that plaintiff is the equitable owner of an improved parcel of real property in Santa Cruz County and that defendant May Pastana (formerly May Johnson) convey it to him; also that she account for money held as his agent and trustee.

Three pieces of real property are in the picture, the first known as the Harder Road place in Alameda County, the second the Winton Road place in Alameda County, and the third a place in Santa Cruz County. Appellant married Mary Orella, his second wife, in 1918 and they lived on the three places successively until her death in 1948, and since then appellant has lived on the Santa Cruz property.

The original Harder Road property belonged to appellant's parents, and 1.712 acres thereof became vested in him as separate property. There was a mortgage of \$1,000 thereon, and to pay it off appellant in 1933 borrowed \$1,000 from respondent, a daughter of his wife by her former marriage.

On March 24, 1938, while the \$1,000 was unpaid, appellant and his wife made a grant deed conveying the 1.712-acre parcel to respondent. The deed was recorded at respondent's request about 21 months later.

On July 15, 1941 the property was sold for \$3,900, which was paid to respondent, and the deed was executed by her; out of the \$3,900 she retained the \$1,000 owing by appellant and \$400 interest thereon, and used \$1,800 of the \$3,900 to purchase the Winton Road property, the title to which was taken in her name.

The latter property was sold for \$4,500, which was paid to respondent, and the deed was executed by her, whereupon the Santa Cruz place was acquired for \$2,300 and title taken in respondent's name; its purchase price was derived from the sale of the Winton Road property.

Alfred J. Harwood, San Francisco, for appellant.

Shortly after the death of appellant's wife he requested respondent to convey to him the Santa Cruz property, which she refused to do.

After that demand, but before this action was commenced, respondent on May 24, 1948 made a deed which vested the title to the Santa Cruz property in herself and her daughter, Geraldine J. Strickland, as joint tenants, and the daughter has since been joined as a defendant and has answered herein.

Appellant testified that he did not learn that the title to the Santa Cruz property was not in his name until December 1, 1947 when he went to pay the taxes.

He testified that when he signed the deed to respondent he "was supposed to sign a deed of trust", and believed he was signing one; that he did not read the deed or discover that it was an absolute deed until December 1, 1947; that all his discussions respecting the deed and the other transactions were with his wife; that he had no conversation with respondent respecting any sale, or the purchase of either the Winton Road place or the Santa Cruz place.

He testified that he paid the taxes on the Santa Cruz property after he bought it (in 1943). The tax bills for 1947-48, produced by appellant, were admitted in evidence. He made alterations and repairs on the Santa Cruz property which came to \$800, which his wife got from respondent "from the sale of the Winton Road property". Aside from that \$800 and the \$2,300 paid for the Santa Cruz property he testified respondent had never accounted for any part of the money received from the Winton Road sale and that, of the \$3,900 received from the Harder Road sale, \$1,800 was used to buy the Winton Road property and \$1,400 to pay off the loan and interest, but the balance had not been paid or accounted for.

Appellant's first contention is that the court erred in excluding evidence of statements made to him by his wife just before the deed to respondent was made.

Appellant's complaint was drawn on the theory that the respondent is a trustee who has repudiated her fiduciary obligation. It alleges that "defendant requested plaintiff

to make a deed of trust of said portion of said Harder Road property to defendant; that said request was made by plaintiff's wife Mary Orella acting on behalf of defendant; that defendant stated to plaintiff through her agent Mary Orella that plaintiff might become involved in an automobile accident and that in order to protect plaintiff, it would be best that defendant hold said portion of said Harder Road property in trust for plaintiff and that upon demand the defendant would reconvey said real property to plaintiff."

Appellant was permitted to testify, over objection, that his wife asked him to sign the deed to May Johnson, but to the question "What did she say?" an objection was sustained on the ground that it called for hearsay. The following offer of proof was then made: "Mr. Harwood: * * * we will show that the answer to that last question is this: 'Honey, I have got a proposition May wants me to put to you; she wants you to make a deed of trust of the property because she is afraid you will be involved in an automobile accident and the people who are injured might come on the property;' * * *."

Appellant was then asked what he said to her, and an objection was sustained on the same ground, followed by this tender: "Mr. Harwood: * * * we will prove by this witness the following: that he said yes, with the understanding that any time he wanted the property back in his name May Johnson would deed it back to him, and that his wife then said 'Yes, that is okay.'"

At the time that this tender was made the full proof in support of plaintiff's theory that her mother was acting as agent for defendant May Johnson in making the representations and promises above outlined had not been made. This proof consisted, in addition to the facts above stated, of the testimony of two witnesses, De Valle and Mesa.

De Valle testified to two admissions made by the defendant May Johnson in his presence. The first was in 1942 when plaintiff and his wife were discussing with May Johnson trading the Winton Road property for a place in Santa Cruz, "they wanted

to make a trade and buy property in Santa Cruz; and my sister (May Johnson) said they were making a mistake buying property in Santa Cruz."

The second was after the Santa Cruz property had been purchased when plaintiff and his wife were discussing with defendant May Johnson the remodeling that was afterwards done.

"Q. What if anything did May Johnson say? A. Well, just said she didn't see why she should spend the money on that place, 'but it is your money, you can do so.'"

The witness Mesa testified to a statement made by Mrs. Strickland, who is May Johnson's daughter, shortly after the death of plaintiff's wife.

"Mr. Orella (the plaintiff) asked Mrs. Strickland what her mother intended to do with her Santa Cruz property; Mrs. Strickland said: 'You know Ma is holding that property for you; that property is yours.'"

* * * Q. Was this conversation or this statement, these two statements—the question asked by Mr. Manuel Orella and the answer made by Mrs. Strickland—were they in the hearing of May Johnson and her husband? A. I would say it was because we were just talking ordinary."

[1] These several admissions of ownership of the property by plaintiff were sufficient, if believed, to support an inference that defendant May Johnson took the property with knowledge of the promise of her mother to the plaintiff that she would hold it for him and reconvey it to him upon his request.

[2] The situation is not unlike that in *Airola v. Gorham*, 56 Cal.App.2d 42, 133 P.2d 78. There one brother, George, induced his mother to convey property to him and his brother Frank on George's promise that he and Frank would later reconvey it to her. The only evidence that Frank was privy to this promise was found in admissions made by him. In that case we said, 56 Cal.App.2d at page 49, 133 P.2d at page 81: "Frank's subsequent statements acknowledging that the rest of the family would ultimately have a share of the property, while too indefinite in themselves to establish that he took the property subject

to a trust, when coupled with the express testimony of the trust, tend to prove both his knowledge of and acquiescence in the trust arrangement. *Taylor v. Morris*, 163 Cal. 717, 127 P. 66; *Cooney v. Glynn*, 157 Cal. 583, 589, 590, 108 P. 506; *Taylor v. Bunnell*, 77 Cal.App. 525, 533, 534, 247 P. 240. Not only the weight of the testimony but the inferences to be drawn therefrom are for the trial court and circumstantial as well as direct evidence will support a finding. *Silva v. Gustine Creamery Co.*, 217 Cal. 146, 149, 17 P.2d 699; *Raggio v. Mallory*, 10 Cal.2d 723, 76 P.2d 660; *Hall v. Susskind*, 120 Cal. 559, 563, 53 P. 46; *Katenkamp v. Union Realty Co.*, 36 Cal. App.2d 602, 617, 98 P.2d 229."

[3] The inference is, of course, strengthened in this case by the further testimony that plaintiff and his wife always lived on the several properties without the payment of any rent and that plaintiff paid the taxes.

[4] At the close of all of the plaintiff's testimony plaintiff's counsel asked leave to reargue the admissibility of the testimony which has been excluded and the trial judge directed him to do so in briefs to be filed on defendants' motion for a nonsuit. By thereafter granting the nonsuit the trial judge reaffirmed his exclusion of the proffered testimony with all of plaintiff's evidence before him. That this was error follows from what we have said above.

[5] We have thus presented a case in which the inference may be reasonably drawn that defendant May Johnson, acting through the agency of her mother, secured the conveyance of plaintiff's property to her upon her promise made through her mother that she would reconvey to plaintiff upon demand. Her repudiation of that promise is sufficient to raise a constructive trust if the necessary relation of trust and confidence is present. *Steinberger v. Steinberger*, 60 Cal.App.2d 116, 140 P.2d 31.

There is much discussion in the briefs as to whether a confidential relation between plaintiff and May Johnson was established by the testimony. It is suggested in *Steinberger v. Steinberger*, supra, 60 Cal. App.2d at page 122, 140 P.2d at page 34 that

"(f)ew cases will arise where one person will convey property to another by absolute deed, and where the grantor will be satisfied with the oral promise of the grantee to reconvey, unless the grantor, in fact, has trust and confidence in the integrity and fidelity of the grantee."

[6] Under the circumstances of this case we are satisfied that the necessary relation of confidence may be found from the evidence. The plaintiff testified of May Johnson: "I thought a lot of her; I thought as much of her as a daughter,—a lot of confidence in her."

We need not determine whether this evidence standing alone would support a finding of a confidential relation. It does not stand alone. That plaintiff and his wife occupied a confidential relation to one another is clear. *Allen v. Meyers*, 5 Cal.2d 311, 54 P.2d 450; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; 13 Cal.Jur., Husband and Wife, sec. 54, pp. 860-862. Here it may be inferred from the evidence that the plaintiff's step-daughter in whom plaintiff had "a lot of confidence" elected to act through the agency of the plaintiff's wife and took advantage of the plaintiff's confidence in his wife which induced the conveyance to her.

[7] Section 2330 of the Civil Code makes the principal subject to all "liabilities which would accrue to the agent * * * if they had been entered into on his own account." When May Johnson elected to act through the agency of her mother to induce the plaintiff to convey his property to her she made herself subject to the same liabilities as her mother would have been under if the conveyance had been made to the mother on the same promises.

[8] If May Johnson did not authorize or ratify her mother's representations to plaintiff the result would be the same. In that event the mother's representations would be false and fraudulent. It is well settled that where A induces B to convey to C by fraudulent representations, C holds as constructive trustee for B. 3 Scott on Trusts, sec. 469, pp. 2336-2337; 3 Bogert, Trusts and Trustees, sec. 473, pp.

25-26; 1 Perry on Trusts and Trustees, 7th Ed., sec. 211, pp. 371-372.

[9] Whether the evidence is sufficient to establish that plaintiff's wife was acting with authority from May Johnson or not the result should be the same.

The judgment of nonsuit is reversed.

NOURSE, P. J., concurs.

GOODELL, J., dissents.

GOODELL, Justice.

I dissent because in my view there was no proof of a confidential relation.

Appellant testified: "Q. Did the defendant May Johnson ever live at your house? A. At one time for a few days,—a weekend or so; they would come up on the weekends, her and her husband, playing cards, or something. Q. Describe your relations with your stepdaughter May Johnson. A. I thought a lot of her; I thought as much of her as a daughter,—a lot of confidence in her." That was all.

Instead of describing their relations, as he was invited to do, so the court could draw its own conclusions from a recital of acts, conduct and dealings, appellant merely told of his affection for respondent and asserted that he had "a lot of confidence in her." Despite the unresponsiveness of his answer, *the subject was not pressed or followed up*.

The trial judge stated the point in a nut-shell when he said: "The kind of relationship the law raises in its wisdom is where over the years two people are in close relationship, where one is in a position, if he desires, to overreach the relationship * * *" and further, when in response to the argument that "This witness has testified as to the actual relationship of confidence between himself and his daughter", he said "He cannot create it by self-serving declarations."

From 1933 to 1947, a period of about 14 years, but one transaction was conducted *personally* between the parties, namely the loan of \$1,000 which bore interest, and, according to the admission of

appellant's counsel, was secured by a deed of trust—an ordinary business transaction.

With respect to the situation at the time of the transfer: despite the alleged confidential relation, appellant never discussed the transaction with respondent. Why enlist an intermediary if a confidential relation existed?

With respect to the relations between 1938 and 1947 (of interest only in so far as they might shed light on the relationship existing *at and before the time of transfer*), appellant's testimony shows that he had no discussion whatever with respondent respecting (a) the sale of the Harder Road place, (b) the purchase of the Winton Road place, (c) the sale of the latter, (d) the purchase of the Santa Cruz property, or (e) the \$800 repairs to the latter. If it be suggested that this might have been because he thought all the while that legal title to these several properties stood in his name, the fact remains that, *for all the record shows, appellant and respondent had no communication of any kind during that period of almost ten years*. Yet it is alleged that such relationship continued throughout that period.

The record is barren of all facts showing any personal dealings other than the \$1,000 loan and *that was a strictly business transaction*.

"It is not every case where parties trust each other that the law recognizes as confidential." *Brison v. Brison*, 75 Cal. 525, 528, 17 P. 689, 691; *Taylor v. Kelly*, 103 Cal. 178, 183, 37 P. 216; *Ampuero v. Luce*, 68 Cal.App.2d 811, 819, 157 P.2d 899; 9 Cal.Jur. p. 229.

In *Jackson v. Gorham*, 98 Cal.App. 112, 116-117, 276 P. 391, 393, the court said: "There must be something further than mere confidence in another's honesty and integrity to sustain the presumption of constructive fraud. [Citations.] As to what does constitute such relationship is well illustrated in the case of *Cox v. Schnerr*, 172 Cal. 371, 156 P. 509, where the person charged with fraud had been the confidential business agent, and for a long time transacted business for the one upon

whom undue influence was alleged to have been exercised. What constitutes confidential relationship in law is also well illustrated in the case of *Piercy v. Piercy*, 18 Cal. App. [751] 756, 124 P. 561, where a son had lived in the same house with his mother, managed her property as her agent, and also held a general power of attorney."

Followed in *Hausfelder v. Security, etc., Bank*, 77 Cal.App.2d 478, 482, 176 P.2d 84, and *Wilson v. Sampson*, 91 Cal.App.2d 453, 459, 205 P.2d 753.

In *Ampuero v. Luce*, 68 Cal.App.2d 811, 819, 157 P.2d 899, 903, this court said: "No evidence whatever is pointed out to show such relation beyond the fact that they had been close friends since girlhood, had corresponded, visited back and forth, and Mrs. Ampuero considered the respondent the most reliable friend she had. It is conceded by respondent's counsel that Mrs. Ampuero had confidence in Mrs. Luce. But that is not to say that a confidential or fiduciary relation, as those terms are used in the authorities (see 9 Cal.Jur. p. 228, sec. 106 et seq.), existed between them."

Other cases dealing with the subject are *Taylor v. Kelly*, 103 Cal. 178, 182-183, 37 P. 216; *Ruhl v. Mott*, 120 Cal. 668, 679, 53 P. 304, and *Frantz v. Porter*, 132 Cal. 49, 54, 64 P. 92. The latter holds that the relation is not shown by proof of a warm personal friendship without more.

Numerous cases have come to an end at the demurrer stage because of a failure to allege facts showing a confidential relation, among them, *Bacon v. Soule*, 19 Cal.App. 428, 436, 126 P. 384; *Robbins v. Law*, 48 Cal.App. 555, 561-562, 192 P. 118; *Meyer v. Zuber*, 92 Cal.App. 767, 772, 268 P. 954 and *Wilson v. Cooper*, 126 Cal.App. 607, 616, 15 P.2d 174.

In *Robbins v. Law*, supra [48 Cal.App. 555, 192 P. 120], in affirming a judgment entered on the sustaining of a demurrer, it was said: "But the mere statement in the complaint that the plaintiff had unlimited confidence in and relied upon the defendant is not a sufficient statement of the facts to show a confidential relation. *The facts must be alleged, from which the court can*

see that a confidential relation does in fact exist. Robins v. Hope, 57 Cal. 493." (Emphasis added.)

There is nothing in the amended complaint herein which goes beyond the allegations held insufficient in the four cases just cited, and there is no testimony in this record which goes any further than the bare statement that plaintiff "had a lot of confidence" in defendant.

I am mindful, of course, of the rule that a family connection is a material circumstance to be considered, Odell v. Moss, 130 Cal. 352, 356, 62 P. 555, but, even so, there was no proof that respondent was even a member of the Orellas' household. She had married before they had, and the record shows that she visited them only occasionally "playing cards, or something". There is no other proof of any family contacts or of any intimacy.

This case is likened by the majority to *Airola v. Gorham*, 56 Cal.App.2d 42, 133 P.2d 78, but there, to start with, the court found, see 56 Cal.App.2d 53, 133 P.2d 83, that "the most confidential relations existed" between the grantor, a woman of 86, "an age when confidence is more likely to be reposed in members of the family" and the grantees, *both* of whom were her sons and *both* of whom were equally interested in obtaining title to her property to save themselves from disaster. It is true that one of the sons, George, was more active in procuring the deed than the other, the appellant, Frank, but it is clear that Frank made statements before the mother's deed was delivered from which it could be inferred that he knew all about the deal and was simply letting George take the lead in getting the property for both grantees. In 56 Cal.App.2d at page 49, 133 P.2d at page 82 this court said: "The acceptance of the deed by Frank with knowledge of George's promise to Lucinda [the mother], and the evidence will support the inference that this is what occurred, was enough to bind him to the obligations previously assumed by George [citation]".

This seems to be somewhat inconsistent with the statement in the majority opinion herein that "The only evidence that Frank

was privy to this promise [made by George] was found in admissions made by him." There the opinion is speaking of "Frank's subsequent statements" but, as said already, this court conceded, 56 Cal.App.2d at page 49, 133 P.2d at page 81, that Frank had "knowledge of George's promise to Lucinda" their mother, which knowledge could have been and was inferred from Frank's conversations with members of the family at the time when George was negotiating which was before the deed was delivered. It would seem, then, that he *was* privy to George's promises.

In the *Airola* case the existence of "the most confidential relations" between the mother and both George and Frank was found by the court and went practically unchallenged on appeal. In the present case no confidential relations between appellant and his step-daughter were proved.

A confidential relationship between appellant and his wife goes without saying, but how that can be used to bridge the gap by invoking some sort of agency relationship is difficult to understand. If the rule respecting confidential relations is to be extended on such an attenuated theory the case law of this state dealing with a very important subject is in danger of becoming seriously unsettled. All a plaintiff will have to do, in order to place on a defendant the burden of explanation, exculpation, and of proving that there was a sufficient consideration for the transfer and that the transaction was fair and above board and not "shady" will be to allege and prove that the plaintiff had "a lot of confidence" in the defendant who is under fire, or "unlimited confidence" see *Robbins v. Law*, *supra*.

Speaking of consideration: the appellant in this case has sought throughout to shift onto the defense the burden of proving that there was sufficient consideration for the deed but he had ample opportunity to prove, as part of his case, that there was no consideration. No such evidence was produced. This might have been because at the time of the transfer appellant's \$1,000 debt to respondent remained unpaid.

In my opinion the judgment should be affirmed.

**PARKS v. SUPERIOR COURT IN AND
FOR ALAMEDA COUNTY et al.**

No. 14979.

District Court of Appeal, First District,
Division 1, California.

Oct. 31, 1951.

Hearing Granted Dec. 20, 1951.*

Reuben W. Parks filed a petition against the Superior Court of the State of California in and for the County of Alameda and the Honorable Charles Wade Snook, Judge thereof, for writ of prohibition commanding respondent court to desist from any further proceedings upon an information against petitioner pending in that court. The District Court of Appeal, Wood, J., held that grand theft charges could not be included in information along with bad check charge.

Petition granted.

1. Criminal Law ☞238

In a preliminary examination defendant need not be proved guilty beyond a reasonable doubt, and reasonable or probable cause required to uphold commitment of a defendant by magistrate exists if there is sufficient proof to make it reasonable to believe that defendant was guilty of the offense charged. Pen.Code, §§ 872, 995.

2. Larceny ☞14(1)

A defendant is not guilty of larceny by trick and device unless the fraud was the cause which induced owner to part with his property.

3. Criminal Law ☞238

Evidence adduced at preliminary examination supported finding of magistrate that it appeared that offense of delivering a check drawn on a bank with intent to defraud, knowing that there was not sufficient funds in bank to meet check in full upon presentation, had been committed, and that there was sufficient cause to believe defendant guilty thereof, and justified magistrate in holding defendant to answer to the Superior Court to such charge. Pen. Code, § 476a.

4. Indictment and Information ☞122(2)

Under statutory provision that information may charge the offense, or offenses,

* Subsequent opinion 241 P.2d 521.

named in order of commitment, or any offense, or offenses, shown by evidence taken before magistrate to have been committed, despite duty of magistrate when holding a defendant to answer for a public offense to designate offense in complaint mentioned, or any offense, according to the fact, stating generally the nature thereof, district attorney is not bound by that designation but may allege in information commission of any crime shown by evidence which was properly before magistrate. Pen.Code, § 809.

5. Criminal Law ☞674

Evidence is not excluded when admissible for one purpose but not for other purposes.

6. Criminal Law ☞673(2)

In a jury case wherein admitted evidence is admissible for one purpose but not for other purposes the opposite party is entitled to instruction appropriately limiting scope of such evidence.

7. Indictment and Information ☞122(2)

Where complaint filed against defendant contained separate counts charging defendant with commission of grand theft and of delivering a check drawn on a bank with intent to defraud, knowing that there were not sufficient funds in bank to meet check in full upon presentation, and magistrate heard all three charges at same time, but there was no intent that all evidence produced should be deemed applicable to each and all counts, and magistrate commented upon evidence separately by counts, and grand theft counts were dismissed and defendant was discharged thereon, grand theft charges could not be included in information along with bad check charge under statutory provision that information may charge offenses named in order of commitment or any offenses shown by evidence before magistrate to have been committed. Pen.Code, §§ 476a, 809.

8. Prohibition ☞5(4)

Where grand theft counts of complaint charging defendant with grand theft and delivering a check drawn on a bank with intent to defraud, knowing that there were not sufficient funds in bank to meet check

in full upon presentation, were dismissed and defendant was discharged thereon, and district attorney filed an information which improperly charged commission of all offenses alleged in complaint rather than limiting charge to bad check charge, prohibition was proper remedy for defendant to invoke. Pen.Code, §§ 476a, 809.

9. Criminal Law ⇨178

If a magistrate erroneously dismisses a complaint, or count of a complaint, and discharges defendant, defendant has not yet been put in "jeopardy" and a second complaint alleging the same facts may be filed and proceedings upon it will not abate because of discharge upon first complaint.

See publication Words and Phrases, for other judicial constructions and definitions of "Jeopardy".

10. Indictment and Information ⇨9

Since indictment may be with or without examination and commitment, neither pendency of a complaint before a magistrate nor discharge of a defendant by a magistrate precludes grand jury from indicting for same offense.

Robert H. Kroninger, Oakland, Davis & Barber and Robert K. Barber, San Francisco, for petitioner.

J. F. Coakley, Dist. Atty., Alameda County, John J. Schauer, Jr., Deputy Dist. Atty., Oakland, for respondents.

FRED B. WOOD, Justice.

Petitioner seeks a writ of prohibition commanding respondent court to desist from any further proceedings upon an information against him pending in that court.

A complaint was filed against petitioner, which alleged, in separate counts, that he committed three felonies: (1) grand theft, September 15, 1950, the unlawful taking of \$2,463 in money, property of Beulah Palmer and Gilbert Blecher; (2) grand theft, November 2, 1950, the unlawful taking of 12,000 board feet of redwood lumber of the value of \$843.76, property of Russell Heacox and Ford Converse, and (3) violation of section 476a of the Penal Code, November 2, 1950, the delivery to Frank McKenzie of

a check for \$843.76 drawn on a bank, with intent to defraud Russell Heacox, Ford Converse and Frank McKenzie, knowing he did not have sufficient funds in or credit with the bank to meet the check in full upon presentation. At the preliminary examination, evidence was introduced on each of the three counts and considered by the magistrate. He dismissed the two grand theft counts and discharged petitioner thereon because it appeared to him that no public offense had been committed, but held petitioner over to answer on the bad check count. In his order of commitment, the magistrate declared, "It appearing to me that the offense, Felony, to-wit: A violation of Section 476a of the Penal Code has been committed, and that there is sufficient cause to believe the within-named defendant Reuben W. Parks * * * guilty thereof, I order that he be held to answer to the Superior Court * * * to the same * * *"

The district attorney filed an information charging the commission of the three offenses alleged in the complaint, not confining it to the offense mentioned in the order of commitment.

Petitioner moved the superior court for an order setting aside the information, upon the asserted grounds that before the filing of the information petitioner had not been legally committed by a magistrate and had not been committed with reasonable or probable cause. Respondent court denied the motion and set a date for trial on all three counts, and will proceed to trial on those counts unless restrained by this court.

Petitioner claims (1) that, as to each of the three charges, the evidence at the preliminary examination showed neither the commission of a public offense nor reasonable or probable cause to believe that petitioner had committed a public offense, and (2) that the district attorney was without power to charge in the information any offenses not named in the order of commitment, particularly offenses charged in the complaint and dismissed by the magistrate.

(1) *The sufficiency of the evidence, as to each of the charges, at the preliminary examination will be first considered.*

Petitioner had developed a process for building homes out of redwood by joining the timbers with dowels and glue. On July 27, 1950, he entered into a written contract with one Robert Coatney, giving the latter an exclusive agency for Alameda County. Coatney paid \$1,000 for the contract and was, by its terms, to receive a commission of \$8 per 1,000 board feet of timber sold in Alameda County. The contract obligated petitioner, at his own expense, to put up a model home in Alameda County within 60 days. The building of the model home was important to interest prospective users of the process.

Later, petitioner claimed he was unable to raise funds for the construction of the model home; whereupon, Coatney and petitioner unsuccessfully tried to sell exclusive agencies for other counties. They then looked to other sources for funds, and discussed the problem with Coatney's sister, Mrs. Beulah Palmer, who, on September 7, 1950, loaned \$1,500 to petitioner and his wife, who gave Mrs. Palmer their note in that sum, secured by a deed of trust on real property in Humboldt County which stood in the name of petitioner's wife. Petitioner represented to Mrs. Palmer that the property thus secured consisted of approximately seven acres, had a seven-room redwood home on it, constructed by the process which they were selling, had a lot of standing redwood timber and a sawmill on it, but that the sawmill had burned; and that the money was to buy the lumber needed for the model home in Alameda County. She also at the same time paid petitioner \$1,000 on behalf of her nephew, Gilbert Blecher, to become the exclusive agent of petitioner in Contra Costa County, having promised petitioner she would help Blecher get that money. Petitioner told Mrs. Palmer he wanted that money for the model home, to buy the lumber for the model home. The actual amount of money which she paid over to petitioner was \$2,643. Petitioner never built a model home in Alameda County. Subsequently, Mrs. Palmer discovered that the Humboldt County property comprised but 1.08 acres; was a strip of land lying between a highway and a river, about three quarters under water or a

part of the highway easement, leaving about one quarter of an acre of usable land; that there was no redwood timber standing on that property; that the house on it was of but five or six rooms instead of seven, not constructed by this particular process, and was unfinished and defective; and that the sawmill was not on the property covered by the deed of trust.

Upon receipt of the \$2,643, petitioner, with Coatney, called on two or three mills in the northern part of the state to obtain the type of redwood timber needed for the model home. The lumber was finally purchased from the Mill Creek Mill at Philo. Petitioner bought about 20,000 board feet at approximately \$1,400. The lumber was sent from the Mill Creek Mill to McKenzie's mill in San Leandro, at the direction of petitioner, where it was milled to size. Payment to the Mill Creek Mill was to be in two payments: the first in the sum of \$600, and the balance upon arrival of the lumber at McKenzie's mill. The \$600 payment was made within two or three days after the order was placed. The lumber was sent in two loads, arriving at McKenzie's mill about September 27 and 30, 1950. Russell Heacox, one of the owners of the Mill Creek Mill, testified that the \$600 was a down payment on the purchase price, and that he then shipped the lumber in two loads, three days apart; petitioner owed him for the balance; the lumber was sent to the McKenzie Planing Mill. "Q. For Mr. Parks? A. Yes. Q. It was not sent down there for your benefit? A. No."

Instead of using the timber for the construction of a model home in Alameda County, petitioner had it shipped to Fresno, for use in a small model at a home show in Fresno. Petitioner called at the mill in San Leandro and told McKenzie to ship the lumber C. O. D. to Fresno and said he would pay the balance due to the Mill Creek Mill when he received payment from the purchasers in Fresno. Petitioner telephoned Heacox at the Mill Creek Mill and told him he was sending the lumber C. O. D. to Fresno and would pay the balance due to the Mill Creek Mill when he received payment from the purchasers in Fresno. Heacox did not object to this arrangement.

The total C. O. D. charges were to be approximately \$1,400, which sum consisted of the shipping and other charges totaling about \$270, and the balance represented the purchase price to be paid to petitioner by the buyers in Fresno. After the lumber arrived at Fresno, the consignee objected to paying the full amount, telephoned petitioner and got his consent that the consignee pay only the shipping and milling charges, which he did and obtained delivery.

When petitioner called at the McKenzie mill and instructed McKenzie to ship the lumber to Fresno, he signed a blank check and left it with McKenzie, instructing McKenzie to fill in the blanks as to date, payee, and amount, and to use the check to pay the Mill Creek Mill the balance due from petitioner on the purchase price of the lumber. As thus filled in, the check bore date November 3, 1950, and was payable to Mill Creek Mill in the sum of \$843.76. The balance maintained by petitioner at the drawee bank was \$892 as of the close of business on November 2, 1950, and \$666.45 as of the close of business on November 3, 1950. The day the check was presented for payment, the balance was \$245.14. The account was completely depleted by December 4, 1950. It appeared that petitioner's wife also drew checks on the same bank account. There was no evidence on the question whether or not petitioner was aware of the amounts of her checks as and when she issued them.

[1] The evidence tending to show that petitioner feloniously took the \$2,643 from Beulah Palmer and Gilbert Blecher would be sufficient to hold him to answer had the magistrate so viewed it. "In a preliminary examination it is not necessary that a defendant be proved guilty beyond a reasonable doubt. 'Reasonable or probable cause,' required to uphold the commitment of a defendant (Pen.Code, § 995), exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. Pen.Code, § 872; [citing cases]." *People v. Mitchell*, 27 Cal.2d 678, at page 681, 166 P.2d 10 at page 12. See, also, *People v. McRae*, 31 Cal.2d 184, 187, 187 P.2d 741; *People v. Nagle*, 25 Cal.2d 216, 222, 153 P.2d 344; and *People v.*

Thomas, 90 Cal.App.2d 491, 494, 203 P.2d 567. But in the instant case the magistrate, as he well might, took a different view of that evidence and discharged the petitioner. Whether such evidence was available to the district attorney when drafting the information will be considered later in this opinion.

[2] The evidence under the second count, the alleged theft of lumber from Heacox and Converse, is less satisfactory. There was no showing that Heacox and Converse owned any of the lumber when it was shipped to Fresno. They had sold it to petitioner upon receipt of part payment, and shipped all of it to McKenzie's mill for petitioner, not for their own benefit. Respondent suggests it might be argued that this lumber was impressed with a trust for the construction of a model house in Alameda County and that its diversion to Fresno without the consent of Coatney and Mrs. Palmer could constitute embezzlement. That is a tenuous argument. The evidence was addressed to a charge of theft of property belonging to Heacox and Converse, not property belonging to or impressed with a trust in favor of Coatney and Mrs. Palmer. And the information does not allege a taking from Coatney and Palmer. Equally tenuous is respondent's argument that this evidence shows larceny by trick and device; i. e., that petitioner never intended to pay the balance due upon the lumber, further evidenced by his tendering such payment in the form of a check without sufficient funds or credit for its payment. This count of the information alleged no such taking. It alleged a taking on November 2, a full month after title passed. Equally unconvincing is the suggestion that this count of the information is but an alternative form of stating the bad check charge; i. e., theft of property by false pretenses by issuing the check and thereby declaring he had sufficient funds or credit for its payment upon presentation to the bank. There is lacking one of the essential elements of such an offense. The fraud must be the cause which induced the owner to part with his property. See *People v. Wasservogle*, 77 Cal. 173, 175, 19 P. 270, and *People v. Cravens*, 79 Cal.App.2d 658,

662, 180 P.2d 453. If petitioner fraudulently induced Heacox and Converse to part with title when they sold and shipped the lumber, his subsequent issuance of the check could not have been the inducing cause. If the evidence under discussion was sufficient to warrant holding petitioner to answer for some offense not charged in the information, the question remains whether or not it would be available to the district attorney in view of the fact that the magistrate discharged the petitioner in respect to the alleged theft of the lumber.

[3] As to the count which alleges a violation of section 476a of the Penal Code, the evidence adduced at the preliminary examination supports the finding of the magistrate that it appeared that the offense had been committed and that there was sufficient cause to believe petitioner guilty thereof. As we have already observed, the evidence at that stage of the proceeding need only show a reasonable probability of a defendant's guilt.

(2) *Inclusion of the two grand theft charges in the information despite the magistrate's dismissal of such charges* upon preliminary examination, finds literal support in the last sentence of section 809 of the Penal Code, which declares that the information "may charge the offense, or offenses, named in the order of commitment, or any offense, or offenses, shown by the evidence taken before the magistrate to have been committed."

Whether or not this sentence means literally what it says turns principally upon the question whether or not under the state Constitution it is competent for the Legislature to give it such a meaning. The applicable provision of the Constitution appears in the first sentence of section 8 of article I: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." This means that ever since the adoption of the Constitution of 1879 it has been and is permissible to prosecute a felony "by information, after examination

and commitment by a magistrate, * * * as may be prescribed by law." This gives the Legislature a wide discretion in so prescribing, limited only by the requirement that there be an "examination and commitment by a magistrate".

At its first session following the adoption of the Constitution of 1879, the Legislature amended various portions of the Penal Code to effectuate this new provision for prosecution by information. Code Amendts., 1880, Pen. Code, pp. 10-30. The Legislature utilized and adapted the existing preliminary examination, and commitment or discharge, procedure which was established in 1850 and until 1880 had been maintained without material change. See Crim. Pract. Act, 1850, §§ 102-124, 147-175; Crim. Pract. Act, 1851, §§ 101-123, 146-176; Pen. Code, §§ 806-829, 858-883. As a part of that adaptation, section 809 was added to the Penal Code, reading in part as follows: "When a defendant has been examined and committed, as provided in section 872 of this code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense." Code Amendts., 1880, Pen. Code, p. 12. The words "such offense" were construed, quite naturally, as limiting the district attorney, when preparing the information, to the offense mentioned by the magistrate in his order of commitment issued pursuant to the requirements of section 872. *People v. Nogiri*, 142 Cal. 596, 598, 76 P. 490.

That was a limitation which did not obtain prior to 1880. Under the old Constitution no person could be held to answer for a "capital or otherwise infamous crime" (with certain specified exceptions) "unless on presentment or indictment of a grand jury" Const., 1849, art. I, § 8. But there was this proceeding for the examination, and commitment or discharge, by a magistrate, of a person charged with the commission of a public offense upon the complaint of any person having knowledge of the facts. At the examination, the testimony of each witness was reduced to writing, "as a deposition," by the magis-

trate, or under his direction. Pen.Code, § 869.¹ If it appeared, after hearing the proofs, that no public offense had been committed or that there was not sufficient cause to believe the defendant guilty of a public offense, it was the duty of the magistrate to so find, and to order the defendant discharged by an "indorsement on the depositions". Pen.Code, § 871. If it appeared from the examination that a public offense had been committed, and there was sufficient cause to believe the defendant guilty thereof, it was the duty of the magistrate to "indorse on the depositions" an order finding such facts and directing that the defendant be held to answer. Pen.Code, § 872. The depositions were returnable "to the clerk of the court at which the defendant is required to appear". Pen.Code, § 883. If the grand jury failed to indict such a person "at the next term of the court at which he is held to answer," it became the duty of the court to order the prosecution dismissed unless good cause to the contrary were shown. Pen.Code, § 1382. It was the depositions, not the order of the magistrate indorsed upon them, which constituted evidence before the grand jury, when considering the question whether or not to indict. In the investigation of a charge, the grand jury could receive no other evidence than such as was given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in the third subdivision of section 686. Pen.Code, § 919. The third subdivision of section 686 mentioned, among others, the case "where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness".

Nowhere in the Penal Code as it existed in 1879, nor in the Criminal Practice Act which preceded it, have we found any provision which required the grand jury, when basing an indictment, after commitment, upon depositions given at a preliminary examination, to limit its charges to the offense or offenses mentioned by the magistrate in his order of commitment. All the emphasis was upon the "evidence" adduced. It was the duty of the grand jury "to weigh all the evidence submitted to them". § 920. They "ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury." § 921. When an indictment was found, the names of the witnesses examined before the grand jury, "or whose depositions may have been read before them," were required to be inserted at the foot of the indictment or indorsed thereon. § 943. The only reasonable inference is that in 1879 it was the duty of the grand jury, when framing an indictment after examination and commitment, to consider the evidence adduced at the examination, without limitation as to the offense or offenses mentioned in the order of commitment. That was the examination and commitment procedure with which the framers of the Constitution of 1879 were familiar.² Doubtless, they had no intention of limiting the district attorney to the offenses mentioned in the order of commitment, when they authorized prosecution "by information, after examination and commitment by a magistrate * * * as may be prescribed by law" art. I, § 8. They left it open to the Legislature to impose such a limitation (which it did in 1880), or not, as it might deem desirable.³

In 1911, the Legislature measurably modified that limitation by amending section 1008 to permit the amendment of an in-

1. In this paragraph, each reference to a Penal Code section is to the text of that section as it read in 1879.

2. Perusal of the Debates and Proceedings of the Constitutional Convention of 1879 (pp. 308-318 and 1176-1177) indicates that a number of the delegates were thoroughly familiar with that procedure.

3. One committee recommended retention of prosecution by indictment only, in felony cases (Debates and Proc., Const. Conv., 1879, p. 232). Another committee recommended: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by indictment or information, as may be prescribed by law * * *" (p. 308). The draft first

formation provided that as amended it does not charge an offense "not shown by the evidence taken at the preliminary examination." Stats. 1911, ch. 257, p. 436; held valid in *People v. Foster*, 198 Cal. 112, 243 p. 667.

[4] In 1927, the Legislature removed all vestiges of that limitation by adding to section 809 the provision that the information "may charge the offense, or offenses, named in the order of commitment, or any offense, or offenses, shown by the evidence taken before the magistrate to have been committed." Stats. 1927, ch. 617, p. 1045. These words mean, simply, that despite the duty of a magistrate (when holding a defendant to answer for a public offense) to designate the "offense in the * * * complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) * * *" § 872, the district attorney is not bound by that designation but is free to allege the commission of any crime shown by the evidence which was properly before the magistrate. This is the plain meaning of the words used and is substantiated by the purpose of the amendment as declared in the report of the Commission for the Reform of Criminal Procedure, created by ch. 346 of Stats. 1925, p. 622, to the Legislature at the 1927 Session. The commission prepared and recommended the 1927 amendment to section 809. Concerning that amendment, the

commission said: "It is further recommended that this section expressly *permit the information to charge either the crime named in the order of commitment or any offense shown by the evidence taken before the magistrate*. This will save time and avoid uncertainty and vexatious delays in cases *where for any reason the order of the committing magistrate does not correctly designate the crime shown by the evidence*." Append. to Journals of Senate and Assembly, 1927, vol. 5, p. 7 of Report of Com'n; emphasis added.

An "incorrect designation" might come about in a number of different ways. A magistrate might draw the wrong legal conclusion from a given set of facts when designating the crime which they evidence, or he might inadvertently overlook or lose sight of the legal significance of one set of facts when holding a defendant over for an offense which he finds sufficiently indicated by another set of facts. In any such case all of such evidence is available to the district attorney in drafting the information. Can the same be true of evidence upon the hearing of which it appears to the magistrate "either that no public offense has been committed" or that "there is not sufficient cause to believe the defendant guilty of a public offense," and pursuant to the duty which section 871 of the Penal Code casts upon him, in such a situation, the magistrate orders the de-

adopted read as follows: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by indictment or by information, after commitment and examination by a Magistrate, as may be prescribed by law * * *" (pp. 1176-1178, and 1425-1426). Later, the Committee on Revision and Adjustment recommended it be amended to read as it now reads (pp. 1491, 1508, and 1509). In that form, as a part of the Constitution as enrolled (pp. 1511-1521), it was adopted (p. 1521).

The Convention adopted an address to the people of the state setting forth the salient points of difference between the old and the proposed new Constitution (pp. 1521-1524) and ordered that the address be published with the proposed Constitution (p. 1524). In respect to prosecution by indictment or by information, that address contained the following

statement: "In reference to the grand jury, it is provided that offenses heretofore required to be prosecuted by indictment may be prosecuted by information, after examination and commitment by a Magistrate. This change dispenses with the necessity of drawing and summoning a grand jury to act upon every case before a party accused can be put on trial, and will be a great saving of expense to the various counties of the State. But to guard against possible abuse or favoritism on the part of the prosecuting officer, and for the purpose of investigating the conduct of officials and supervising the management of county affairs, a grand jury is required to be drawn and summoned at least once a year in each county. The practice of prosecuting by information instead of by indictment has been adopted in several of the States, and found to work well." (P. 1522.)

fendant discharged? That is the question posed in the instant case, for the petitioner alleges and the respondent admits that the court which conducted the preliminary examination "dismissed the two counts of the complaint charging grand theft and discharged petitioner thereon; that petitioner was discharged on said counts for the reason that it appeared to the said court that no public offense had been committed."

[5-7] If the two grand theft counts had been in one complaint and the bad check count in another, and a separate hearing held on each complaint, there would be no such problem. The magistrate's discharge of the defendant on the first complaint, as provided in section 871,⁴ and his order of commitment on the second complaint, as provided in section 872, would have produced a clear and distinct record of evidence relevant to the bad check count. The joining of the three counts in a single complaint, followed by a hearing of all three at the same time, produces a seemingly all inclusive record of "evidence taken before the magistrate" at the hearing of the bad check count. It is only seemingly so in the instant case. The record does not indicate an intent upon the part of counsel or of the magistrate that all of the evidence introduced should be deemed applicable to each and all of the counts, and at the conclusion of the hearing the magistrate commented upon the evidence separately by counts. The problem of unscrambling the record is not the same that it would be if the defendant had stipulated that all of the evidence introduced at the hearing would be deemed applicable to all of the counts. Evidence is not excluded when admissible for one purpose but not for other purposes. In a jury case the opposite party is entitled to an instruction appropriately limiting the scope of such evidence. *Adkins v. Brett*, 184 Cal. 252, 256-260, 193 P. 251.

In the absence of a jury and before a magistrate learned in the law, the opposite party would quite naturally assume that he had no occasion to ask for an express limitation. Even if such evidence were to go in without limitation as to purpose, it would not be available for consideration on any question not involved in the issues. *White v. Merrill*, 82 Cal. 14, 16, 22 P. 1129. See, also, *Miller v. Peters*, 37 Cal. 2d 89, 230 P.2d 803, citing earlier cases, including *Riverside Water Co. v. Gage*, 108 Cal. 240, 245, 41 P. 299. Hence, evidence relevant only to one or the other of the grand theft counts, should, upon dismissal of those counts and discharge of the defendant thereon, cease to be available for any purpose. There is the greater reason for such a conclusion, in view of the constitutional sanction for prosecution by information only "after examination and commitment by a magistrate" (not "examination and discharge"), when the magistrate has expressly "committed" as to one count and "discharged" as to the other two. The mere fact that the three charges were heard at one time and recorded in a single transcript would furnish an artificial, illogical, and unsound basis for saying that all the evidence in that transcript was "evidence taken before the magistrate" upon the examination of the bad check charge, especially when that would operate to render nugatory the clear mandate of the Constitution and the manifest purpose of the applicable statutes. The only reasonable conclusion, in the instant case, is that no offense shown by the evidence which pertained solely to the grand theft counts is an "offense * * * shown by the evidence taken before the magistrate to have been committed", within the meaning of that expression as used in section 809, which by its own terms operates only "When a defendant has been examined and committed".

The judicial decisions which construe

4. Indeed, in the event of such a discharge, there would appear to be no legal authority for ordering a reporter's transcript of the preliminary examination, or of paying for it if transcribed. See *Pen.*

Code, § 869, 5th subd., as amended by *Stats.*, 1881, p. 18; *Mattingly v. Nichols*, 133 Cal. 332, 65 P. 748; and *Fursdon v. County of Los Angeles*, 100 Cal.App.2d Supp. 845, 223 P.2d 520.

and apply the 1927 amendment, thus far rendered, tend to support the views herein expressed.

In *People v. Bird*, 212 Cal. 632, 300 P. 23, the court affirmed a conviction of manslaughter upon an information charging murder, despite the fact that upon the preliminary examination the magistrate held the defendant to answer for manslaughter. The court observed that no lack of due process was involved, citing *Lem Woon v. State of Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340, to the point that provision for prosecution of a crime by a prosecuting attorney, upon filing his own affidavit of probable cause without providing for examination or commitment by a magistrate, does not violate the due process clause of the federal Constitution. The court found that the words "as may be prescribed by law" (in section 8 of article I of our state Constitution) authorize the Legislature to prescribe the procedure for information as well as for indictment; that it is not a delegation of judicial power to the district attorney to authorize him, when drafting an information, to determine what the charge should be, based upon the evidence, irrespective of the offense mentioned in the order of commitment; and that section 8 of article I of the Constitution does not provide that the magistrate shall have the power to designate the crime, much less the exclusive power so to designate. "When the magistrate has concluded that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, he has performed his function under the common law practice (*O'campo v. United States*, 234 U.S. 91, 100, 34 S.Ct. 712, 58 L.Ed. 1231), and has performed all that the Constitution of this state required of him. The fact that the Legislature has required of him under section 872 of the Penal Code that he name the offense in the order of commitment and under section 877 of the same code that the commitment state briefly the nature of the offense, is not to deny to the same legislative authority the power to say that the designation of the offense shall not be exclusively in the magistrate, but that the responsibility therefor shall

devolve likewise and finally on the public officer who is charged with the duty of conducting the prosecution in the superior court." 212 Cal. at pages 642-643, 300 P. at page 27.

The court indicated there might be a limit to the literal application of the 1927 amendment, when it said: "It is conceivable that the action of the district attorney might be without the pale of the legislative sanction. For instance, if the defendant should be complained against for grand theft and be informed against for bigamy, because, forsooth, there might be testimony before the magistrate that the defendant was guilty of the latter crime, a serious problem might be presented. But no such question is presented here. Murder and manslaughter are both homicides. The latter is included in the former and is one or the other, depending on the facts and circumstances attendant upon the killing. One transaction only is involved. Such is the situation in the present case." 212 Cal. at pages 644-645, 300 P. at page 28. By that comment, we think the court meant that the district attorney should base his information upon competent evidence properly adduced at the preliminary examination. This is borne out by the decision in *People v. Wyatt*, 121 Cal.App. 180, 8 P.2d 901 (hearing in Supreme Court denied), which affirmed a judgment upon conviction of an offense not charged in the complaint nor mentioned in the order of commitment, nor growing out of the same transaction. "It consisted of one of a series of alleged like offenses during a period of about two years, and was shown at the preliminary examination for the purpose of showing system and intent." 121 Cal.App. at page 185, 8 P.2d at page 903. Evidence of such other offenses, thus properly admitted, was legally before the magistrate in the first instance, and later before the district attorney, for consideration. And there was involved no order of the magistrate discharging the defendant as to the offense in question.

In the greater number of cases, a decision sustaining an information which charged offenses differing from those charged in the order of commitment has involved,

primarily, differing legal conclusions respectively drawn by the magistrate and the district attorney concerning the type of offense or offenses which a particular set or series of facts, evidenced at the preliminary examination, indicated. *People v. Tallman*, 27 Cal.2d 209, 163 P.2d 857, commitment for assault with intent to commit rape, the information also charging assault by means of force likely to produce great bodily injury; *People v. McGee*, 31 Cal.2d 229, 187 P.2d 706, commitment for manslaughter, the information charging murder; *People v. Barnett*, 99 Cal.App. 409, 278 P. 885, commitment for rape, the information also charging lewd and lascivious conduct; *People v. Sturman*, 56 Cal.App.2d 173, 132 P.2d 504, commitment for attempted burglary, the information also charging burglary.

Respondent invokes *People v. Sanders*, 102 Cal.App. 237, 283 P. 136, in which it appeared that the order of commitment designated the offense of attempting to commit robbery of one Knezvich, whereas the information in addition charged attempted robbery of one Summers, and also alleged that defendant committed burglary. It is not clear just how the evidence indicating burglary or the evidence of attempted robbery of Summers came into the case at the preliminary examination, nor whether those charges were alleged in the complaint or not. More particularly, it does not appear that the magistrate discharged the defendant in respect to any such additional charges, nor does it appear that the reviewing court's attention was called to any such questions. The defendant's attack upon these additional charges was based entirely upon a questioned constitutionality of the 1927 amendment to section 809. He claimed it was unconstitutional to authorize the district attorney to charge in the information any offense not mentioned in the order of commitment. In overruling that contention, the court in that case did not have occasion to decide, nor did it undertake to decide, the question whether or not the district attorney may base an information upon evidence which pertained solely to a count which the

magistrate has dismissed for failure of proof that a public offense has been committed.

Another decision upon which respondent relies is *People v. Malowitz*, 133 Cal.App. 250, 24 P.2d 177. The order of commitment embraced five grand theft counts. The information, as amended, contained those five and an additional grand theft count. The defendant unsuccessfully claimed that the district attorney had no power to include any offense greater than or different from those for which he had been committed. The question posed in the instant case was not presented or considered in the *Malowitz* case.

In *People v. Shutler*, 15 Cal.App.2d 704, 59 P.2d 1050, the complaint charged kidnapping, rape, and violation of section 288 of the Penal Code. The order of commitment mentioned only kidnapping and rape. The information, as amended, charged all three offenses. In overruling defendant's contention that "the refusal of the magistrate to commit him for violation of section 288 was a determination that the evidence did not show the commission of that offense" 15 Cal.App.2d at page 709, 59 P. 2d at page 1052, the reviewing court said that the evidence taken at the preliminary examination was not before it, that the trial court had that evidence and found it sufficient to warrant the additional charge, and the reviewing court could not presume that the trial court erred in so holding. That, certainly was not a decision that, if a magistrate holds a defendant to answer on one count of a complaint and discharges him on another, the evidence peculiar to the latter is available for consideration in drafting charges for inclusion in the information.

[8] Respondent further contends that prohibition is not an available remedy in such a case as this, citing *Western Meat Co. v. Superior Court*, 1908, 9 Cal.App. 538, 543-544, 99 P. 976. This point is not well taken. See *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713; *Cleland v. Superior Court*, 52 Cal.App.2d 530, 126 P.2d 622; and § 999a, added to Pen.Code in 1949.

[9, 10] It seems appropriate to observe that if a magistrate erroneously dismisses a complaint, or a count of a complaint, and discharges a defendant, prosecution for the public offense involved is not necessarily at an end. The defendant, in such a case, has not yet been put in jeopardy. A second complaint, alleging the same facts, may be filed. Proceedings upon it will not abate because of the discharge upon the first complaint. *Ex parte Fenton*, 77 Cal. 183, 19 P. 267, and *People v. Zadro*, 20 Cal.App.2d 320, 66 P.2d 1204. Since indictment may be with or without examination and commitment, neither the pendency of a complaint before a magistrate, *People v. Collins*, 60 Cal.App. 263, 270, 212 P. 701 nor the discharge of a defendant by a magistrate, *People v. Hrak*, 85 Cal.App. 301, 259 P. 353 precludes the grand jury from indicting for the same offense.

Respondent court is without jurisdiction to try petitioner on either of the two grand theft counts but has jurisdiction to try him on the count involving section 476a of the Penal Code. As so limited, the petition for the writ of prohibition is granted.

PETERS, P. J., and BRAY, J., concur.



107 Cal.App.2d 60

In re HART'S ESTATE. 1

HART v. GOULD et al.

Civ. 18370.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1951.

Hearing Denied Dec. 18, 1951.

Proceeding in the matter of the estate of William S. Hart, deceased, wherein William S. Hart, Jr., filed a petition to revoke probate of the will. The petition was opposed by Thomas C. Gould; the County of Los Angeles, and others. The Superior Court of Los Angeles County, Harold B. Jeffery, J., en-

tered a judgment upon a verdict returned in favor of the proponents of the will, and the contestant appealed. The District Court of Appeal, McComb, J., held that where contestant's motion for change of venue was not made until two years after filing of his petition and 17 months after the date the matter first came on for setting of trial, and the trial court's order denying the motion was in general terms, it would be assumed that the court denied the motion for the reason that contestant had not acted with due diligence.

Affirmed.

See also, Cal.App., 236 P.2d 891.

1. Wills ⚡400

On appeal from jury verdict in a will contest, evidence must be viewed from standpoint most favorable to respondents and to sustaining the judgment.

2. Appeal and Error ⚡901, 912

Where an order denying a motion for change of venue is general in its terms and nothing to the contrary appears in the record, it will be assumed on appeal that the trial court based its ruling on fact that defendant had not acted with due diligence, and burden of excusing delays appearing in record would rest upon moving party.

3. Appeal and Error ⚡965

Whether moving party acted with reasonable diligence in presenting motion for change of venue is a question of fact to be determined by trial court, and where record on appeal is silent as to reason for delays, it will be held that the court did not abuse its discretion in denying the motion.

4. Wills ⚡258

Where motion for change of venue was not made in will contest until two years after filing of petition for revocation of will and 17 months after date matter first came on for setting for trial, and no explanation appeared in record for delay in bringing the matter to attention of trial court, it would be assumed that trial court denied motion for reason that movant had not acted with due diligence, and denial was proper.

5. Wills ⚡400

Instruction in will contest as to effect of monomania, an insane delusion, on tes-

tamentary capacity, and stating that monomania does not affect testamentary capacity in general, but that testamentary capacity is "admitted" only as to person or subject in regard to which unsoundness exists, was improper for use of word "admitted" which should have been "affected", but did not constitute prejudicial error in view of following sentences in the instruction to the effect that monomania affects only that part of the will which is a product of the monomania.

6. Trial ⚭295(1)

Instructions to the jury must be considered in their entirety, and if after such consideration they are correct, the court will not reverse a judgment even though an instruction or isolated statements are subject to criticism because of verbal inaccuracies.

7. Wills ⚭38(1)

Essential element of an insane delusion which will affect testamentary capacity is that it is created without reason or evidence and is adhered to against reason and evidence.

8. Wills ⚭54(5), 165(5)

Where a testator shows a continuity of purpose running through his former wills and codicils which indicates a settled intent or a consistent state of mind on his part as to the manner of distributing his estate, that is entitled to be considered in determining whether or not testator was in possession of a disposing mind and testamentary capacity and was free from undue influence.

9. Appeal and Error ⚭930(2)

It is presumed that jury considered instructions in their entirety and as read together.

10. Trial ⚭240

In will contest, requested instruction containing statement that it does not necessarily follow from these facts and these facts alone that at time of alleged execution of will in question testator was of sound mind, was argumentative and properly refused.

11. Wills ⚭329(5)

In contest of will which gave to county land for uses and purposes and upon and subject to conditions therein set forth, instruction that the county holds property on behalf of public and holds legal title in trust and that the will gives the land to the county for purposes and subject to conditions set forth therein, correctly stated provisions of will and was properly given in response to argument made to jury by contestant that the land referred to in the will had been given outright to the county.

12. Wills ⚭330(2)

In will contest, requested instruction that if testator was victim of monomania and entertained unwarranted, unfounded and unexplained hatred of former wife which was adhered to against reason and evidence and that such feeling influenced and colored his later life and was actively present and operative at time of execution of will, and acting under its effect, testator disinherited son, then testator was laboring under effect of an insane delusion even though he may have appeared to be of sound mind in other matters, was erroneous and defective as a formula instruction for omitting to state requirements of an insane delusion and was properly refused, especially where given instructions fully covered the subject matter.

13. Wills ⚭400

Where will contestant objected to proponents' submitted forms of special verdicts and submitted his forms which court submitted to jury, contestant could not attack the special verdicts on appeal.

14. Appeal and Error ⚭882(1)

Parties to an action must abide by consequences of their own acts and cannot obtain a reversal on appeal for errors which they have committed or invited.

15. Appeal and Error ⚭207

Unless harmful result of misconduct during trial cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in appellate court on such alleged misconduct in absence of as-

signment of such misconduct as error and a request to trial court to instruct jury to disregard it.

16. Wills ⚡396

Where proponents in will contest during argument to jury enlarged and placed on a blackboard in front of the jury portions of a letter which had been excluded from evidence, and referred to the enlargement, and contestant objected but failed to request trial court to instruct jury to disregard it, contestant could not predicate error upon the alleged improper argument.

17. Wills ⚡396

Where contestant in will contest was questioned for purpose of impeaching him relative to portions of a letter which had been written by him and which had not been formally received in evidence, and argument to jury with reference to the letter was also predicated upon the impeachment, and there was no objection to the questioning and the letter was before the jury without objection, contestant was not prejudiced and any error in that respect would be disregarded on appeal. Const. art. 6, § 4½.

Freston & Files, and Eugene D. Williams, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for Thomas C. Gould and others, as Executors of the Estate of William S. Hart, deceased.

Harold W. Kennedy, County Counsel and John B. Anson, Deputy County Counsel, Los Angeles, for respondent Los Angeles County.

Sidney N. Bachtell and B. Dean Clanton, Los Angeles, for respondent Los Angeles Society for the Prevention of Cruelty to Animals.

McCOMB, Justice.

This is an appeal by the son and only child of William S. Hart, deceased, from an adverse judgment following a jury verdict in a will contest.

[1] The evidence being viewed from the standpoint most favorable to the re-

spondents and to sustaining the judgment (In re Estate of Isenberg, 63 Cal.App.2d 214, 216[2], 146 P.2d 424; see also cases cited in 6 West's California Digest (1951), Appeal and Error, ⚡931(1), page 438), discloses these facts:

Mr. Hart died on June 23, 1946, leaving a will which was executed on September 9, 1944. So far as material here the will made certain specific bequests and contained these provisions:

"Second: I further declare that I have but one child, a son by the name of William S. Hart, Jr., who is the issue of my marriage to said Winifred Westover Hart. I have made no provision in this Will for my son for the reason that I have amply provided for him during my lifetime.

"Fourth: I hereby give, devise and bequeath to the County of Los Angeles, State of California, a body politic and corporate, (hereinafter sometimes referred to as 'the County'), for the uses and purposes, and upon and subject to the conditions, hereinafter set forth, all that certain real and personal property described as follows, to-wit: (description of property).

"A. That the said real and personal property (hereinafter sometimes referred to as the 'Park') shall be forever used and maintained by the County and its successors in interest and estate, exclusively as a public park and pleasure grounds, and for exhibition purposes, for the amusement, recreation, health and pleasure of its inhabitants. That the Park shall be open to public use at all times subject to proper restrictions to be provided by the Board of Supervisors of the County. That a charge or fee shall never be made of the public for admittance to the said premises, provided, however, that the Board of Supervisors may fix and collect a nominal charge for the use of camping facilities located on the Park Property in an amount of approximately the cost of the public utilities likely to be used by the person to be charged.

"B. That the name of said Park shall be established by ordinance to be 'William S. Hart Park', and that 'William S. Hart Park' shall be continued as the official name and designation of said Park.

"C. That, within twelve months from and after the date of the recordation of the decree of distribution distributing the said property to the County, the County shall

"(1) Construct and thereafter maintain at the present location of the main entrance to said property a plate on which shall be inscribed in letters of suitable size and character the words 'William S. Hart Park'; and, that at a proper location on or adjacent to the Museum Property, place or erect a tablet on which shall be inscribed in letters of suitable size and character the following words:

"This Park has been dedicated
by

William S. Hart

for the benefit of the American Public
of every race and creed."

There follow then a number of restrictions upon the use of the park estate.

"Seventh: All the rest, residue and remainder of my estate of every kind or nature and wheresoever situate, including any property over which I may have any power of appointment, after paying all my just debts, all expenses of my last illness and burial, all estate, inheritance, income and other taxes payable from estate funds, and all administration costs, expenses, fees and commissions, as provided in paragraph Third, I hereby give devise and bequeath and appoint to the County of Los Angeles, In Trust, to be added to the property and/or fund hereinabove specified in paragraph Fifth hereof, and to be used and devoted as a part of said property and/or fund and under and subject to the same terms and conditions, and for the same uses and purposes, provided for in said paragraph Fifth.
* * *

"Fifteenth: I hereby nominate and appoint Thomas C. Gould and William R. McKay, now judges of the Superior Court of the State of California, in and for the County of Los Angeles, as joint Executors hereof."

- Page 2, Appellant's Opening Brief reads in part thus: "The Reporter's Transcript herein contains in excess of 7800 pages, including the testimony of a very large number of witnesses and a mass of

This will was admitted to probate July 26, 1946. January 25, 1947, decedent's son filed a petition to revoke the probate of the will. On January 27, 1947, an amended petition was filed on the grounds (1) that decedent did not have the mental capacity to execute a testamentary document, (2) that the will had been procured through undue influence on the testator, and (3) that testator suffered from monomania at the time of the execution of the will.

On February 17, 1949, appellant filed a notice of motion for change of venue upon the ground there was reason to believe an impartial trial could not be had in the County of Los Angeles. This motion was denied.

After various continuances the trial was commenced January 3, 1950, and after a jury had been selected and evidence received the case was duly submitted to the jury on the issues set forth above, which jury returned a verdict on each of the issues against appellant (contestant).

It is to be noted appellant concedes the evidence is sufficient to sustain the findings of the jury.*

Questions: First: Did the trial court commit prejudicial error in denying appellant's motion for a change of venue?

[2] No. The following rules are applicable to the present action:

(1) Where an order denying a motion for change of venue is general in its terms and nothing to the contrary appears in the record, it will be assumed on appeal that the trial court based its ruling on the fact defendant had not acted with due diligence. The burden of excusing delays appearing in the record rests upon the moving party. (Hart v. Forgeus, 184 Cal. 327, 329[2] et seq., 193 P. 764; Votaw v. Miller, 42 Cal. App.2d 676, 677[1-2], 109 P.2d 719.)

[3] (2) Whether the moving party acted with reasonable diligence in presenting a motion for change of venue is a question

evidence on each side. *The evidence is such that it could furnish a substantial basis for an express or implied finding on either side of any essential issue.**
(Italics added.)

of fact to be determined by the trial court, and where the record is silent as to the reason for the delays, it will be held that the court has not abused its discretion in denying the motion. (*Hart v. Forgeus*, supra; *Votaw v. Miller*, supra.)

In the present case appellant filed his motion for change of venue on February 17, 1949. This motion was heard on February 23, 1949, and the trial court made an order in general terms denying the motion. It therefore appears it was approximately two years after the filing of the petition for revocation of the will, and about one year and five months after the date the matter first came on for setting for trial, that appellant made his motion for change of venue.

[4] No explanation appears in the record for this delay in bringing the matter to the attention of the trial court. Therefore under the rules set forth above this court must assume the trial court denied the motion for the reason that appellant had not acted with due diligence.

Second: *Did the trial court commit prejudicial error in giving the instructions hereinafter set forth?*

This question must be answered in the negative.

(a) "Monomania is a form of insane delusion. It's a false belief of the existence of something which does not exist but if there is any evidence, however slight or inconclusive which might have a tendency to create the belief or inference, such belief is not an insane delusion or monomania.

"To more fully define monomania, it is a partial insanity or unsound mind as to one or more persons or upon one or more subjects, and soundness as to all others. This does not affect the testamentary capacity in general. In such a case testamentary capacity is admitted only as to the person or subject in regard to which the unsoundness exists.

"In other words, if some portion of a will is a product of monomania, but the rest of the will is not, the will must be upheld except as to that portion which is found to have been the product of monomania in the mind of the testator.

"In this connection I instruct you that monomania may be found only if the belief or opinion has no basis and reason or probability and is without any evidence in its support, but exists without any process or reasoning or is the spontaneous offspring of a perverted imagination and is adhered to against evidence and argument, but if there is any evidence, however, slight or inconclusive, which might have a tendency to create a belief, such a belief is not monomania.

"One cannot be said to act under a monomania if his condition results from a belief or inference, however irrational or unfounded, which is drawn from facts which are shown to exist.

"If you should find either that the entire will, or any part thereof, of Mr. Hart, was the result of monomania on his part, then you should so indicate by a special verdict which I am now submitting to you, and it will be handed to your foreman to take to the jury room."

[5] Appellant criticizes the word "admitted" in this statement in the instruction: "In such a case testamentary capacity is admitted only as to the person or subject in regard to which the unsoundness exists." The word "admitted" was erroneous and should have been "affected." However, such error is not prejudicial since the error is clarified by the sentence following which reads: "In other words, if some portion of a will is a product of monomania, but the rest of the will is not, the will must be upheld, except as to that portion which is found to have been the product of monomania in the mind of the testator." It is further clarified by the last statement in the instruction reading thus: "If you should find either that the entire will or any part thereof, of Mr. Hart, was the result of monomania on his part, then you should so indicate by a special verdict which I am now submitting to you * * *

[6] The rule is established that instructions to the jury must be considered in their entirety and if after such consideration they are correct the court will not reverse a judgment even though an instruc-

tion or isolated statements are subject to criticism because of verbal inaccuracies. (*Shapiro v. Equitable Life Assur. Soc.*, 76 Cal.App.2d 75, 95[34], 172 P.2d 725, 736.)

It is clear that in the present case the word "admitted" constitutes merely a verbal inaccuracy which was corrected by more specific parts of the instruction and the jury could not have been misled by the use of the word. The instruction was not prejudicial.

(b) "An insane delusion is the unyielding belief of the existence of something which does not exist and the acting upon that belief. Belief of things which are entirely without foundation in fact, and which no sane person would believe, is insane delusion. If a person be under a delusion, though there be but partial insanity, yet if it be in relation to the act in question, it will defeat a will which is the direct offspring of that partial insanity."

[7] Appellant complains that this instruction was erroneous for the reason that it includes the idea that a belief or opinion to constitute a monomania must be without any basis and reason or probability. This contention is erroneous. The essential element of an insane delusion is that it is created without reason or evidence and is adhered to against reason and evidence. (In re Estate of Kendrick, 130 Cal. 360, 370, 62 P. 605.) The instruction as given was correct.

(c) "If, prior to executing his last will, a testator shows a continuity of purpose running through his former wills and codicils which indicates a settled intent or a consistent state of mind on his part as to the manner of distributing his estate, this is entitled to be considered by you in determining whether or not a testator was in possession of a disposing mind, that is, had testamentary capacity and was free from undue influence in making his last will."

[8] This instruction was a correct statement of the law. (In re Estate of Bagicalupi, 202 Cal. 450, 454, 261 P. 470; In re Estate of Stump, 202 Cal. 308, 310, 260 P. 543; In re Estate of Perkins, 195 Cal. 699, 707, 708, 235 P. 45.)

236 P.2d—56½

Cal. Rep. 235-236 P.2d—49

[9] There is likewise no merit in appellant's contention that the foregoing instructions single out certain facts and tend to emphasize them. As stated above the instructions to the jury must be considered in their entirety and as read together. It is presumed that the jury so considered them.

[10] In Estate of Clark, 180 Cal. 395, 181 P. 639, 641, a similar instruction was requested to the one here questioned, and was properly refused for the reason that it contained this statement: "It does not necessarily follow from these facts, and these facts alone, that at the time of the alleged execution of the will in question she was of sound mind." The quoted language constituted an argument and since the instruction was argumentative the court properly refused it.

(d) "The County of Los Angeles, being by its nature a political subdivision of the State, holds its property on behalf of the public, and the proprietary interest in all such property belongs to the public, and if there be legal title in the County, it is held in trust.

"You are further instructed that the will gives the ranch to the County for the purposes and subject to the conditions set forth in the will."

The giving of this instruction was correct for the reason that the will read in part as follows:

"Fourth: I hereby give, devise and bequeath to the County of Los Angeles, State of California, a body politic and corporate, (hereinafter sometimes referred to as 'the County'), for the uses and purposes, and upon and subject to the conditions, hereinafter set forth, all that certain real and personal property described as follows, to-wit:":

[11] Such instruction was given in response to the argument made to the jury by appellant that the ranch property referred to in the will had been given outright to the County of Los Angeles. The instruction correctly stated the provisions of the will.

Third: *Did the trial court commit prejudicial error in refusing to give the following instruction requested by appellant?*

"If William S. Hart was primarily a victim of Monomania, on September 9, 1944, at the time of the execution of the Will; if he entertained an unwarranted, unfounded and unexplained hatred of his former wife, Winifred Westover, which was adhered to against reason and evidence; and that this feeling not only influenced and colored his later life, but was actively present and operative at the time of the making of the Will; and that, acting under its effect, William S. Hart, was constrained to and actually did disinherit his son, then William S. Hart, at the time of making said Will, was laboring under the effect of an insane delusion, even though he may have appeared to be of sound mind in other matters."

[12] *No.* The foregoing proposed instruction was erroneous in that it omitted to state the requirements of an insane delusion. Therefore as a formula instruction it was defective and the court properly denied it. In addition the instructions given by the court fully covered the subject matter of this instruction. Therefore there was no error in refusing it. (*Luis v. Cavin*, 88 Cal.App.2d 107, 115, 198 P.2d 563.)

Fourth: *Did the trial court commit prejudicial error in submitting to the jury special verdicts numbers 2 and 3?*

[13,14] *No.* Respondents submitted certain forms of special verdicts to the trial judge. Appellant objected to these special verdicts claiming that they required the jury to find on matters of evidence and that the correct rule was stated in *Re Estate of Webster*, 43 Cal.App.2d 6, 16, 110 P.2d 81, 111 P.2d 355. Appellant therefore requested that certain special verdicts be submitted to the jury. The court complied with appellant's request and submitted the special verdict number 2 as requested by appellant and followed the theory announced in *Estate of Webster*, *supra*, in verdict number 3. Hence under the rule that the parties must abide by the consequences of their own acts and cannot obtain a reversal on appeal for errors which they have committed or invited (*Noble v. Miles*, 129 Cal.App. 724, 727, 19 P.2d 265; See also cases cited in 6 West's California Digest (1951), Appeal and Error, ¶882(1), page 246), appellant may not now attack

the special verdicts which were submitted to the jury.

Fifth: *Was counsel for respondents guilty of prejudicial misconduct during the course of the argument?*

No. Portions of a letter written by appellant were received in evidence while other portions were excluded. During the course of the argument portions of the letter not received in evidence were enlarged and placed on a blackboard in front of the jury, and counsel for respondents referred to the enlargement. To this appellant objected. He now urges that it was prejudicial error to permit reference to the portions of the letter not received in evidence.

[15,16] This objection is not sound for two reasons: (1) Though appellant objected to the argument he did not request the trial court to instruct the jury to disregard it. The rule is established that unless the harmful result of misconduct cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error, and (b) a request to the trial court to instruct the jury to disregard it. (*Delzell v. Day*, 36 Cal.2d 349, 351, 223 P.2d 625; *Burke v. John E. Marshall, Inc.*, 42 Cal.App.2d 195, 208, 108 P.2d 738; *Sit-kei v. Ralphs Grocery Co.*, 25 Cal.App.2d 294, 296[2], 77 P.2d 311. See also cases cited in 5 West's California Digest (1951), Appeal and Error, ¶207, page 271.)

[17] (2) The record discloses that without objection appellant was questioned for the purpose of impeaching him relative to portions of the letter which had not been formally received in evidence and that the argument to the jury also with reference to this letter was predicated upon the same theory. Since the content of the letter was before the jury without objection of appellant it is clear that no prejudice resulted. Under Article VI, section 4½ of the Constitution of the State of California any error in this respect must be disregarded on appeal.

Affirmed.

MOORE, P. J., concurs.

Hearing denied; CARTER, J., dissenting.

107 Cal.App.2d 58

In re HART'S ESTATE.

GOULD et al. v. HART.

Civ. 18370.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1951.

until there had been final determination of the case on appeal. Probate Code, § 385; Const. art. 1, § 11.

4. Wills ⇨356

In will contest, orders of the court amending judgment and striking cost bill were not "appealable". Probate Code, § 1240.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Orders".

Spray, Gould & Bowers, Los Angeles, for appellants.

Freston & Files and Eugene D. Williams, Los Angeles, for respondent.

McCOMB, Justice.

The executors of the estate of decedent, William S. Hart, appeal from the portion of a judgment omitting provision for costs in favor of the proponents of decedent's will after a judgment refusing revocation thereof.

They also purport to appeal from (a) an order of the court amending the judgment, and (b) an order of the court striking the cost bill.

Facts: After verdicts of a jury sustaining decedent's will a judgment denying a petition for revocation of the will was filed containing this provision: "And that proponents have and recover from said contestant their costs and disbursements amounting to the sum of \$—."

Thereafter the coexecutors filed a memorandum of costs and disbursements in the sum of \$15,335.99. Subsequently the trial court upon motion of the contestant struck the above quoted provision for costs from the judgment.

Section 383 of the Probate Code reads as follows: "If the probate is not revoked, the costs of trial must be paid by the contestant. If the probate is revoked, the costs must be paid by the party who resisted the revocation or out of the property of the decedent, as the court directs."

Question: Is section 383 of the Probate Code merely directory and not mandatory?

Proceeding in the matter of the estate of William S. Hart, deceased, wherein William S. Hart, Jr., filed a petition for revocation of the will. The petition was opposed by Thomas C. Gould, and others. After judgment in favor of the proponents, the Superior Court of Los Angeles County, Harold B. Jeffery, J., struck provision of the judgment granting proponents costs, and the proponents appealed. The District Court of Appeal, McComb, J., held that the court properly refused to award costs until final determination of the litigation on appeal, and that orders of the court amending the judgment and striking the cost bill were not appealable.

Judgment affirmed, and purported appeals from the orders dismissed.

See also, Cal.App., 236 P.2d 884.

1. Constitutional Law ⇨48

Where a legislative enactment is susceptible of two constructions, one consistent and the other inconsistent with provisions of state constitution, the enactment will be so construed as to make it harmonious with the constitution.

2. Wills ⇨402

Probate Code provision that if probate of a will is not revoked, cost of trial must be paid by contestant, but that if probate is revoked, costs must be paid by proponents or out of property of decedent, as court directs, was merely directory and not mandatory when construed in accordance with constitutional provision that laws of a general nature must have a uniform operation. Probate Code, § 383; Const. art. 1, § 11.

3. Wills ⇨402

Where will contestant's petition for revocation of will was denied following verdict sustaining the will, trial court properly refused to award costs to proponents

LOS ANGELES COUNTY v. WRIGHT et al.

LOS ANGELES COUNTY v. PACIFIC
LIGHTING GAS SUPPLY CO.

Nos. 18321, 18320.

District Court of Appeal, Second District,
Division 2, California.

Nov. 2, 1951.

[1] *Yes.* There is a cardinal rule of construction of code provisions that where a legislative enactment is susceptible of two constructions, one consistent and the other inconsistent with the provisions of the State Constitution, such enactment will be so construed as to make it harmonious with the Constitution. (See cases cited in 5 Cal.Jur. (1922), section 46, page 615.)

In the present case if section 383 of the Probate Code were to be held mandatory it would be unconstitutional as contrary to the provisions of Article I, Section 11, of the State Constitution, which reads as follows: "All laws of a general nature shall have a uniform operation."

[2] It is evident that there is no logical or reasonable basis or distinction for mandatorily awarding costs against a contestant *after* a will has been admitted to probate and not awarding the same costs against a contestant of a will *before* it is admitted to probate. Therefore by construing the code provision as merely directory it is consistent with the constitutional provision.

This rule is consistent with the decided cases which hold that costs in a will contest should not be allowed prior to the final determination of the contest, which, where an appeal has been taken as in the instant case, is not until after there has been a final disposition of the appeal. (In re Estate of Berthol, 163 Cal. 343, 344, 125 P. 750.)

[3] The trial court was therefore correct in striking the provision from the judgment and in making an order leaving the determination of costs until there had been a final determination of the litigation on appeal.

[4] The two orders from which an appeal has been taken are not listed in section 1240 of the Probate Code and are therefore nonappealable. (In re Estate of Hart, 92 Cal.App.2d 691, 692, 208 P.2d 59.)

The judgment appealed from is affirmed. The purported appeals from the order of the court amending the judgment and the order of the court striking the cost bill are dismissed.

MOORE, P. J., concurs.

Condemnation proceeding by County of Los Angeles against Preston S. Wright, Pacific Lighting Gas Supply Company, and others to obtain easement over certain property for public highway purposes and action by County of Los Angeles against Pacific Lighting and Gas Supply Company to determine whether plaintiff by reason of grant to it of easement for road purposes succeeded to rights of its grantor to require defendant to relocate pipe line at its own expense. The Superior Court of Los Angeles County, J. A. Smith, J., rendered judgment in each case in favor of plaintiff and defendant Pacific Lighting and Gas Supply Company appealed. The District Court of Appeal, Wilson, J., held that the conveyance to county of road easement without reference to pipe-line easement did not vest county with any right to require relocation of defendant's pipe line and as that county did not acquire right, either by deed or condemnation to compel defendant to move its pipe line without payment of cost of removal.

Judgment in contract case reversed.

Judgment in condemnation case modified and as modified affirmed.

1. Appeal and Error ⇨1008(1)

Where there is no conflict in evidence, findings and conclusions of trial court are but conclusions of law and are not binding upon district court of appeal.

2. Appeal and Error ⇨842(1)

Where there is no conflict in evidence an appellate court is not bound by trial court's construction of an instrument based solely on its terms unaided by extrinsic evidence.

3. Easements ⇨1

Eminent Domain ⇨85

An easement over land is real property and holder of such easement is entitled to recover damages when such ease-

ment is taken or damaged for public use. Const. art. 1, § 14.

4. Easements ⇨12(1)

An easement creates an interest in land and the rules applicable to the construction of deeds apply to instruments conveying easements.

5. Dedication ⇨53, 60

Where common grantor reserved right to require defendant gas company to relocate its gas pipe line at its own expense in its prior grant of gas pipe-line easement to defendant, grant to plaintiff county of easement for road purposes without reference in deed to county of pipe-line easement did not convey the fee title to county and therefore county did not succeed to any rights of grantor to require defendant to relocate its pipe line.

6. Covenants ⇨84

A covenant running with land binds those only who acquire the whole estate of the covenantor in some part of the property. Civ.Code, § 1465.

7. Stipulations ⇨14(12)

Where plaintiff county seeking to condemn easement for road purposes in property expressly recognized defendant gas company's right in easement for gas pipe line by joining in stipulation that judgment of condemnation for road purposes entered against defendant's grantor should be subject to rights of holders of easement over parcel, plaintiff could not compel defendant gas company to re-locate its pipe line without payment to defendant of cost thereof.

8. Dedication ⇨60

Where common grantor reserved right to require defendant gas company to change location of its gas pipe line to such location as might be demanded by grantor in writing and deed provided as condition precedent that if such re-location were demanded outside area of easement grantor agreed to give defendant an easement covering such new area on same

terms, obtaining by plaintiff county of easement in same property for road purposes did not give it authority to designate new location to which pipe line should be moved nor to grant easement therefor and plaintiff could not claim benefit of covenant without accepting burden which was contained in same covenant. Civ.Code, § 1465.

9. Dedication ⇨60

Where deed conveying pipe line easement to defendant gas company provided for removal of pipe line to new location whenever a change in location was deemed by grantor necessary or convenient to permit of any construction or use which grantor might desire to make or carry on and plaintiff county and not grantor was desirous of intending to construct roadway and to make use of that portion of property covered by road easement conveyed to county, grantor's notice to gas company to remove its pipe line was ineffectual for any purpose and as county had not acquired right either by deed or by condemnation to compel defendant to move its pipe line its notice so to do was ineffectual without payment of cost of removal.

LeRoy M. Edwards, Oscar C. Sattinger, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Milnor E. Gleaves, Deputy County Counsel, Los Angeles, for respondent.

WILSON, Justice.

The sole question for determination is whether plaintiff County of Los Angeles by reason of the grant to it of an easement for road purposes by Los Angeles Investment Company succeeded to the right of its grantor to require defendant Pacific Lighting Gas Supply Company to relocate its pipe line at its own expense, such right having been reserved to Investment Company in its prior grant of a gas pipe-line easement to Pacific Lighting Corporation, predecessor in interest of defendant Pacific Lighting Gas Supply Company.¹

1. On March 22, 1950, the operating properties of Pacific Lighting Corporation, including the facilities involved in the con-

demnation action, were transferred to Pacific Lighting Gas Supply Company. At the trial the latter corporation was

The two actions, one on a contract between County and Pacific and the other for condemnation, were consolidated for trial. Judgment in each case having been rendered in favor of plaintiff, defendant Pacific has appealed.

There is no dispute as to the facts. Investment Company by deed dated June 1, 1943, granted an easement to Pacific for the installation and maintenance of a gas pipe line. The deed provides in paragraph 4² that the "location of said pipe line or lines to be changed by the Grantee to such new location as may be demanded by Grantor in writing whenever a change in the location of said pipe line or lines, or any part thereof, is deemed by the Grantor necessary or convenient to permit of any construction, use or employment which the

substituted as defendant in place of Pacific Lighting Corporation. Both companies will be referred to herein as Pacific.

2. "4. The location of said pipeline or lines to be changed by the Grantee to such new location as may be demanded by Grantor in writing whenever a change in the location of said pipeline or lines, or any part thereof, is deemed by the Grantor necessary or convenient to permit of any construction, use or employment which the Grantor may desire to make or carry on, and all costs of making such change in the location of said pipeline or lines as demanded by the Grantor shall be wholly paid and borne by the Grantee. Upon such relocation, such pipeline or lines shall be laid at such depth that the top of said pipeline or lines will at all points be not less than thirty (30) inches below the surface level of the ground, except at points crossing deep gulleys or ravines, where said pipeline or lines may be laid at a lesser depth or supported above the ground to prevent soil erosion or damage to the pipeline or lines. The Grantee agrees to commence the work of relocation within fifteen (15) days after receipt of written demand and to prosecute said work diligently to completion. The grantee agrees, however, that if the Grantor should determine that Grantee should locate or relocate its pipeline or lines under any existing street or streets, or street or streets hereafter laid out, that Grantee will do so at its own cost and expense. Grantor agrees that in every instance where a relocation of said pipeline or lines is deemed by it to be necessary, that it will not arbitrarily demand that Gran-

tor may desire to make or carry on, and all costs of making such change in the location of said pipe line or lines as demanded by the Grantor shall be wholly paid and borne by the Grantee." Paragraph 11 of the deed provides: "It is further mutually understood and agreed by and between the Grantor and Grantee that each and every one of the conditions, agreements and covenants herein shall inure to the benefit of or bind (as the case may be) the successors and assigns of the respective parties hereto."

In January, 1948, Investment Company granted to County a road easement in connection with the contemplated improvement of La Cienega Boulevard. The area covered by the deed included part of the pipeline easement conveyed in 1943 to Pacific.

tee shall relocate its pipeline or lines beneath any existing street or streets, or street or streets hereafter laid out, if there is still some other route available therefor over and across Grantor's property that would not in any wise prevent Grantor from subdividing its property and/or from dedicating roads or streets over the same. Grantee further agrees that it will execute and deliver upon demand to the Grantor any and all documents necessary to enable Grantor to effectively subdivide its property, and to execute and deliver to Grantor such other documents as may be required by any governmental laws, rules or regulations now or hereafter enacted pertaining to the subdivision of land. Grantor expressly reserves unto itself the right to at any time subdivide all or any portion of the above described property, including the right-of-way herein. Provided, however, and as a condition precedent, if such relocation as demanded by Grantor shall be outside the area of this easement, Grantor agrees to give Grantee, without additional payment to Grantor of any consideration therefor, an easement covering such new area on the same terms as the present easement and to execute and deliver said new easement to Grantee before the recordation of any new subdivision map or dedication of any street affecting the Grantee herein. To the extent that the new easements are given pursuant to this clause and upon completion of said relocation, the Grantor agrees to quitclaim that portion of the present easement which is superseded by the new easement."

On March 1, 1948, Investment Company wrote Pacific notifying it that County was ready to begin construction of a bridge for the grade separation of Slauson Avenue and the proposed La Cienega Boulevard; that apparently it was essential that a part of Pacific's pipe line be removed "to the extent that it is necessary for construction of the grade separation" and it assumed Pacific agreed "that both of us should cooperate to bring about this result" and "we would appreciate it if you would accept this letter as the formal notice referred to in the easement deed." In response to this notice Pacific wrote Investment Company on March 9, 1948, stating it would be necessary to obtain a new right of way from the latter for the portion outside the limits of Slauson Avenue and submitting a tentative relocation of the pipe line for its approval. Pacific also stated it had "been advised by Los Angeles County Road Department that they will compensate us for our costs involved in the relocating of the facilities and it is, therefore, not necessary to discuss this phase further with you." On March 18, 1948, Pacific again wrote Investment Company stating it was ready to proceed with the relocation of its pipe line. Thereafter, upon learning that County contended it was entitled to the benefits of the provisions of the pipe-line easement, Pacific refused to move its pipe line until it had been compensated for the cost.

On April 6, 1948, County claiming to be the assignee of Investment Company made written demand upon Pacific to move that part of its pipe line affected by the proposed construction of an overpass on Slauson Avenue where it crosses La Cienega Boulevard stating that "any location for your line outside the right of way of La Cienega Boulevard of course would have to be obtained from the Los Angeles Investment Company." Pacific refused to do so until it had been compensated therefor, contending that the conditions and covenants in the pipe-line easement did not inure to the benefit of County. In order to avoid delay in the improvement of the streets, Pacific and County entered into an agreement on April 13, 1948, whereby

Pacific agreed to move its pipe line and County agreed to pay the costs of relocation pending a judicial determination as to whether Pacific was obligated to relocate its pipe line at its own expense pursuant to the terms of its pipe-line easement. Thereafter Pacific relocated its pipe line at County's expense subject to the latter's right to sue within one year to recover the cost of the relocation. It is stipulated between the parties that the cost of moving the pipe line was \$4,631.90, which is the amount of the judgment rendered in favor of County in the contract action.

The condemnation action was filed on April 12, 1948, both Investment Company and Pacific being named as defendants, Investment Company as the owner in fee simple of parcels 10-18, 10-19 and 10-20 and Pacific as the holder of a gas pipe-line easement traversing the same parcels. The property over which the road easement was granted by the deed of January, 1948, from Investment Company to County was coextensive with parcels 10-19 and 10-20. About November 30, 1948, a stipulation was entered into between County and Investment Company for the entry of a judgment condemning an easement over parcel 10-18 and other parcels not herein involved. The stipulation further provided that "plaintiff may have a final order of condemnation conveying to it an easement over said property for public highway purposes subject to the rights of lessees, sublessees, holders of easements and rights-of-way."

The interlocutory judgment for condemnation recites that the action "came on by written stipulation as to Parcels Nos. 10-16, 10-17 and 10-18 * * * and said parties having stipulated to the entry of an interlocutory judgment as to said parcels of land;

"Now, therefore, it is ordered, adjudged and decreed: * * *

"That pursuant to said written stipulation on file herein, * * *" upon payment to Investment Company of the sum agreed upon "plaintiff may have a final order of condemnation conveying to it an easement over said parcel for public highway purposes."

Subsequently a final order of condemnation was entered reciting that plaintiff had paid to defendants the sums required by the interlocutory judgment and adjudging that the property be condemned and plaintiff take and acquire an easement over said property for public road and highway purposes.

On April 11, 1949, Investment Company wrote Pacific requesting it to remove its pipe line, pursuant to the provisions of the pipe-line easement, "at such points and places as may be found to lie within the boundaries of said La Cienega Boulevard from approximately 800 feet north of Slau-son Avenue southerly to La Tijera Boulevard." This letter was signed by the president of Investment Company who testified at the trial that it was not his intention that the notice include parcel 10-18, since the stipulation above recited had reserved the rights of easement holders in that parcel, and it was his intention merely to cover the area in the vicinity of the Slau-son Avenue Bridge. To this letter Pacific replied that the notice did not comply with the terms of the easement and that it was improper inasmuch as at that time Investment Company had already deeded for road purposes a portion of the property involved and had entered into a stipulation for the compensation to be paid it for the balance of the property. Pacific agreed, however, to proceed with the relocation of its pipe line in order not to delay the improvement of La Cienega Boulevard pending the outcome of its litigation with County and without prejudice to its rights. Thereafter the pipe line was moved and it was stipulated between the parties that the cost of the relocation was \$6,766.04, which is the amount of damage claimed by Pacific in the condemnation action.

The trial court found, in the contract action, that the deed conveying the pipe-line easement provided that Pacific "should relocate at its own expense any pipe lines constructed on said easement by said defendant when it became necessary to do so to enable the grantor to construct a road upon said easement, or for the dedication of same for a public highway; and upon

the further provision that such relocation should be upon the demand of the grantor and upon the grantor's granting to said grantee another easement for the relocation of said pipe lines." This finding does not coincide with the language in the first sentence of paragraph 4 of the deed hereinbefore quoted in the text of this opinion and in footnote No. 2.

The court concluded that County "is the successor in interest and assign of Los Angeles Investment Company to the full extent of its said easement within the meaning of Section 11 of the deed easement [hereinbefore quoted] executed by said Los Angeles Investment Company as grantor in favor of defendant on June 1, 1943, and entitled to the benefits of its provisions" and that the "notice given to said defendant to relocate its said pipe line was a substantial compliance with the terms of the said deed easement."

In the condemnation action the court determined that County is the successor in interest and assignee of Investment Company within the meaning of Section 11 of the deed of June 1, 1943, conveying the easement and is entitled to the benefits of its provisions; that the notice which the Investment Company gave to Pacific on April 11, 1949, demanding that it relocate its pipe lines so that County could construct La Cienega Boulevard was a substantial compliance with the terms of said deed easement.

[1,2] Since there is no conflict in the evidence, the findings and conclusions of the trial court are but conclusions of law and not binding upon this court. *Leis v. City & County of San Francisco*, 213 Cal. 256, 258, 2 P.2d 26; *San Diego Trust & Savings Bank v. San Diego County*, 16 Cal.2d 142, 153, 105 P.2d 94, 133 A.L.R. 416. Furthermore, when there is no conflict in the evidence an appellate court is not bound by the trial court's construction of an instrument based solely upon its terms unaided by extrinsic evidence. *Estate of Wunderle*, 30 Cal.2d 274, 280, 181 P.2d 874; *Western Coal & M. Co. v. Jones*, 27 Cal.2d 819, 826-827, 167 P.2d 719, 164 A.L.R. 685.

[3-5] An easement over land is real property and the holder of such easement is entitled to recover damages when such easement is taken or damaged for public use. Const. art. I, sec. 14; *Bacich v. Board of Control*, 23 Cal.2d 343, 349-350, 144 P.2d 818; *Rose v. State of California*, 19 Cal.2d 713, 727, 123 P.2d 505. Pacific is therefore entitled to damages in the amount of the cost of removal of its pipe lines unless the right of Investment Company to compel removal without compensation passed to County by Investment Company's deed to the latter of the road easement. An easement creates an interest in land, *Eastman v. Piper*, 68 Cal.App. 554, 560, 229 P. 1002 and the rules applicable to the construction of deeds apply to instruments conveying easements. *Idem*, 68 Cal.App. 561, 229 P. 1002. The terms of the deed conveying the road easement and the rights conveyed thereby are clear and explicit. The conveyance is to County alone and not to its successors or assigns. County did not acquire the fee title to the property but only an easement thereover. There is no reference in the deed to County of the pipe-line easement. Therefore, insofar as the contract case is concerned, County did not succeed to any rights of Investment Company and the latter did not purport to and did not convey or assign to County any such rights.

[6] In the condemnation case County expressly recognized Pacific's rights and easement by joining in the stipulation that a judgment of condemnation for road purposes be entered against Investment Company "subject to the rights of * * * holders of easements" over parcel 10-18, and by the terms of the judgment itself reciting that the case came on for hearing by the stipulation and that the judgment was rendered "pursuant to said written stipulation."

[7,8] Although Investment Company's right to compel Pacific to remove its pipe line without compensation in the circumstances mentioned in the conveyance of the pipe-line easement was a covenant running with the land which would have passed to Investment Company's grantee as successor in interest upon a conveyance of

the fee title, such right did not pass to County by the conveyance of the road easement and did not attach thereto. "A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property." Civ. Code, sec. 1465. Moreover, while the grantor reserved the right under the conditions specified in the deed conveying the easement to require the grantee to change the location of its pipe line "to such new location as may be demanded by Grantor in writing" the deed also provided that "as a condition precedent, if such relocation as demanded by Grantor shall be outside the area of this easement, Grantor agrees to give Grantee, * * * an easement covering such new area on the same terms * * *" Obviously County could not designate the new location to which the pipe line should be moved nor could it grant an easement therefor. It cannot claim the benefit of the covenant without accepting the burden which is contained in the same covenant.

[9] The deed conveying the pipe line easement provided for the removal of the pipe line to a new location whenever a change in location was deemed by the "grantor" necessary or convenient to permit of any construction or use which the "grantor" might desire to make or carry on. Since Investment Company itself was not desiring or intending to construct the roadway or to make any use of the property covered by the road easement, Investment Company's notice to Pacific to remove its pipe line was ineffectual for any purpose. Since County did not acquire the right, either by deed or by condemnation, to compel Pacific to move its pipe line its notice so to do was likewise ineffectual without the payment of the cost of removal.

In the contract case (No. 18320, County v. Pacific Lighting Gas Supply Co.) the judgment is reversed. In the condemnation case (No. 18321, County v. Wright) the judgment is modified by striking from paragraph VII thereof the words "without compensation to said defendant, Pacific Lighting Gas Supply Company" and inserting in lieu thereof the following words

and figures: "upon payment to said defendant Pacific Lighting Gas Supply Company, or into court for its benefit, the sum of \$6,766.04, with interest thereon from July 10, 1950." As modified the judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



107 Cal.App.2d 377

MESSNER v. MALLORY et al.

Civ. 7995.

District Court of Appeal, Third District,
California.

Nov. 7, 1951.

Action by Jack P. Messner against R. V. Mallory and another on a promissory note, wherein the defendant sought to have the promissory note reformed. The Superior Court, Siskiyou County, James M. Allen, J., entered a judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, Peek, J., held that the evidence sustained the finding that the acceleration clause was not improperly included in the promissory note.

Judgment affirmed.

1. Bills and Notes ⇨129(2)

Where makers of promissory note defaulted in monthly payments and payee elected to invoke acceleration clause option making entire balance due and payable though note did represent extension of credit to makers, exercise of option under acceleration clause did not, as contended, cause forfeiture of valuable property rights to such extension of credit as represented by note, and in absence of any forfeiture makers were not entitled to benefit of statute relating to relief from forfeitures and issue of payee's waiver of right to accelerate payments by his acceptance of past due payments was not involved. Civ.Code, § 3275.

2. Bills and Notes ⇨129(2)

A provision in a promissory note for accelerated maturity is not in the nature of a penalty or forfeiture, but simply an agreement as to the time when a debt shall become due and enforceable according to its terms, and such provision will be enforced by court of equity.

3. Bills and Notes ⇨520

In action by payee against makers of promissory note to recover entire sum allegedly due and payable by reason of payee's exercise of option in acceleration clause, evidence sustained findings that there was neither fraud, mutual mistake nor mistake of one party known or suspected by the other in the insertion of the acceleration clause in the promissory note. Civ.Code, §§ 3275, 3399.

4. Reformation of Instruments ⇨45(1)

To justify a court in decreeing the reformation of an instrument upon the grounds of mistake, the proof of the mistake must be clear, convincing, and satisfactory to the court.

5. Reformation of Instruments ⇨19(1)

A contract cannot be reformed because of the mistake of but one party.

L. C. Smith, Redding, for appellants.

Tebbe & Correia, Yreka, for respondent.

PEEK, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff in an action on a promissory note.

By his complaint plaintiff alleged that on July 31, 1949, defendants executed and delivered to him their promissory note; that default had been made in the payment due June 1, 1950, and that he elected under the terms of the acceleration clause of the note to cause the entire balance to be due and payable.

Said provision reads as follows:

"And We Further Agree that in case of default in the payment of any of said installments in the manner aforesaid, then such installments shall bear interest from the date of maturity until the date of pay-

ment at the same rate as the principal sum; and at any time during such default the entire unpaid balance of said principal sum and the interest thereon, shall at the option of the holder of this note be due and payable, of which election notice is hereby expressly waived.

"R. V. Mallory

"R. K. Thom"

Defendants by their answers admitted the execution of the note and by way of defense alleged the execution of the written agreement between the parties whereby plaintiff, as the retiring partner, agreed to sell to defendants, his former partners, his interest in the M. & M. Chevrolet Company, for the sum of \$35,000, payable \$10,000 upon the execution of the agreement and the balance to be evidenced by "A Promissory Note in the amount of Twenty-five Thousand (\$25,000.00) Dollars to be executed by the Continuing Partners to the order of the Retiring Partner and delivered to the Retiring Partner upon the execution of this contract, which Promissory Note shall provide for installment payments of Four Hundred (\$400.00) Dollars a month or more, including principal and interest, commencing on the 1st day of September, 1949, and on the first day of each and every month thereafter, with interest on unpaid balances at the rate of four (4%) per cent per annum until paid." Defendants also allege that any provision in the note contrary to the portion of the agreement above quoted was a mistake and not known or suspected by defendants. As a further defense it is alleged that defendants have performed all of the terms, covenants and conditions of said agreement, and that plaintiff by accepting past due payments was thereby estopped from asserting or demanding precise performance; that defendants are ready, willing and able to make the monthly payments as provided for in said agreement and that said payments have been tendered to plaintiff but that the same have been refused. In this connection defendants specifically asked to be relieved from any default and to make full compensation to plaintiff for any injury which may have resulted from such delay. Lastly, the defendants sought to

have the promissory note reformed upon the ground that the provisions thereof are contrary to the agreement.

The cause proceeded to trial before the court and at the conclusion thereof findings were made favorable to plaintiff, and judgment was entered accordingly. It is from the judgment so entered that the defendants now appeal, contending: (1) that the exercise by plaintiff of the right given to him under the acceleration clause amounted to a forfeiture; (2) that by virtue of the provisions of Civil Code Section 3275 the court erred in failing to relieve them of their default; (3) that plaintiff by the acceptance of past due payments waived his right to declare a default and is now estopped to do so, and (4) that the court erred in failing to reform the contract as requested by defendants.

The essential facts relative to the monthly payments were that it was the practice of each defendant to send to plaintiff a separate check representing his share of such payment. Mallory always made his payment on time but Thom's payment was late for five of the nine months the contract was in existence. Mallory's check for the June payment was received prior to the due date thereof. On June 5, 1950, plaintiff mailed a letter to defendants declaring that the entire balance was due and payable. Subsequently, on the 7th of the month plaintiff refused Thom's tender of his check in the sum of \$200 and on the same day returned to Mallory his check in a like amount.

In support of their first contention appellants argue that if under the circumstances plaintiff could declare the entire unpaid balance to be due then defendants would be compelled to forfeit "valuable property rights" to an extension of credit as represented by the note.

[1,2] We find no merit in this contention. While it is true that the note did represent an extension of credit by plaintiff to defendants, no question of forfeiture is involved. This is not a case where a seller seeks to retain what has been paid under a contract of sale and in addition seeks a return of the property which was the subject

of the sale. As stated in the case of *Harris v. Kessler*, 124 Cal.App. 299, at page 302, 12 P.2d 467, 468: "A provision in an agreement for accelerated maturity is not in the nature of a penalty or forfeiture, but simply an agreement as to the time when a debt shall become due and enforceable according to its terms. Such an agreement is a lawful one which the parties may enter into, and when they do so the conditions will be enforced by courts of equity. No forfeiture is involved in such act, and no penalty imposed. Plaintiff is not asking for anything that has been paid under the contract by way of forfeiture, but is simply refusing to extend the credit for the reason that defendant has failed to comply with his contract. The situation is entirely different from an agreement of sale wherein, upon failure of payment of an installment, the vendor is attempting to retain payments made and also the property itself, the subject of the sale."

Since we conclude, as did the trial court, that the question of forfeiture is not involved, appellants' second and third contentions, which are predicated solely, and necessarily so, upon such a theory, are entirely without support, and therefore any further discussion thereof becomes wholly unnecessary.

[3-5] Appellants contend that the trial court erred in refusing to reform the promissory note by striking therefrom the acceleration clause. The applicable section 3399 of the Civil Code provides that a contract may be reformed or revised when it does not truly express the intentions of the parties due to one of the following circumstances: (1) fraud, (2) mutual mistake of the parties, or (3) a mistake of one party which the other at the time knew or suspected. On each of these three possible grounds for reformation, the findings of the trial court were adverse to appellants. The only question then is whether or not there is evidence to sustain the court's findings that there was neither fraud nor mistake on the part of either of the parties in the insertion in the note of the acceleration clause. The opening brief of appellants contains a statement that counsel has no knowledge of, nor has he been able to

find any evidence to dispute his contention that the acceleration clause was included in the note without defendants' knowledge or consent; that defendants inadvertently signed the same and did not discover their error until plaintiff declared the unpaid balance to be due and payable. In this regard suffice it to say that our examination of the record has disclosed substantial evidence to the contrary. And although the testimony of Messner and his wife sharply conflicts with that given by the defendants, the findings of the trial court, being supported by substantial evidence, must be sustained on appeal. *Baines v. Zuieback*, 84 Cal.App.2d 483, 488, 191 P.2d 67. Appellants further argue that the agreement of sale of the partnership interest sets forth all of the terms intended by the parties to be contained in the promissory note, and that the note here sued upon is not in conformity with that agreement as respects the acceleration clause. We cannot agree with such an interpretation of the agreement. It provides only the amount of the note, the interest rate, and the amount and due date of the installment payments on the note. The agreement does not purport either to provide or to limit the relief which may be afforded the obligee in the event of a default in payments on the note or does it in any way preclude the acceleration clause set forth in the note. In any event to justify the court in decreeing the reformation of an instrument upon the grounds of mistake, "the proof of the mistake must be clear, convincing, and satisfactory to the court". *Baines v. Zuieback*, supra, 84 Cal. App.2d at page 488, 191 P.2d at page 70. It is quite obvious that the evidence relied upon by appellants was neither clear, convincing, or satisfactory to the trial court. Furthermore no fraud whatsoever was shown. The most that appellants' evidence could establish was that they alone, through negligence, failed to familiarize themselves of the contents of the note. A contract cannot be reformed because of the mistake of but one party. *Miller v. Lantz*, 9 Cal.2d 544, 548, 71 P.2d 585.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

AMERICAN ENTERPRISE, Inc. v. VAN WINKLE.

Civ. 14749.

District Court of Appeal, First District,
Division 1, California.

Nov. 6, 1951.

Hearing Granted Jan. 3, 1952.*

Declaratory judgment action by American Enterprise, Inc., a corporation, against Walter S. Van Winkle to determine rights of parties under a lease. The Superior Court, County of Alameda, A. T. Shine, J., concluded that the lease was terminated by plaintiff's notice of December 31, 1947, and that defendant was owner of the fixtures and personal property and from the determination that defendant was owner of the personal property plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the lease having provided for termination thereof in event premises were condemned by city and for purchase of personalty and fixtures thereon by plaintiff in such event, and plaintiff having conveyed its entire interest in property to third party prior to sale of property to city by third party under threat of condemnation, that portion of judgment appealed from which found defendant to be owner of personalty and fixtures was inconsistent with that portion which found that lease was terminated by notice received from plaintiff and a reversal was required.

The portion of the judgment appealed from reversed.

1. Appeal and Error ⇨878(4)

Defendant could not seek to sustain that portion of judgment favorable to him by attacking part of judgment from which he did not appeal and which was final.

2. Declaratory Judgment ⇨385

In an action for declaratory relief it is duty of trial court to make a declaration of rights and duties of parties including a determination of any question of construction or validity arising under an instrument or contract. Code Civ.Proc. § 1060.

3. Declaratory Judgment ⇨369

In an action for declaratory relief brought to secure a construction of a document, trial court in its findings should fully disclose basis of its construction. Code Civ.Proc. § 1060.

4. Declaratory Judgment ⇨381

Where lease provided that in event of condemnation of leased premises by city, lessor could terminate lease and purchase fixtures and personalty installed by lessee, and after lessor conveyed its entire interest in property to third party, lessor, purporting to act under condemnation provisions of lease, served notice of termination on lessee and demanded bill of sale of fixtures and personalty, that portion of judgment entered in lessor's action for declaratory relief, finding that lease had been lawfully terminated by lessor's notice was inconsistent with that portion of judgment finding that lessee was owner of fixtures and personalty and therefore judgment would be reversed.

5. Deeds ⇨120

Normally a grant deed conveys not only the land, but all interests thereon. Civ.Code, §§ 1105, 1106.

6. Declaratory Judgment ⇨369

In a declaratory judgment action it is incumbent on trial court, where legal right of plaintiff to maintain action is challenged, to pass on and make findings on that issue. Code Civ.Proc. § 1060.

7. Trial ⇨398

Where a trial court interprets same words in a contract differently in different parts of contract trial court is required to explain such apparent inconsistency in its findings.

8. Declaratory Judgment ⇨393

Where lease provided that in event of condemnation of premises by city, lessor could terminate lease and purchase fixtures and personalty installed by lessee, and after sale of premises to third party, and conveyance of premises to city by third party under threat of condemnation, trial court's determination in lessor's action for declaratory relief brought after sale of its interest in property that lessor's notice terminated lease and it became entitled to possession of premises but that lessee was entitled to fixtures and personalty, without explaining inconsistency in findings, required reversal of judgment. Code Civ. Proc. § 1060.

* Subsequent opinion 246 P.2d 935.

Donahue, Richards, Rowell & Gallagher and George E. Thomas, all of Oakland, for appellant.

Mancuso, Herron & Winn, San Francisco, for respondent.

PETERS, Presiding Justice.

This case involves a controversy between American Enterprise, Inc. and Walter S. Van Winkle. American Enterprise, Inc. owned certain improved real property in Oakland, which was leased to Van Winkle for a term expiring in June, 1950. The lease contains various provisions defining the rights of the parties in the event the leased premises should be condemned by the city during the term of the lease. Among other things, it provided that, in such event, the landlord, subject to certain conditions, could terminate the lease, and that the fixtures and personal property installed by the tenant could be bought by the landlord as provided in the lease. On May 9, 1946, while the lease still had over four years to run, American Enterprise, Inc. conveyed its entire interest in the property to Sam Neider, its president. Van Winkle, however, continued to pay rent to American Enterprise, Inc. No contention is made that this transfer to Neider was other than a bona fide transfer, nor is it contended that the corporation retained any interest in the property after such conveyance or that Neider was the alter ego of the corporation. In 1947 the city authorized the condemnation of the property, and other surrounding areas, as part of a public improvement. The city threatened to institute a condemnation suit against the property here involved and, by reason of such threat, Neider conveyed the property to the city on December 8, 1947. No proceeding was ever instituted to condemn this parcel, Neider deciding to sell under the threat of the filing of such an action. On January 3, 1948, American Enterprise, Inc., purporting to act under the "condemnation" provisions of the lease, and as landlord, served upon Van Winkle a notice, dated December 31, 1947, to surrender possession within thirty days. The notice also purported to comply with those provisions of the lease in reference to the fixtures and

personal property, and demanded a bill of sale of such property. Van Winkle refused to comply with this notice. On January 6, 1949, this action was instituted by American Enterprise, Inc. against Van Winkle. Neither Neider nor the City of Oakland is a party to this action. The action is for declaratory relief, and seeks a judgment declaring the rights and duties of American Enterprise, Inc. and Van Winkle under the lease. The two principal issues were whether the lease had been lawfully terminated, and whether American Enterprise, Inc. was entitled to the fixtures and personal property installed by the tenant.

The trial court concluded that the lease was terminated by the notice dated December 31, 1947. This conclusion is based upon findings to the effect that although the property was not taken in condemnation it was sold to the city under threat of condemnation. The court concluded that this was such a sale as to give the landlord the right to terminate the lease under its terms. These findings and conclusions were, of course, favorable to American Enterprise, Inc., and in accordance with its contentions. The court also concluded, however, that Van Winkle was the owner of the fixtures and personal property. The judgment recites in paragraph 1 that the lease was terminated by the notice dated December 31, 1947, and that plaintiff (American Enterprise, Inc.) "was, since that date, and ever since has been, entitled to the possession of said premises." In paragraph 2 it is recited that "Van Winkle is the owner of and entitled to the possession of the bowling alley equipment, furniture and fixtures, and all of the personal property in and about said premises." From the second paragraph of this judgment American Enterprise, Inc. appeals. This notice is entitled "Notice of Appeal from Part of Judgment," and states that the appeal is taken from "that particular part of the judgment * * * rendered in the above entitled Court on the 12th day of April, 1950, to-wit: '2. That defendant Walter S. Van Winkle is the owner of and entitled to the possession of the bowling alley equipment, furniture and fixtures, and all of the

personal property in and about said premises.' Plaintiff does not appeal from other than the foregoing part of said judgment." Van Winkle does not appeal from any portion of the judgment.

[1] Because of the limited nature of the appeal we are faced with a most unusual situation. American Enterprise, Inc. is the appellant. It was the former owner of this property. Under date of May 9, 1946, it deeded the property to Sam Neider. Thereafter, so far as appears from the record, it had no further rights in the property, although it may have still been liable to Van Winkle under the covenants of the lease. In December, 1947, Neider conveyed to the city. But the trial court provided in its findings, conclusions, and judgment that the notice to terminate given by American Enterprise, Inc. and dated December 31, 1947 (that company then not being the owner of the property and presumably having no rights therein), terminated the lease, and that after that date American Enterprise, Inc. was and is entitled to possession of the property. Thus, a corporation, after it conveyed its interests in the property, is determined to be entitled to the possession of the property as against its tenant. No one appeals from that portion of the judgment. Right or wrong that portion of the judgment has long since become final. That portion of the judgment is necessarily predicated on the findings and conclusions to the effect that the sale to the city was such a sale as was contemplated by the condemnation provisions of the lease. It was for this reason that American Enterprise, Inc. appealed only from the portion of the judgment relating to the personal property. Its theory is that, since it has now been finally determined that the lease was terminated by the sale to the city, such findings also necessarily determined that the provisions of the lease in reference to the sale of the fixtures and personal property to the landlord, also made dependent on condemnation, came into play, and that the trial court's determination as to the personal property and fixtures is entirely inconsistent with its determination in reference to the termination of the lease. The

respondent—Van Winkle—seeks to sustain the judgment in reference to the fixtures and personal property by attacking the part of the judgment (from which he does not appeal and which is final) to the effect that the lease was terminated by the sale to the city under the condemnation provisions of the lease. This, of course, the respondent cannot do.

It would appear that, on their face, and unexplained, the two portions of the judgment are inconsistent with each other. If there was a condemnation within the meaning of those provisions of the lease relating to its termination, then there would appear to be a condemnation within the meaning of those provisions of the lease relating to the sale to the landlord of the fixtures and personal property in the event of a condemnation. Certainly, no argument has been even suggested as to why a "condemnation" for purposes of termination would not also be a "condemnation" for the purposes of the sale of the equipment. The findings and conclusions do not disclose the theory upon which the court held that Van Winkle was the owner and entitled to the possession of the fixtures and personal property, after it had held that a condemnation within the meaning of the lease had taken place. Thus it would appear that the portion of the judgment appealed from is inconsistent with the portion of the judgment that has long since become final.

[2-4] The parties argue at some length over whether the "sale" provisions of the lease were fair and equitable and enforceable. There is no hint in the findings and conclusions that the trial court adopted these factors as the basis of its decision. This was an action for declaratory relief. In such an action it is the duty of the trial court to make a declaration of the rights and duties of the parties "including a determination of any question of construction or validity arising under such instrument or contract." § 1060, Code of Civ.Proc. In an action for declaratory relief brought to secure a construction of a document the trial court in its findings should fully disclose the basis of its construction. Otherwise the appellate court is left without any guide that might explain what otherwise

appears to be inconsistent provisions of the judgment. Inasmuch as the trial court construed the word "condemnation" to include the threat of condemnation in one part of the lease, if it concluded that such construction did not apply to another part of the lease it should have disclosed in its findings the theory upon which such conclusion rests. The two portions of the judgment are either inconsistent, or there was a failure to find on a material issue. In either event, a reversal is called for.

[5] But that is not the only inconsistency that appears in the findings. It is there found that American Enterprise, Inc. leased the premises to one Russell in 1939, for a period of ten years, eight and one-half months; that in 1944 Russell assigned the lease, with the consent of the lessor, to Van Winkle. Thus, at that time American Enterprise, Inc. owned the property subject to the lease, and Van Winkle held under the lease. Then, it is found that "on May 9, 1946, plaintiff [American Enterprise, Inc.] granted to one Sam Neider all of plaintiff's right, title and interest in and to the real property involved herein." Thus, after that date, it would appear that American Enterprise, Inc. no longer had any interest in the property. Van Winkle, in his answer, set up as a special defense that American Enterprise, Inc. had voluntarily divested itself of all right, title and interest in and to the property, including the lease. The findings fail to disclose how one who is not the owner of a lease, who pleads and proves that it is not such owner, can be declared, as against a tenant, to certain rights under the lease. It may be that it was the theory of the trial court that, because it appears that the tenant has continued to pay rent to American Enterprise, Inc. since the date of the conveyance and after it knew of such conveyance, the tenant is estopped to question the title of his landlord. But, assuming that an estoppel could exist under such facts, a point we do not decide, there is no finding on that issue. Normally, of course, a grant deed, conveys not only the land, but all interests therein. Civil Code, §§ 1105 and 1106; *Resh v. Pillsbury*, 12 Cal.App.2d 226, 55

P.2d 264; *Taylor v. Avila*, 175 Cal. 203, 165 P. 533. It may be that the trial court concluded that the fixtures and personal property belonged to Van Winkle because it believed that American Enterprise, Inc. had conveyed away all of its rights under the lease. Such a theory might sustain the judgment. But, in any event, if it was the theory of the trial court that American Enterprise, Inc. had no interest, by reason of the conveyance, it should have set forth such holding in its conclusions of law. Such a theory would, of course, be totally inconsistent with the first part of the judgment determining that American Enterprise, Inc., by its notice dated December 31, 1947, not only terminated the lease but thereafter became entitled to the possession of the premises. Perhaps the trial court believed that Neider was the alter ego of the corporation. Such was neither pleaded nor found.

[6-8] Thus we are faced with a situation where the portion of the judgment appealed from apparently is inconsistent with a portion of the judgment that has long since become final. No explanation of such apparent inconsistency appears in the findings, conclusions or judgment. On the other hand, there is a possibility that respondent can sustain the judgment on a theory not found or discussed in the findings, conclusions or judgment. In such an action it is incumbent upon the trial court, where the legal right of the plaintiff to maintain the action is challenged, to pass upon and make findings on that issue. Where a trial court interprets the same words in a contract differently in different parts of the contract the trial court is required to explain such apparent inconsistency in its findings. In the instant case the trial court has failed to find on basic, important and material issues. This requires a reversal.

The portion of the judgment appealed from is reversed. In the interests of justice it is ordered that each side bear its own costs on appeal.

BRAY and FRED B. WOOD, JJ., concur.

LOUCKS et al. v. LUCKEL.

Civ. 18417.

District Court of Appeal, Second District,
Division 1, California.

Nov. 1, 1951.

Rehearing Denied Nov. 20, 1951.

Hearing Denied Dec. 20, 1951.

Action by Daisy Loucks, and others, against Louis Luckel to foreclose a trust deed executed by defendant to one Nellye B. McLachlan, deceased. The Superior Court, Los Angeles County, A. K. Wylie, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Doran, J., held that the exclusion of evidence offered by defendant to show payment of a former debt which allegedly was the sole consideration for the note sued on, was improper.

Reversed.

1. Appeal and Error ⇨1056(1)**Bills and Notes** ⇨511

In action by representative of deceased payee's estate, maker had right to show that a former debt, which allegedly was the sole consideration for the note sued on, had been paid, even though a claim for payments was not filed against the estate, and refusal to admit evidence offered to show that payments were made was reversible error. Code Civ.Proc. § 440.

2. Mortgages ⇨319(2)

In action to foreclose a trust deed against the maker of a note, exclusion of certain checks, offered in evidence by maker to prove payment of a former debt which allegedly was the sole consideration for the debt sued on, on ground that such checks had formerly been used as evidence in another proceeding was error.

3. Mortgages ⇨319(1)

Fact that note and trust deed sued on continued in possession of lender without being cancelled and released raised a presumption that debt secured had not been paid but such presumption was not conclusive.

4. Appeal and Error ⇨1056(1)

Exclusion of relevant evidence of payment of note was reversible error notwithstanding the fact that findings against maker were supported by substantial evidence.

236 P.2d—57½

Louis Luckel, John F. Poole, Los Angeles, for appellant.

Ingram & Sharritt, by Inez Sharritt, Los Angeles, for respondents.

DORAN, Justice.

The action herein is one to foreclose a trust deed in the sum of \$1,400 executed by the appellant Luckel to one Nellye B. McLachlan, deceased. The trial court found in favor of respondents in the amount claimed, together with interest of \$525 and an attorney fee of \$350.

In 1942 Luckel had executed a note to Nellye B. McLachlan, secured by a mortgage, in the sum of \$700, bearing interest at 7%. On June 15, 1944, McLachlan accepted a new note for \$1,400 with 6% interest, secured by the trust deed here involved. It is the appellant's contention that there was no consideration for the execution of the larger note and trust deed other than the former debt of \$700, and that the \$700 debt had been fully discharged by payment. Appellant claims that the larger amount was inserted to cover any additional loans which might be made, but that no other money was ever advanced by Mrs. McLachlan.

[1] Upon objection of plaintiffs, the trial court excluded evidence offered by appellant to show payments on the ground that a claim for the payments should have been filed against the McLachlan estate. Appellant's brief, however, calls attention to the fact that Luckel was making no demand or claim as a creditor against the estate but was merely offering the evidence for the purpose of showing that the note had been paid.

On this proposition is cited Section 440 of the Code of Civil Procedure providing that "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and *neither can be deprived * * * thereof by the assignment or death of the other*". (Italics added.)

Also cited as authority for appellant's contention that evidence of payment was admissible notwithstanding no claim had been filed against decedent's estate, is *Pendleton v. Hellman Commercial, etc., Bank*, 58 Cal.App. 448, 452, 208 P. 702, 704, where the court held that a bank's right to apply the amount of a deposit of a deceased depositor to the payment of the depositor's promissory note owned by the bank, where the depositor's estate was insolvent, was not defeated by the bank's failure to file a claim against the estate. In that case the reviewing court said: "But in the case at bar the defense presented is not in the nature of a counterclaim. Its allegations are, in effect, that there exists no indebtedness of the defendant to the plaintiff. The bank is not seeking to collect its note from the decedent's estate".

Since it is apparent in the instant case that Luckel was not making any claim *against* the McLachlan Estate but on the contrary was seeking to defeat a money claim made *by* the estate, and was merely endeavoring to prove payment of the promissory note in question, it would seem that the trial court was in error in not receiving the appellant's relevant evidence on the subject of payment.

[2] The trial court likewise excluded certain checks proffered by the appellant for the purpose of showing payment, on the stated ground that such checks had formerly been made use of as evidence in another proceeding involving a partnership accounting. Without in any manner passing upon the question whether such checks, if received, would have established the payments claimed by the appellant and thus altered the final result, the fact that these checks had been made use of in some other legal proceeding, does not, in and of itself furnish a ground for exclusion in the instant litigation. If relevant to the question whether defendant had paid the debt in full or in part, such checks should have been received in evidence, regardless of their previous use in some other case.

[3, 4] Although, as stressed by respondents, the fact that the note and trust deed continued in the possession of the lender

without being cancelled and released undoubtedly raised a presumption that the debt secured had not been paid, such presumption was in no manner conclusive. Bearing in mind that the parties were friends of long standing, it was entirely possible that payment might have been made and that the usual legal safeguards for the protection of the debtor were not taken. This was a question of fact, and a vital issue in regard to which appellant should have been accorded the right to introduce evidence of payment, and this regardless of the weight or sufficiency of such evidence. Whether a different result would have ensued is beside the point. It is likewise immaterial that the record discloses substantial evidence in support of the findings. The errors in restricting appellant's evidence on the subject of payment cannot be deemed harmless.

The judgment is reversed and a new trial ordered.

WHITE, P. J., and DRAPEAU, J., concur.



107 Cal.App.2d 268

In re WELLAUER'S ESTATE.

Civ. 7982.

District Court of Appeal, Third District,
California.

Nov. 5, 1951.

Rehearing Denied Nov. 30, 1951.

Hearing Denied Jan. 3, 1952.

Proceeding in the matter of the estate of Jeanette Wellauer, also known as Jeanette Kelly, also known as Jeanette Wellauer Kelly, and also known as Mrs. Henry Wellauer, deceased, wherein D. R. Robinson, executor, offered for probate a will contested by Gregory J. Altenhofen, and others, on the grounds of mental incapacity and undue influence exerted by Roland John Kelly, legatee and devisee. The Superior Court, Placer County, Ralph McGee, J., entered a judgment admitting the will to probate notwithstanding a verdict returned in favor of contestants, and the contestants appealed. The District Court of Appeal, Van Dyke, J., held

that evidence was insufficient to sustain finding of testatrix's mental incapacity when she executed the will.

Affirmed.

1. Judgment ⇨199(3.10, 3.19)

A judgment notwithstanding verdict can be granted only when, disregarding conflicting evidence and giving evidence of party favored by verdict all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support the verdict, whether the issue is presented in a will contest or in any other civil proceeding.

2. Wills ⇨55(1)

In will contest, evidence was insufficient to support finding that testatrix was, when she made her will, incapable of doing so by reason of mental incapacity.

3. Wills ⇨163(2)

Beneficiary under will did not have burden of proving that will was not obtained through his undue influence, even if he was in confidential relation to testatrix, in absence of evidence that he suggested terms of will or was active in procuring it.

4. Wills ⇨166(1)

In will contest, evidence on issue of whether beneficiary took active part in preparation of the will was insufficient to sustain finding of undue influence.

F. H. Bowers, Roseville, Thomas F. Sargent, Auburn, for appellant.

Leland J. Propp, Auburn, Fontaine Johnson, Sacramento, for respondent.

VAN DYKE, Justice.

Jeanette Wellauer, also known as Jeanette Wellauer Kelly, died August 3, 1949, a resident of Placer County. She left a purported will dated May 2, 1947, which was offered for probate. Gregory J. Altenhofen and Eugene Altenhofen, brothers of decedent, contested the probate of the will on the grounds of mental incapacity, and undue influence, alleged to have been inserted by Roland J. Kelly. The case was

tried to a jury which returned verdicts in favor of contestants upon both grounds. Motions for judgments notwithstanding the verdicts were granted by the trial court and the will admitted to probate. The contestants appeal.

Decedent's husband, Henry C. Wellauer, died in 1945 in Wisconsin. Decedent became acquainted with respondent Kelly and they came to California in January, 1946. Kelly returned to Wisconsin for a short time and then rejoined decedent, whereupon they moved to a ranch in Placer County where they resided until Decedent's death. They were never married, but lived together as husband and wife and held themselves out to friends and neighbors as being married. By the will she gave to respondent Kelly, whom she referred to as her husband, all her property save gifts to a sister, a niece, a son of Kelly, and two nephews. She made no bequests to either of contestants. Roughly, three-fourths of her estate of around \$100,000 in value, most of which she derived from her predeceased husband, went to Kelly.

Three witnesses testified for appellants and their testimony can be summarized as follows: Doctor Barnes, physician and surgeon, had treated decedent at various times from June, 1946, to June, 1948, including treatments on April 8th and in June of 1947, approximately a month before and a month after the will was made. He said that she had degenerated mentally and physically during this period of time, was a chronic alcoholic and had regressed to the mental condition of childhood and was mentally incompetent. On April 8th, 1947, he found her suffering from hysterical paralysis of the left side induced by alcoholism. He said she was not of sound mind on that date but was petulant and childish. As to the month of June, he said she was very sick mentally and physically, and mentally incompetent, and he described her as being in the same condition in April; that her conversation during that period could be compared to that of an old person in dotage, that is, the childishness of old age or senility; he could not say what age of child he referred to, but she was childish; she did not have sufficient mentality to use

the ordinary judgment of an adult person, could rarely go through with a good conversation, but would go off on tangents and could not be pinned down, and this was true when she was intoxicated and when she wasn't intoxicated; that she could not at any time carry on a completed conversation; that while a child can carry on a conversation it sometimes just prattles. When asked if he knew of times when she was not drinking he said he couldn't say because he didn't know. As an illustration of childish action he said she would promise him to keep off the liquor and as soon as his back was turned she was right back on it, which was about the control a child would have, although the general attitude of a chronic alcoholic. She evidenced lack of full possession of her faculties because she was unreasonable. She changed from a woman who had been almost immaculate in her person to slovenliness. Appellant Gregory Altenhofen stated that his sister had graduated from Marquette University as an honor student; that she had taught school and been a social service worker at times; that after coming to California she became indecisive and incoherent in her manner of expressing herself; that she had refused to go back to her father's funeral; that he had seen her looking dirty and unkempt when he saw her in a bar and she appeared "a little bit woozy"; she rambled in her talk; she had lost a lot of weight. he saw her seldom. Gregory's wife, Mary Altenhofen, first saw deceased in January, 1946, when she visited at the witness' home. At that occasion she came out of the car with two bottles of whisky on one arm and a large "panda bear" on the other, with which she constantly played; she went to sleep with it on the davenport; she would turn on the radio at any time of day or night; when her brother came in she would try to get her bearings; she would reach into the cupboard and take the condiment containers which she would arrange in a straight line down the table like a little child. She was there two and a half weeks without taking a bath or changing her clothes, which was not her normal mode of living; she had been athletic and cleanly. In April of 1947, while drunk, she was

rambling and incoherent and expressed her sorrow that when her husband was buried she had had to have his legs cut off to get him in the casket; during that same month she invited the witness to a New Year's dinner; she would get terribly drunk, was thin and haggard and wouldn't eat; in April of 1947 she was insane; when the witness saw her in June of 1947 she was drunk and could not hold a normal conversation; in December of 1948, one and a half years after she made her will, she was drunk in a bar in Auburn and was found by the witness in a dirty dark room on a dirty bed dressed in dirty old slacks with a rag around her head, wearing an old sweater and so drunk she couldn't be waked up. The witness never saw her when she was sober from the time she came to California until the date of her death; her signature on the will did not look normal. The witness gave it as her opinion that the decedent had not been of sound mind on any occasion she saw her from January, 1946, to May 7, 1947; she could not remember her mother and how she died, or the aunts, uncles, nephews or nieces; she believed she was married to Kelly and said she had been married in the Catholic church in Auburn. When talking to her attorney when the will was drawn she told him that Kelly was her husband.

[1,2] A judgment notwithstanding the verdict can be granted only when, disregarding conflicting evidence and giving appellants' evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support the verdict. This is the rule whether the issue is presented in a will contest or in any other civil proceeding. The facts relied upon by appellant to support the verdicts of the jury in this case are quite similar to those relied upon for the same purpose in the Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25; Estate of Shields, 49 Cal.App.2d 293, 121 P.2d 795; and in Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551, in all of which cases, as in this case, the mental deficiency was claimed to be due to alcoholism. The facts in this case

fall far short of those delineated in the cases cited. It is unnecessary to restate the evidence which in those cases was held insufficient to support verdicts of mental unsoundness. To do so would unduly extend this opinion. But a reading of the statements of fact will disclose that they were much stronger than the facts presented and relied on here. On the authority of those cases, which have not been challenged since rendition, we hold that the facts here relied upon are insufficient to support the jury's finding that the decedent, Jeanette Wellauer, was, when she made her will, incapable of doing so by reason of mental incapacity.

[3, 4] Upon the issue of undue influence little need be said. The rules by which the sufficiency of the facts relied upon are to be tested have often been stated. Conceding, for the purpose of argument, that a confidential relation was proved to have existed between Mrs. Wellauer and respondent Kelly, the burden was not thereby cast upon him to prove the will was not obtained through his undue influence in the absence of evidence that he suggested the terms of the will or was active in procuring it. Estate of Purcell, 164 Cal. 300, 303, 128 P. 932; Estate of Baird, 176 Cal. 381, 384, 168 P. 561. In Estate of Arnold, supra, the court said, 16 Cal.2d at page 581, 107 P.2d at page 29: "'As suggested in Estate of Higgins, 156 Cal. [257] 261, 104 P. [6] 8, a 'presumption of undue influence' arises from proof of the exercise of a confidential relation between the testator and such a beneficiary, *'coupled with activity on the part of the latter in the preparation of the will.'*" As to the evidence and the inferences therefrom which in this case appellants claim furnish support for the jury's verdict upon this issue, they put the matter as follows: They refer to the evidence we have heretofore set out upon the issue of incompetency and they then refer to testimony of Mrs. Altenhofen that in August of 1946 respondent Kelly was trying to influence deceased in matters relative to her property. They infer this from the witness' statement that about 1:30 or 2 o'clock on a morning in that month she found de-

ceased trying to write some letters and deceased stated the only time she could do this was at that time of night when respondent was asleep because, as she put it, "I understand my own business, I know what I want to do with my own business, and I cannot do it his way." In March of 1946 Mrs. Altenhofen said that respondent Kelly had phoned her and threatened her because she had been holding some checks belonging to decedent and from this they infer that Kelly was of a dangerous disposition. They point to testimony that Kelly stated that during August of 1946 he had struck deceased, "laid her out" and "poured her into bed." She said Kelly told her that on that occasion the decedent was unconscious for hours. The same witness testified that in the latter days of April, 1947, she was sitting around with decedent who was drunk, and during that time decedent told her that "Kelly had knocked her out in the bathroom" and that she "was afraid of Kelly." Again, concerning an occurrence in August of 1946, the same witness said that decedent had come to her home, called her a liar, called her husband everything she could lay her tongue to and that Mr. Kelly at that same time said that "he would get Mr. Altenhofen" and decedent backed him up on it. During their life together she paid Kelly's expenses in getting a divorce from his wife in Milwaukee which included paying something over \$3,000 as heart balm to Mrs. Kelly who had threatened suit for alienation of affections or had filed one—the witness was not sure. Kelly, in answer to a question if it wasn't true decedent had maintained him all the time they were in California, answered "to a certain extent after we got out here, we were trying to put the ranch on a paying basis. I built the ranch. I did practically all of the work. I had no money when I came out here nor any after outside of what I got from Jeanette." He further said that all the money he got was used for building up the estate. Applying the stated rule to the foregoing testimony, there is a complete failure to sustain the verdict of the jury as to undue influence. There is no evidence whatever of any activity on the part of

Kelly in the matter of the will. This would be enough, but it may be said that the record shows Kelly did not even accompany Mrs. Wellauer to her attorney's office when the will was made. Upon this issue appellants signally failed to sustain the burden of proof which the law casts upon them.

The judgment appealed from is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



107 Cal.App.2d 250

BACK et al. v. HOOK.

Civ. 18198.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1951.

Action by Earl V. Back, and another, against Geraldine W. Hook, for damages for failure to convey a parcel of realty. The defendant entered a cross-complaint. The Superior Court, Los Angeles County, William S. Baird, J., entered judgment for plaintiffs and denied defendant's motion to vacate and enter a new and different judgment. Defendant appealed from the judgment and also from the order denying her motion to vacate the judgment. The District Court of Appeal, Drapeau, J., held that in view of the fact that the contract was admitted by defendant, no issue as to its validity ever arose for determination and the finding that the contract was of no force and effect was erroneous.

Reversed.

See also 101 Cal.App.2d 656, 225 P.2d 1005.

1. Vendor and Purchaser $\S$ 349, 352

In action for breach of a contract for sale of realty, where vendor admitted contract in her answer and pleaded contract in her cross-complaint, no issue as to its validity arose for determination and finding that contract was of no force and effect was erroneous.

2. Appeal and Error $\S$ 780(1)

Where grounds in support of a motion to vacate and to enter a new and different judgment were identical with contentions urged upon the appeal from the judgment, the appeal from the order denying motion to vacate was dismissed.

Gandy & Cockins, Santa Monica, Ralph C. McCall, Los Angeles, of counsel, for appellant.

P. E. Durkee, Los Angeles, for respondents.

DRAPEAU, Justice.

By the instant action, plaintiffs seek damages on account of defendant's failure to convey to them a parcel of real property.

It was alleged in paragraph I of plaintiffs' complaint that on or about August 5, 1947, they entered into a written agreement with defendant to purchase the realty upon certain terms and conditions.

Paragraph III of the complaint alleged that this agreement was modified by a subsequent contract between the parties on April 30, 1948, under the terms of which plaintiffs were to receive certain credits toward the monthly payments required under the agreement of August 5, 1947.

The answer specifically admitted paragraph I of the complaint and denied paragraph III.

At the conclusion of the trial, the court made and filed its findings of fact that on August 5, 1947, the parties purported to enter into an agreement, as set forth in paragraph I of the complaint and admitted in defendant's answer; but "That no meeting of minds was ever had between plaintiffs and defendant and said purported contract of agreement of sale of said above described real property is of no force and effect."

It was further found that the parties purported to enter into a contract on April 30, 1948, modifying the agreement of August 5th; that said contract was never authorized or ratified by defendant and that said purported modification of the original agreement was of no force and effect.

Judgment was entered in favor of plaintiffs for return of the money expended by them, to-wit: \$2,848 on the purported contract of August 5, 1947; \$1,978.66 for building materials and labor used in improving the property in reliance on said contract; andn \$187.89 for taxes; a total of \$5,014.55, together with a lien in their favor on the property in question.

Defendant appeals from the judgment and also from the order denying her motion to vacate the same and to enter a new and different judgment.

Appellant states the question for determination as follows: "Can a judgment be sustained which is based on findings which are adverse to the facts admitted in the pleadings?"

To this respondents answer: "Findings which are contrary to admissions in the pleadings will not be sustained *unless supported by adequate evidence.*" (Emphasis added.)

In *Lifton v. Harshman*, 80 Cal.App.2d 422, 431, 182 P.2d 222, 228, it was said: "When allegations in a complaint are admitted by the answer (a) no evidence need be offered in their support; (b) evidence is not admissible to prove their untruth; (c) no finding thereon is necessary; (d) a finding contrary thereto is error."

Also in *Stoneman v. Fritz*, 34 Cal.App.2d 26, 31, 92 P.2d 1035, 1038, the following appears:

"As the delivery of the two deeds to defendant was admitted by the pleadings, no evidence should have been received on that question as it was not an issue in the case. Findings of fact contrary to these facts admitted in the pleadings must be disregarded. 21 Cal.Jur., sec. 106, p. 155. The rule is stated in *Welch v. Alcott*, 185 Cal. 731, at page 754, 198 P. 626, 636, as follows:

"It was said in *Burnett v. Stearns*, 33 Cal. 468: "The finding should be confined to the facts in issue. The province of the

court in respect of facts is to determine but not to raise the issue." See, also, *Ortega v. Cordero*, 88 Cal. 221, 26 P. 80 [90]. "Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of fact being admitted it is conclusive. A finding against the admission is therefore outside the issues." *White v. Douglass*, 71 Cal. 115, 119, 11 P. 860. It was declared in *Estate of Doyle*, 73 Cal. 564, 570, 15 P. 125, 128: "When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as 'found.' * * * If the court does find adversely to the admission, such findings should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous." See, also, *Hutchison v. Barr*, 183 Cal. 182, 190 P. 799; *Sutherland on Code Pleading*, § 1167. "There can be no necessity of a finding as to a fact admitted by the pleading." "

[1] The contract of August 5, 1947, is admitted by appellant in her answer, as well as pleaded by her in her cross-complaint. Therefore, no issue as to its validity ever arose for determination by the trial court. It follows that the finding that the contract of August 5, 1947 was of no force and effect was erroneous.

[2] In view of the fact that the grounds in support of the motion to vacate and to enter a new and different judgment were identical with the contentions urged upon the appeal from the judgment, the appeal from the order denying such motion is dismissed. The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

107 Cal.App.2d 257

KING v. KING.

Civ. 18369.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1951.

Aura King brought action against Grace Haynes King and Grace Haynes King, as executrix of the estate of Preshaw Duke King, deceased, to recover on a note representing sum loaned by plaintiff to the deceased to extinguish lien of trust deed on realty which had been held by the deceased and Grace Haynes King as joint tenants. The Superior Court of Los Angeles County, F. Ray Bennett, J., entered a judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that title to realty vested in Grace Haynes King on the death of the deceased and that the realty could not be subjected to payment of the note.

Judgment affirmed.

1. Executors and Administrators §55**Joint Tenancy** §6

Survivorship is one of the incidents of joint tenancy, and unless the estate is terminated before the death of a joint tenant, the executor of deceased has no interest in the property.

2. Joint Tenancy §6

On the death of a joint tenant, the survivor becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original grant creating the tenancy.

3. Husband and Wife §14(3)

Fact that deed was taken in joint tenancy by husband and wife established a prima facie case that realty was in fact held in joint tenancy.

4. Husband and Wife §14(3)

The use of community funds to purchase the property and the taking of title thereto in name of the spouses as joint tenants is tantamount to a binding agreement between them that the property shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such estate.

5. Husband and Wife §14(3), 249, 262(1)

When property is conveyed to a husband and wife as joint tenants, the form of the conveyance is such as to destroy the statutory presumption that the property is community, and deed creates a joint tenancy in which interests of husband and wife are separate property.

6. Executors and Administrators §55, 272
Husband and Wife §14(3)

Where realty was acquired by husband and wife as joint tenants and thereafter the husband's sister lent husband sum of money to extinguish lien of trust deed on the realty, and thereafter husband died without having repaid the loan made by his sister, title to the realty vested in the wife and was not part of the husband's estate, and could not be subjected to payment of the note.

Lester E. Hardy, Altadena, for appellant.

S. Ward Sullivan, Los Angeles (Frank Alef, Los Angeles, of counsel), for respondent.

DRAPEAU, Justice.

Preshaw Duke King and Grace Haynes King, husband and wife, acquired a home as joint tenants using community funds for its payment. About the same time, husband borrowed \$5,000 on his personal note from his sister, Aura King. Then husband died and his wife qualified as executrix of his estate, the assets of which were less than the amount of the note. Aura King presented her claim in the estate and it was disallowed by executrix.

By this action said sister sought a judgment against the estate for the amount of the note, plus interest and attorney's fees; and also "that the property held in joint tenancy by Preshaw Duke King and Grace Haynes King * * * be declared community property and the executrix be required to inventory same."

Plaintiff Aura King testified that she lent her brother the \$5,000 represented by the promissory note here sued upon because he had bought a house and needed it.

Defendant testified that the price of the joint tenancy property acquired on August 30, 1946, was \$27,000 of which \$21,000 was paid in cash taken from a joint safe deposit box; that this money was earned by her husband who had "worked for it over the years. That was his way of saving money for our home." The \$6,000.00 balance of the purchase price was borrowed from a bank and secured by a trust deed.

The complaint alleged on information and belief that this \$6,000 loan was paid off on December 5, 1946, and that the \$5,000 borrowed from plaintiff sister was used for that purpose. Further "that the payment of this money to extinguish a lien on the jointly owned property above described was a planned method of hindering plaintiff in the collection of the amount represented by said note. That said act was fraudulent in intent and that Grace Haynes King was an informed party to said plan."

It was found that except for \$4,500, no other funds of any kind or nature were contributed by defendant wife to either the joint account of herself and husband or the purchase price of the joint tenancy property, and that deposits in the said account and the money paid for the home were entirely community funds.

It was also found that the final payment on the joint tenancy property, to-wit: \$5,-950.83 made on December 5, 1946, "was made from community funds on deposit in a joint bank account in the name of Preshaw Duke King and Grace Haynes King."

Judgment was for plaintiff against the estate for the full amount prayed for. However, the trial court ruled that the home, which was held in joint tenancy, was not part of the estate, and that plaintiff was not entitled to a judgment against Grace Haynes King personally.

This appeal is taken by plaintiff from that portion of the judgment which denied the relief she sought from the joint tenancy property.

The sole question presented, says the appellant, is whether under the facts the trial court should have found that the home place was community property, and subject to payment of the note sued upon.

[1,2] As said by this court in *Re Estate of Zaring*, 93 Cal.App.2d 577, 579, 209 P.2d 642, 644: "Survivorship is one of the incidents of joint tenancy, and unless the estate is terminated before the death of a joint tenant, the executor of the decedent has no interest in the property. *Dando v. Dando*, 37 Cal.App.2d 371, 99 P.2d 561." In other words, upon the death of the joint tenant, the survivor "becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original grant creating the tenancy." 7 Cal.Jur. 334, sec. 4.

[3] The fact that a deed "was taken in joint tenancy established a prima facie case that the property was in fact held in joint tenancy." *Cox v. Cox*, 82 Cal.App.2d 867, 870, 187 P.2d 23, 25.

The complaint herein does not allege, nor was it proved, that husband and wife ever intended to hold the house they bought for their home as community property, although it was purchased with community funds.

[4] In *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003, 1005, it was held: "The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such an estate." See, also, *In re Rauer's Collection Co.*, 87 Cal.App.2d 248, 256-257, 196 P.2d 803; *Rogers v. Rogers*, 86 Cal. App.2d 817, 821, 195 P.2d 890, citing *Tomaier v. Tomaier*, 23 Cal.2d 754, 758, 146 P.2d 905.

[5] "When property is conveyed to a husband and wife as joint tenants, the form of the conveyance is such as to destroy the statutory presumption that the property is community (*Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003), and that thereby such deed creates a joint tenancy in which the interests of husband and wife are separate property. *Young v. Young*, 126 Cal.App. 306, 14 P.2d 580. Appellants have shown nothing to take the present case out of this rule or to bring it within the rule stated by this court in *Cummins v. Cummins*, 7 Cal.

App.2d 294, 46 P.2d 284, 289, that 'a conveyance * * * to a husband and wife as joint tenants does not necessarily * * * preclude the idea of their holding the same as community property.' " *Launer v. Griffin*, 60 Cal.App.2d 659, 664, 141 P.2d 236, 237.

[6] Likewise here, the evidence is not sufficient to take the case out of the rule above stated. Before appellant lent the money to her brother, the property in question had been acquired by him and respondent as joint tenants. Upon the death of the brother, the title to the property vested in respondent by virtue of the original grant creating the tenancy. As a consequence, the said property was not a part of the brother's estate.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



107 Cal.App.2d Supp. 847

ALTMAN v. McCOLLUM et al.
Civ. 17.

Appellate Department, Superior Court,
Alameda County, California.
Oct. 22, 1951.

Hazel L. Altman brought an unlawful detainer action against Roy A. McCollum and Anna M. McCollum. The Municipal Court of the City of Oakland, James S. Blaine, J., entered a judgment for plaintiff, and defendants appealed. The Superior Court, Appellate Division, Ledwich, J., held that Municipal Court had jurisdiction to try equitable defense of estoppel, and that conduct of plaintiff constituted both a waiver and an estoppel which were good defenses in the action.

Judgment reversed.

I. Courts ⇨188(3)

In unlawful detainer action by purchaser at sale under trust deed, municipal court of the City of Oakland had jurisdic-

tion to try defendants' equitable defense of estoppel based on conduct of plaintiff in accepting four payments from defendants after recordation of notice of default by defendants which had not been mailed to defendants. Civ.Code, § 2924b; Code Civ.Proc. §§ 89, 112(b), 1161, 1161a.

2. Estoppel ⇨52, 53

"Waiver" is a voluntary relinquishment, expressly or impliedly, of a known right and depends on the intention of one party only.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

3. Estoppel ⇨58

Equitable estoppel is based on the fundamental principles that one's conduct has induced another to take such a position that he will be injured if one guilty of such conduct be permitted to repudiate his acts.

4. Estoppel ⇨95

An estoppel may arise from silence as well as from words or conduct where there is a duty to speak, and where the party on whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent.

5. Mortgages ⇨369(6)

Where plaintiff did not give defendants notice of default in payments on trust deed, so that plaintiff might accelerate maturity of loan after lapse of three months allowed defendants by statute to reinstate the loan for comparatively small amount, and during that time plaintiff accepted payments from defendants and impliedly represented to defendants that loan was in good standing when defendants purchased realty, postponement of sale under trust deed for thirty days at defendants' request did not amount to a waiver or estoppel by defendants of right to question validity of sale, in absence of any injury or detriment suffered by plaintiff by reason of the postponement of sale for thirty days. Civ.Code, §§ 2924c, 2953.

6. Mortgages ⇨372(4)

Where plaintiff did not give defendants notice of default in payments on trust deed, so that plaintiff might accelerate ma-

turity of loan after lapse of three months allowed defendants by statute to reinstate the loan for comparatively small amount, and during that time plaintiff accepted payments from defendants and impliedly represented to defendants that loan was in good standing when defendants purchased realty, conduct of plaintiff constituted both a waiver and an estoppel which were good defenses in unlawful detainer action. Civ. Code, §§ 2924c, 2953.

Young, Ryan & Whitton and Richards & Rankin, Oakland, for appellant.

John L. McVey, Oakland, for respondent.

LEDWICH, Judge.

Defendants' appeal from a judgment of the municipal court in favor of plaintiff in an unlawful detainer action brought under Section 1161a, subdivision 3 of the Code of Civil Procedure by plaintiff, the purchaser at a sale under a deed of trust. The promissory note is dated October 12, 1946, in the principal sum of \$12,500, payable in monthly installments of \$100, or more, each month, commencing November 15, 1946. The note provides "that each installment when paid *shall* be applied by the holder hereof, first so much thereof as shall be required, to the payment of interest accrued * * * and the balance thereof to the repayment of said principal sum". The note was made payable to plaintiff and her since deceased husband, as joint tenants.

The note and deed of trust were executed by one Rogers and wife, as "Trustor". They sold and conveyed the property to defendants about September 15, 1949. The balance of principal then unpaid was \$10,203.41, and interest was then paid to August 15, 1949. At that time Rogers and wife had paid approximately \$2,300 on principal and all interest to August 15, 1949, or a total of approximately \$4,100. If Rogers had paid plaintiff \$100 every month, his total payments would have been \$3,400 on September 12, 1951, so Rogers had then paid approximately \$700 on principal in excess of what the note required.

In response to a request to do so, on September 12, 1949 plaintiff deposited in escrow in connection with the purchase of the property by defendants from Rogers and wife, a statement signed by her that the balance then owing on the loan was \$10,203.41 and interest was paid to August 15, 1949, as aforesaid. She made no mention of any previous defaults by Rogers and wife, or said anything to indicate that she did not consider the loan in good standing. The payment book was not deposited in escrow and defendants did not receive it until they made their first payment of \$100 on October 13, 1949, when it was mailed to them by plaintiff, without comment.

The payment book, wherein all entries were made by plaintiff, and the endorsements on the note by plaintiff disclose that Rogers and wife on November 10, 1946 (less than one month after the date of the note) paid plaintiff and her husband \$1,152.05, of which amount \$1,089.55 was credited to principal, thereby reducing the balance of principal as of November 10, 1946, to \$11,410.45.

The payment book also shows that in 1948 Rogers and wife made six payments of interest only, the last of these payments being entered in the book on June 18, 1948, which paid interest to May 15, 1948. The book further shows that from June 22, 1948 to and including July 11, 1949 Rogers and wife made 12 monthly payments of \$100 each, and the payment on July 11 paid interest to May 15, 1949. On August 30, 1949, two payments of interest only are entered in the book, which shows interest paid to July 15, 1949. On September 12, 1949 (the date plaintiff placed in escrow her statement above mentioned), the book shows \$104 paid, \$51.28 thereof being credited to interest to August 15, 1951, (which was current), and \$52.72 to principal, leaving a balance unpaid of principal of \$10,203.41 (which was the condition of the loan when defendants acquired title to the property).

Defendants paid \$100 a month in October, November, December of 1949, and January and February of 1950, the last of these

payments being made February 26, 1950. The last two of these payments were made after the 15th of the month, but plaintiff made no objection to that. In accordance with her previous custom, she credited approximately half of each \$100 payment on interest to the 15th of the previous month and the balance on principal, so that on February 26, 1950, the book shows that interest was paid to January 15, 1950.

Had plaintiff applied the February payment first to the payment of accrued interest, as the note provides, interest would have been paid to February 15, 1950 and been current. The only default by defendants on the note would then be approximately \$50 in the payment of principal. In any event the total default of defendants in payments on the note itself, after the payment of February 26, 1950, was \$50, whether the default be considered as one in payment of principal, or interest.

The defendants, however, were then in default in the payment of the first installment of taxes, \$148.83, so that their total default was less than \$200 on March 7, 1950.

On March 7, 1950 the plaintiff, through her attorney, wrote the defendants a letter stating:

"You are delinquent in the matter of current payments under the deed of trust plus a *small balance* due prior to the time you purchased the property. In addition the taxes for the first installment of the current year in the amount of \$140.41 plus \$8.42 penalty are unpaid.

"I am instructed to take such proceedings as may appear to me to be appropriate unless you bring your payments to her up to date and pay the taxes forthwith. You will please govern yourself accordingly."

Defendants made no reply to this letter. On March 24th defendants mailed plaintiff a check for \$50.05, stating it was "for interest for month of March. If amount is incorrect, please advise". Plaintiff made no response to this letter, but on March 26, 1950, as had been her custom, she entered the interest of \$49.77 paid for one month, to February 15, 1950. The next day, on March 27, 1950, plaintiff signed a notice of

default and intention to sell under the deed of trust. She recorded this notice on March 29, 1950.

Neither plaintiff nor her attorney ever mailed a copy of this notice to defendants, or ever advised defendants in any manner, orally or written, that such notice had been recorded. Defendants had no knowledge thereof at all until about the ninth or tenth of August, 1950, when they learned that their property was being advertised for sale from a broker. Plaintiff's attorney was substituted as trustee on August 8, 1950. Notice of sale was published on August 9, 1950 and posted on the property on August 10, 1950, and the sale held October 5, 1950, it having been postponed at the request of defendants' attorney for 30 days.

Plaintiff mailed a copy of the recorded notice of default to the original Trustors, Rogers and wife, at the place specified by them in the deed of trust, namely, the property described therein, 5262 Foothill Boulevard, Oakland, California, which plaintiff knew was the residence of defendants. Defendants never saw or heard of this notice until after the notice of sale was published.

After plaintiff recorded the notice of intention to sell, she received from defendants and credited on the payment book three payments of \$100 each and one payment of \$50. She credited interest paid to the 15th of the previous month and the balance on principal, as had been her invariable practice with Rogers and defendants. These payments were entered as follows:

	Pays Interest
	up to
April 27, 1950 — \$100.00;	3-15-50.
May 31, 1950 — 50.00;	4-15-50.
June 28, 1950 — 100.00;	5-15-50.
July 31, 1950 — 100.00;	6-15-50.

Defendants did not pay an insurance premium of \$14.34 in April. Plaintiff paid this premium and added the amount to the balance of principal and so advised defendants. Defendants defaulted in the payment of the second installment of taxes in April, 1950.

When plaintiff received the \$100 payment in April, she wrote defendants that it was

not the April payment, and that she had paid the \$14.34 insurance premium and added it to the principal. She also wrote "How about the taxes?" She did *not* mention anything about the recorded notice of default, or any previous default by Rogers.

The Court found (Finding II) that defendants were "in default" on March 29th "in that they failed to pay \$50.00 due on March 15, 1950" and failed to pay the first installment of taxes of \$148.83. It further found that on said date defendants "*had not paid* arrearages which had accrued *prior to the purchase of said real property* by defendants in the sum of \$500.00 or more".

The Court found (Finding VIII), (in accordance with the uncontradicted evidence), that it was true "that defendants did not discover the commencement of the foreclosure proceedings until August 10, 1950 after the first publication of the notice of sale, and defendants were informed regarding said publication by a friend who had read the notice in the Inter-City Express". The Court further found (Finding IV) that it was untrue that plaintiff deliberately with intention to prevent defendants from reinstatement of the loan "concealed" from defendants the recordation of said notice of intention to sell.

Defendants' Pleadings.

The defendants, in their answer, pleaded three "separate and affirmative" defenses. In their first affirmative defense, they pleaded that they had made payments of \$100 in April, June and July of 1950 and \$50 in May of 1950, which payments plaintiff accepted without informing defendants of the recordation of the said notice of default and intention to sell and while defendants did not know of the existence thereof and that by plaintiff's "concealment" of the recordation of said notice defendants were prevented from exercising their rights under Section 2924 of the Civil Code to cure their default in the payment of the taxes and \$50 default in payment on the note. Defendants further allege that they were at all times ready, able and willing to pay "taxes and any other arrearage" there may have been and offered and tendered said money in their answer and also offered and

tendered \$100 each for payments for the months of August, September and October, 1950.

In their "second and affirmative defense" defendants alleged that plaintiff had waived any claimed default by the acceptance of the sum of \$350, as aforesaid, in monthly payments, after recordation of the said notice.

The "third and separate defense" is that plaintiff failed to comply with the provisions of Section 2924b of the Civil Code by failing to mail to defendants a copy of the notice of intention to sell and a copy of the substitution of plaintiff's attorney as trustee. Defendants did not file for record a request for notices.

The Defense of Estoppel.

The argument on appeal centered principally on the defense of equitable estoppel. The Court found, or concluded as a matter of law against defendants on this defense.

The question presented by this defense is whether by her acceptance of the four payments aggregating \$350 and her conduct toward defendants after the recordation of the notice of default plaintiff, in equity and good conscience, is estopped to assert, in this unlawful detainer action, the validity of title she acquired at the trustee's sale. The trial court found that she was not so estopped.

Respondent contends that this equitable defense of estoppel could not be properly tried in this unlawful detainer action, and that even if it could be tried in this action defendants "would have to both plead and prove a willingness to do equity". The "equity" referred to by plaintiff is payment of the full amount of the loan and costs of foreclosure.

In support of plaintiff's contention that the municipal court could not properly try the issue of estoppel, which in this case arose after the recordation of default, plaintiff cites *Cheney v. Trauzettel*, 9 Cal. 2d 158, 69 P.2d 832, and *Seidell v. Anglo, etc., Co.*, 55 Cal.App.2d 913, 132 P.2d 12. Neither of these cases involved the jurisdiction of the *municipal court* of equitable defenses in this type of action.

The Cheney case appears to be the leading case in California. It is cited and distinguished in the Seidell case. It is also cited in *Delpy v. Ono*, 22 Cal.App.2d 301, 70 P.2d 960, and *Higgins v. Coyne*, 75 Cal.App.2d 69, 170 P.2d 25. The Cheney case [9 Cal.2d 158, 69 P.2d 833], declared this basic rule, "matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment". In the Cheney case the defense, which was held properly stricken out by the trial court, was that the trustee's sale "was merely colorable, in pursuance of an agreement to effect a transfer of property to preserve it from execution at the hands of a judgment creditor; and that plaintiffs did not thereby acquire a valid title". In the *Delpy* case the defense held not triable in the unlawful detainer action was that the deed of trust was from its inception a conspiracy between the parties to evade the Alien Land Law.

The *Higgins* case, (which involved the jurisdiction of a Class A Justice Court), it was admitted there was a "purported" sale in accordance with Section 2924 of the Civil Code, but denied the execution of the deed of trust by defendant's grantor and affirmatively alleged it was a forgery, a matter going to the validity of the deed of trust itself.

In the *Seidell* case, it is somewhat difficult to determine what if any equitable issues were raised in the unlawful detainer action. The majority opinion states "if the answer contained equitable issues of fraud, as the Supreme Court said in the *Cheney* case, *supra*, they had no place in that unlawful detainer proceeding, and the findings thereon were immaterial and may therefore be disregarded. They were harmless." [55 Cal.App.2d 913, 132 P.2d 17.] In the *Seidell* case the Court held that the judgment in the unlawful detainer action was *res adjudicata* as to any irregularities in the foreclosure proceedings and that no equitable issues were tendered or litigated in the unlawful detainer action.

The equitable defense here raised does not affect "the validity of the trust deed or primary obligation itself", nor does it involve "other basic defects in the plaintiff's title" (*Cheney* case). Rather, it involves whether "the property has been duly sold * * * and the title under the sale has been duly perfected" Section 1161a(3) C.C.P. The defense of estoppel here involved is one that arose during the course of the foreclosure proceedings, after the commencement thereof by the recordation of the notice of default and prior to the conclusion thereof by the sale and trustee's deed.

None of the cases cited on jurisdiction of equitable issues in this type of action has passed upon this factual situation, where pleaded as defensive matter.

The reason given in the decisions that equitable issues may not be tried in an unlawful detainer action is that the trial of such issues would change the summary character of the action. In this connection it should be borne in mind that the unlawful detainer statutes, including Section 1161(3), C.C.P., are purely statutory remedies created by the legislature. See *Hewitt v. Justice's Court*, 131 Cal.App. 439, 21 P.2d 641. This being so, it is competent for the legislature to determine the scope of the issues that may be tried in such an action. The legislature has spoken on that subject, as late as 1949, by adopting Section 89, C.C.P., fixing the jurisdiction of municipal courts.

None of the cases cited involve the jurisdiction of municipal courts or consider, or mention, Section 89, C.C.P. This section was enacted in 1933 in the same language as now appears in subdivision (g) (3) of that section. This subdivision gives the municipal court original jurisdiction "of *all cases in equity* when pleaded as defensive matter, *in any case properly pending* in such municipal courts". (Italics ours.)

If this language "*all cases in equity when pleaded as defensive matter*" is construed according to its plain tenor, clearly the municipal court had jurisdiction of the defense of estoppel here claimed.

The rental value alleged is \$100 per month, so this case was "properly pending" in the municipal court, Section 89, subdivision (d), C.C.P. There is no language in Section 89 that in any way restricts the broad language "all cases in equity when pleaded as defensive matter".

It is true that construed according to its plain and comprehensive language the section gives a municipal court jurisdiction of equitable defenses which has been held in the past the Superior Court, a court of general jurisdiction, did not possess, but that is a legislative and not a judicial matter, *Hewitt v. Justice's Court*, supra. In fixing the jurisdiction of municipal courts, the legislature acted pursuant to authority conferred on it by the constitution.

We think it is significant that the legislature in fixing the jurisdiction of class A and class B Justices' Courts in unlawful detainer actions has not used the same broad language it has used in fixing the jurisdiction of municipal courts, namely, "*all cases in equity*". Instead, it has limited the jurisdiction of such justices' courts in unlawful detainer actions to a determination of "any question *properly involved therein*". See Section 112 C.C.P., both subdivisions (b). (Italics ours.)

The Supreme Court in *Jacobson v. Superior Court*, 5 Cal.2d 170, 53 P.2d 756, 757, has given the words "all cases in equity when pleaded as defensive matter" the broad interpretation above mentioned. While that was not an unlawful detainer action the reasoning of the Court therein is directly applicable here. At page 173, of 5 Cal.2d, 53 P.2d at page 757, the Court states: "But the *Brix Case* [*Brix v. Peoples Mutual Life Ins. Co.*, Cal.Sup., 37 P.2d 448], was decided upon appeal from a judgment entered prior to the amendment of section 89 of the Code of Civil Procedure in 1933. This section as amended provided that: 'Each municipal court shall have jurisdiction of all cases in equity when pleaded as defensive matter, in any case properly pending in such municipal courts.' [1] Under this section as it now reads, the jurisdiction of the municipal

court has been extended to include the determination of any equitable issue when pleaded as defensive matter in any case properly triable in such municipal court. [2] The matters therefore contained in the cross-complaint in said action, if they are mere matters of defense, were properly cognizable by the municipal court, and the jurisdiction over said case was in that court and not in the superior court. By an examination of the pleadings filed in said action it conclusively appears that the equitable matters pleaded therein merely tend to show that the plaintiff therein was not entitled to recover anything whatever on said policy of insurance for the reason that he was in default in the payments of the premiums called for by said policy. These matters were merely defensive matters and therefore properly cognizable by the municipal court as provided by the 1933 amendment to said section 89 of the Code of Civil Procedure."

Again 5 Cal.2d at page 174, 53 P.2d at page 757, the Court says: "On the other hand, it seems clear to this court that the object of this amendment to the section was to give to municipal courts exclusive jurisdiction over all cases in which equitable matters are pleaded as a defense, when the original jurisdiction of such cases is in the municipal court."

[1] There is, of course, no question here that this action was properly commenced and was "properly pending" in the municipal court. As in the *Jacobson* case, supra, defendants here seek no affirmative relief, but to defeat plaintiff's suit for possession of the property. They pray simply "that plaintiff take nothing". We conclude, both under the plain and broad language of Section 89, C.C.P. and the authority of the *Jacobson* case, supra, the municipal court had jurisdiction to try the equitable defense of estoppel in this action.

If the finding that defendants "*had not paid*" the arrearages of Rogers of \$500, or more, is considered as a finding that defendants were "in default" because they had not paid these arrearages, it is an erroneous conclusion and is contrary to law. The non-payment of approximately \$300

of this \$500 arrearages occurred prior to June 1948, after which time plaintiff accepted 12 consecutive monthly payments of \$100 from Rogers and also all interest to August 15, 1949. She also accepted five consecutive monthly payments of \$100 each from defendants, without ever mentioning any Rogers arrearages to defendants. This course of conduct on her part and the statement she placed in escrow constitute both a waiver and estoppel by every principle of equity and good conscience. She could never revive these defaults, even against Rogers, without previous demand and notice given within a reasonable time after such defaults occurred. A reasonable time had long since elapsed before the notice of default was recorded. *Bledsoe v. Pacific Ready Cut Homes, Inc.*, 92 Cal.App. 641, 645, 268 P. 697.

In the *Bledsoe* case, a trust deed case, the plaintiff defaulted in the payment of principal of \$500 on November 1, 1924, but thereafter made several monthly payments of \$69 each, which the defendant accepted without objection, but at the same time wrote numerous letters to plaintiff demanding payment of \$500. At page 645 of 92 Cal.App., 268 P. at page 698, the Court states: "To avoid being charged with a waiver, the defendant was bound to give notice before proceeding to foreclose. As the defendant did not collect the \$500 payable November 1, 1924, it was bound to make a formal demand therefor. It was bound to stay its hand a reasonable length of time so that the plaintiff could comply with the terms of the contract."

Gonzalez v. Hirose, 33 Cal.2d 213, 200 P.2d 793, declares the same rule. It holds that in a contract for the sale of land, where time is agreed to be of the essence, that defaults in time of payment are waived by a course of conduct of crediting payments on account of interest and principal without regard to time factors, and that the time element could only be re-established by definite notice. At page 216 of 33 Cal.2d, 200 P.2d at page 795, the Court says: "Since the law looks unfavorably upon forfeitures, waiver of the time clause will be deemed to be a waiver of the forfeiture unless the time element is first re-estab-

lished by definite notice. *Boone v. Templeman*, 158 Cal. 290, 110 P. 947, 139 Am.St. Rep. 126; *City of Los Angeles v. Krutz*, 170 Cal. 344, 149 P. 580; *McCartney v. Campbell*, 216 Cal. 715, 720, 16 P.2d 729; section 311, Restatement of Contracts. Admittedly no such notice was given."

We see no reason why the same principle does not apply to obligations secured by deeds of trust. The *Bledsoe* case holds that it does.

When plaintiff placed her statement in escrow respecting the Rogers loan, it was in response to an inquiry regarding that loan. It requested information on a matter peculiarly within plaintiff's knowledge. It was plaintiff's duty not to conceal any facts but to make a full and fair disclosure thereof. This rule applies independently of any confidential relationship between the parties. *Rogers v. Warden*, 20 Cal.2d 286, 289; 125 P.2d 7; *Bank of America v. Greenbach*, 98 Cal.App.2d 220, 224, 219 P.2d 814.

In *Rogers v. Warden*, supra, 20 Cal.2d at page 289, 125 P.2d at page 9, the Court states: "But the rule has long been settled in this state that although one may be under no duty to speak as to a matter, 'if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure.' *Sullivan v. Helbing*, 66 Cal.App. 478, 483, 226 P. 803, 805; *Pohl v. Mills*, 218 Cal. 641, 654, 24 P.2d 476; *American Trust Co. v. California Western States Life Ins. Co.*, 15 Cal.2d 42, 65, 98 P.2d 497."

The finding that defendants "had not paid" the Rogers defaults is an immaterial factor in this case. That finding and the evidence on which it is based lend no support whatever to the judgment herein. The only defaults that are material to this case are the defaults of the defendants, which the trial court found were \$198.83 at the time the notice of default was recorded.

Respondent contends that the acceptance by plaintiff of the payments of \$350 after

recordation of the notice of default was not a waiver by her of the default of defendants in the payment of \$50 principal and \$148 taxes, and cites the following cases: *Sellman v. Crosby*, 20 Cal.App.2d 562, 67 P.2d 706; *Harris v. Whittier*, 18 Cal.App.2d 260, 63 P.2d 840; *Birkhofer v. Krumm*, 27 Cal.App.2d 513, 81 P.2d 609; *Hamilton Corporation v. Corum*, 218 Cal. 92, 21 P.2d 413.

The principle relied upon is stated in substantially the same language in all the cases. In the *Sellman* case the Court says: "In other words, no implied waiver results from the mere acceptance of such partial payments". [20 Cal.App.2d 562, 67 P.2d 707.]

In the *Whittier* case the Court in holding there was no waiver under the facts in that case says: "This claim, *under the facts of this case*, is without merit, because it has been repeatedly held that the mere acceptance of *interest or a small amount on the principal* after the notice of forfeiture is given will not of itself revive the contract". [18 Cal.App.2d 260, 63 P.2d 843.] (Italics ours.)

None of the cases cited by plaintiff which held there was no waiver by the mere acceptance of partial payments presented a factual situation anything like that presented in the instant case and the holding of "no waiver" in those cases must be considered in relation to the facts before the Court. In the *Whitaker* and *Hamilton* cases, the Court was careful to so limit its language. In all of those cases the defaults involved were defaults of the borrower personally, and in none of them does it appear that the borrower was ignorant of the recordation of the notice of default.

In the *Sellman* case the plaintiff was in default in eleven monthly payments which he agreed to pay from monies to be received from a lawsuit and failed to do so after receiving them. Furthermore, each installment paid after the recordation of the notice of default was credited when paid to the installment longest past due, clearly indicating to plaintiff that the loan was considered by the lender as a delinquent loan in default at all times.

In the *Hamilton* case the lender never made a full monthly payment and was in default for over 12 months, or nearly \$24,000 in payment of principal, interest and advancements. The Court held, "under these circumstances", the lender had shown leniency and there was no waiver.

In *Harris v. Whittier*, supra, \$60 was paid *before* the recordation of the notice of default, nothing afterward, and the borrower had full knowledge that the notice of default was recorded.

In the *Birkhofer* case, one of two delinquent interest payments which existed when the notice of default was recorded was paid and this was held not to be a waiver.

The only reasonable inference that can be drawn from the evidence in the instant case is that plaintiff pursued a course of conduct after the recordation of the notice of default calculated to withhold from defendants that fact so that she might accelerate the maturity of the loan after the lapse of the three months allowed the defendants to reinstate the same under Section 2924c of the Civil Code. Enacted 1933 and 1935. Under this section the defendants had a right during said three months to reinstate the loan upon the payment of less than \$200 and attorney's fees not to exceed \$50, and any other arrearages that occurred after the recordation of the notice of default. This was a valuable right and one which the borrower could not waive by express agreement at the time of the loan or any renewal thereof, for such agreement is "void and of no effect". Civil Code, Section 2953, enacted 1937. Such a waiver is against public policy.

Plaintiff was at all times acting under the advice of her attorney. She occupied the superior position. She knew of defendants' rights to reinstate the loan, for the knowledge of her attorney is chargeable to her, but her conduct indicates quite clearly that she was fully aware personally of this right of defendants. By her statement placed in escrow and by her acceptance of five consecutive monthly payments of \$100 each from defendants and entering them in the book as she did, she represented to them, impliedly, at least, that the loan

was in good standing when defendants purchased the property. No other reasonable inference can be drawn from her conduct.

In addition to accepting and entering payments of \$350 on the payment book and returning it as usual, after recordation of the notice of default, when one defendant wrote her in April that \$100 payment made that month was the April payment, she adroitly replied: "This is not the April payment.—How about the taxes?" When she paid an insurance premium of \$14 in April, without requesting payment by defendants, she merely advised them that she had done so and had added it to the principal. She knew that defendants and not Rogers occupied the property. She mailed the statutory notice to Rogers at the property where she knew the defendants resided, but refrained from mailing the defendants a copy and carefully avoided ever mentioning to them that she had recorded the notice of default. Her statements respecting the April payment of \$100 conveyed no information to defendants that their loan was in the serious jeopardy created by the recordation of the notice of default. It would naturally have the effect on defendants' minds that aside from payment of the taxes and not being "*the April payment*", the loan was otherwise in good standing.

Defendants were not making "small" payments or payments of interest only, but in three out of the four months following the recordation of the notice defendants made and plaintiff accepted the full monthly payments of \$100 called for by the note, which plaintiff entered as usual in the payment book and returned it to the defendants as usual. Plaintiff by her action and her silence lulled the defendants into a sense of security while she sat back and waited the lapse of the three months in which the defendants might reinstate the loan for a comparatively small amount, so that she could leave them in the position of being compelled to pay the full amount of the loan, or have their property sold at a trustee's sale.—If this conduct does not amount to waiver, it has all the elements of equitable estoppel.

[2,3] Although waiver and equitable estoppel are not always distinguished in the cases, they rest upon different legal principles. There may be an equitable estoppel where there is no waiver in the technical sense. Waiver is a voluntary relinquishment, expressly or impliedly, of a known right and depends upon the intention of one party only. Equitable estoppel is based upon the fundamental principle that "one's conduct has induced another to take such a position that he will be injured if the first be permitted to repudiate his acts". *Bastanchury v. Times Mirror Co.*, 68 Cal.App.2d 217, 240, 156 P.2d 488, 500.

[4] "An estoppel may arise also from silence as well as from words or conduct. But this is only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent". 10 Cal.Jur. p. 631-632. See also *People v. Ocean Shore Railroad*, 32 Cal.2d 406, 421-422, 196 P.2d 570, 6 A.L.R.2d 1179; *Merry v. Garibaldi*, 48 Cal.App.2d 397, 401, 119 P.2d 768; *Crittenden v. McCloud*, 106 Cal.App.2d 42, 234 P.2d 642.

"It is not necessary that the duty to speak should arise out of any agreement, or rest upon any legal obligation in the ordinary sense. Courts of equity apply in such cases the principles of natural justice, and whenever these require disclosure they raise the duty and bind the conscience and base upon the omission an equitable forfeiture to the extent necessary to the protection of the innocent party". 10 Cal.Jur., p. 632.

Plaintiff's acceptance of the payments made after the recordation of the notice of default, taken in connection with her conduct toward defendants, required her in equity and good conscience to speak, and to tell the defendants of her action in recording the notice of default while there was time for them to reinstate the loan under Section 2924c of the Civil Code. She was seeking to invoke a forfeiture against them. She knew her rights and the defendants' rights and knew that the defendants would lose their valuable right

to reinstate the loan for a small amount, if she could only keep them in ignorance of her action until three months had elapsed. She had ample opportunity to speak, but would not do so, except in a manner to lull the defendants into a sense of security.

When plaintiff did speak, as she did in April, she did not make a full and fair disclosure of all the facts respecting the defaults that she then claimed. Her conduct, as shown by the evidence in this case, was calculated to and succeeded in lulling the defendants into a sense of security, to their serious injury. It left them where they were faced with paying the full amount of the loan, or a sale of their property, within a very short time. Plaintiff's conduct, as disclosed by the evidence, is so shocking to the conscience that no court should permit her to achieve the goal that she seeks in this case. The ultimate finding, or conclusion of the trial court, that plaintiff is not estopped is unsupported by the evidence.

After defendants learned that their property was advertised for sale, a postponement of the sale for 30 days, requested by defendants' attorney, was consented to by plaintiff. Plaintiff contends that because of this postponement, defendants had to "both prove and plead a willingness to do equity", which plaintiff states is payment of the loan and costs in full. In support of this contention, plaintiff cites, Mack v. Golino, 95 Cal.App.2d 731, 213 P.2d 760, and Leonard v. Bank of America, 16 Cal. App.2d 341, 60 P.2d 325.

Both these cases were actions by a trustor in equity to set aside a trustee's sale, under a deed of trust. In both cases the attack on the sale was solely on the sufficiency of the notice of sale. In the Leonard case the publication of notice was for 17 days only, instead of the required 20 days. In the Mack case it was claimed that it was an insufficient posting of the notice of sale.

The Court held, in both cases, that the sale was merely "voidable", because of the insufficient notice. Plaintiff in each case

was seeking equitable relief and was denied relief from the "voidable" sale because of a total failure to offer to do equity, by paying the amount due on the loan, which in the Leonard case was admitted to be the full amount thereof.

Here, the defendants in their answer offered to pay their own delinquencies in the payment of the note, the taxes and insurance. Since they were not chargeable with the Rogers defaults, this was all that they were required to do to do equity. There was no evidence that the defendants were not able to make the payment of their delinquencies.

Here the defendants are not relying upon an insufficiency of the notice of the sale, but rely upon the proposition that plaintiff had no right at all to hold the sale because she was in equity and good conscience estopped from doing so.

Counsel for plaintiff contends that the postponement of the sale for 30 days at defendants' request amounts to a waiver, or estoppel, by defendants to question the validity of the sale and cites and quotes from an extensive note in 2 A.L.R.2d pages 78 and 96.

This note relates to judicial sales and the language quoted is that of the author of the note, and not of any court. The gist of the quoted language is that there "may" be an estoppel or waiver of a right to object to defects in the sale, if the facts of the particular case are such as to warrant the finding of waiver or estoppel.

The note cites the California case of Summerville v. March, 142 Cal. 554, 76 P. 388.

There it nothing in that case in any way resembling the present case. It merely holds that a mortgagor was not entitled to have the mortgage sale set aside for the sole reason that the property was sold in two separate parcels, instead of one parcel, without a showing that it would have brought more money if sold as a whole.

[5] Here there is nothing in the correspondence between the attorneys for the parties relating to the postponement

of the sale for the short space of 30 days, which indicates that this extension was granted on the understanding or condition that defendants thereby waived any rights they had to object to the plaintiff holding the sale at all. No injury, or detriment appears to have been suffered by plaintiff by reason of the short postponement of the sale for 30 days. To hold that because defendants were unsuccessful in their efforts to refinance the whole loan during this 30 days, they lost a defense going to the right of plaintiff to sell the property at all, is to sanction a forfeiture of the harshest kind, especially under the facts

in this case. No authority cited by plaintiff so holds.

[6] We conclude that the only reasonable inference from the evidence in this case is that plaintiff was estopped to sell the property and the finding of the trial court to the contrary is not warranted by the evidence and is contrary to law. In view of our conclusion on the matter of estoppel, it is unnecessary to pass upon the other points for reversal raised by appellant. The judgment of the Municipal Court is reversed.

WAGLER, P. J., and HOYT, J., concur.



